

Memorandum to: Board of Directors

From: Doreen R. Eberley
Director
Division of Risk Management Supervision

Mark Pearce
Director
Division of Depositor and Consumer Protection

Subject: Final Statement of Policy on Bank Merger Transactions

Recommendation

Staff recommends that the FDIC Board of Directors (Board) approve the attached Statement of Policy on Bank Merger Transactions (Final Statement) for publication in the *Federal Register*. The Final Statement takes into consideration comments received in response to the FDIC's April 19, 2024, request for comment on a Proposed Statement of Policy on Bank Merger Transactions (Proposed Statement), and this Final Statement reflects certain changes made in response to comments received. The Final Statement focuses on the scope of transactions subject to FDIC approval, the FDIC's process for evaluating merger applications, and the principles that guide the FDIC's consideration of the applicable statutory factors as set forth in the Bank Merger Act (BMA).

Concur:

Harrel Pettway
General Counsel

Background

Section 18(c) of the Federal Deposit Insurance Act, which codifies the BMA, prohibits an insured depository institution (IDI) from engaging in a merger transaction without regulatory approval. The FDIC is one of three federal banking agencies with responsibility for evaluating transactions subject to the BMA. The FDIC has jurisdiction to act on merger applications that involve an IDI and any non-insured entity, notwithstanding the IDI's charter.¹ The FDIC also has jurisdiction to act on transactions that solely involve IDIs in which the acquiring, assuming, or resulting institution is an FDIC-supervised institution.²

In order to implement its responsibilities under the BMA, the FDIC has codified regulations in 12 CFR Part 303, Subpart D; issued a Statement of Policy; and adopted and published a chapter on mergers in its Applications Procedures Manual (APM). The APM provides direction for professional staff assigned to review and process applications, notices, and other requests submitted to the FDIC. The merger chapter of the APM provides detailed procedural instruction to staff, including guidance for the assessment of each statutory factor.³

On April 19, 2024, the FDIC published the Proposed Statement in the *Federal Register*.⁴ After review of the public comments received, staff has made revisions to address certain comments and recommends publication of the Final Statement in the *Federal Register*. The following sections summarize the significant changes to the Final Statement and the responses to the comments received.

Comments on the Proposed Statement of Policy

¹ 12 U.S.C. § 1828(c)(1).

² 12 U.S.C. § 1828(c)(2).

³ Applications Procedures Manual - Section 4: Mergers.

⁴ Request for Comment on Proposed Statement of Policy on Bank Merger Transactions. See 89 FR 29222.

The FDIC received 23 comment letters from the public, including representatives of the financial services industry, trade associations, consumer groups, university professors, and Members of Congress.

The Final Statement updates, strengthens, and clarifies the FDIC's policies related to the evaluation of bank merger applications. The Final Statement would supersede the FDIC's existing Statement of Policy, which was last revised in 2008. As compared to the Superseded Statement, the Final Statement includes new content; is more principles-based; addresses jurisdiction and scope; describes the FDIC's approach to each statutory factor separately; and highlights other matters and considerations such as interstate mergers and the unique aspects of applications from non-banks, operating non-insured entities, and banks that are not traditional community banks. The Final Statement highlights the FDIC's expectations for each statutory factor and incorporates analytical considerations for these areas.

Overview of Final Statement

Introduction

The Introduction to the Final Statement retains the Proposed Statement's content by providing a roadmap of the Final Statement's structure, which follows the BMA's core statutory provisions, and highlights the principles that guide the FDIC's evaluation of the statutory factors for a merger application.

Overview of the Applications Process

The Final Statement addresses the importance of pre-filing meetings and the submission of a substantially complete application that includes all of the information necessary for the FDIC to evaluate the statutory factors. The Final Statement also discusses public feedback and

coordination with the Department of Justice.

Jurisdiction and Scope

The Final Statement generally retains the Proposed Statement's discussion regarding the FDIC's jurisdiction under the BMA, and the scope of transactions subject to regulatory approval. Specifically, the Final Statement provides transparency and clarity regarding the types of transactions that are subject to the BMA, including mergers in substance and assumptions of deposits or other similar liabilities. This section highlights the overarching principle that the FDIC emphasizes a transaction's substance over its form when determining whether it constitutes a merger transaction subject to FDIC approval under the BMA.

Process and Adjudication

The Final Statement retains the Proposed Statement's discussion of the FDIC's processing and adjudication of merger applications. With respect to adjudication, the Final Statement retains the FDIC's longstanding tenet of the FDIC's applications processing policy and procedures,⁵ to not use conditions as a means to favorably resolve statutory factors, but adopts slightly modified language to more clearly articulate this point. The Final Statement indicates the imposition of conditions will be taken into account as part of the FDIC's consideration of the merger application, but will not necessarily lead to the favorable resolution of any statutory factor where the facts and circumstances are otherwise unfavorable.

As with the Proposed Statement, this section of the Final Statement emphasizes that the FDIC Board of Directors (FDIC Board) reserves the authority to deny any merger transaction or to act on any merger transaction for which one or more statutory factors are not favorably

⁵ Applications Procedures Manual, Applications Overview, 1.1; APM, Standard and Nonstandard Conditions, 1.11; and Deposit Insurance Applications Procedures Manual Supplement – Applications from Non-Bank and Non-Community Bank Applicants.

resolved. In addition, the FDIC Board notably reserves authority to act on any application in which the merging institutions operate in the same relevant geographic market(s), and for which the Attorney General has not notified the FDIC in writing that the proposed transaction would not have a significantly adverse effect on competition, or for which the Attorney General has notified the FDIC that the merger transaction would have a significantly adverse effect on competition.

The Final Statement describes the FDIC's approach to evaluating each of the statutory factors. The Final Statement is intended to provide greater clarity to the public regarding what features of merger transactions may be consistent with a favorable finding on each respective statutory factor.

Consistent with the Proposed Statement, a significant portion of the Final Statement is organized around a discussion of the BMA's statutory factors.

Monopolistic or Anticompetitive Effects

The Final Statement builds upon the Proposed Statement by highlighting practices that may be particularly relevant to rural institutions. Specifically, the Final Statement acknowledges that, as circumstances warrant, the FDIC will take into account certain non-bank competitors, expressly identifying credit unions, thrifts, and Farm Credit System institutions.

In addition, the Final Statement recognizes that mergers in rural areas involving local community banks may result in concentrated markets and emphasizes that the FDIC will carefully balance the competitive effects of such a merger with the public interest served by the capacity of the resulting IDI to serve the convenience and needs of the community. Further, the Final Statement states that the evaluation of competitive effects is guided by the Department of Justice's approach to evaluating competitive effects. Lastly, the Final Statement communicates

the FDIC's expectation that in situations where divestitures are required and the IDI continues to own the property, the FDIC also expects the selling IDI divesting a branch to waive any terms or conditions (*e.g.*, exclusive use clauses) that preclude the ability of other IDIs to lease the property.

Financial Resources

The Final Statement generally retains the Proposed Statement's emphasis on the resulting IDI reflecting sound financial performance and condition and meeting applicable capital standards. However, the Final Statement does not incorporate the Proposed Statement's assertion that the FDIC will not find favorably on the financial resources factor if the merger would result in a weaker IDI from a financial perspective. This statement was removed to avoid the suggestion that an IDI that reflects a very strong financial condition would be precluded from absorbing a weaker target. The Final Statement indicates that a favorable finding on the financial resources factor would be appropriate only in cases where the merger results in a combined IDI that presents less financial risk than the financial risk posed by the institutions on a standalone basis. The revised comment affirms that the FDIC's analysis balances the impact of the proposed merger on financial resources particularly when the resulting IDI may initially be weaker immediately following consummation.

Managerial Resources

The Final Statement retains without change the Proposed Statement's discussion of the managerial resources factor. This discussion reflects and elaborates on the FDIC's expectation that the management of the resulting IDI possess the capabilities to administer the resulting IDI's affairs in a safe and sound manner, and to effectively implement post-merger integration plans and strategies.

Future Prospects

The Final Statement retains without change the Proposed Statement's discussion of the future prospects statutory factor. The discussion reflects and elaborates upon the FDIC's expectation that the resulting IDI will operate in a safe and sound manner on a sustained basis following consummation of the merger.

Convenience and Needs of the Community to be Served

The Final Statement retains with slight modifications the Proposed Statement's discussion of the statutory factor related to the convenience and needs of the community to be served. Notably, the Final Statement communicates and elaborates upon the FDIC's expectation that a merger between IDIs will enable the resulting IDI to *better* meet the convenience and needs of the community to be served than would occur absent the merger in order to find favorably on this factor. For transactions that have a negligible impact on consumers, such as where an IDI merges with a non-customer facing operating subsidiary, the FDIC will consider the record of the IDI in meeting the convenience and needs of the community to be served as the primary means for resolving this factor. The discussion of convenience and needs of the community to be served includes a footnote that credit union applicants may be required to provide additional information to evaluate this factor, as credit unions are not subject to the Community Reinvestment Act (CRA). The Final Statement clarifies that a favorable finding on the convenience and needs of the community to be served factor in and of itself may not be adequate to support approval of the application when anticompetitive effects are identified.

The Final Statement communicates the FDIC's expectation to hold public hearings for mergers resulting in IDIs that have \$50 billion or more in total assets. Public input is an essential

part of the FDIC's consideration of every merger transaction. The primary means of receiving public input is through the statutorily mandated public comment process. The Final Statement reflects the FDIC's policy that public hearings are an additional forum for input for the most consequential merger transactions.

Risk to the Stability of the United States Banking or Financial System

The Final Statement retains without change the Proposed Statement's discussion of the financial stability factor. The Final Statement emphasizes that size alone is not dispositive for determining the risk to the U.S. banking or financial system's stability, but nonetheless recognizes that transactions that result in an IDI with \$100 billion or more in total assets are more likely to present potential stability concerns. The Final Statement communicates the FDIC's expectation that additional scrutiny will be afforded to the evaluation of such mergers. For the purposes of establishing clarity, the Final Statement reflects that this additional scrutiny will apply to transactions resulting in IDIs with \$100 billion or more in total consolidated assets.

Effectiveness in Combatting Money Laundering Activities

The Final Statement retains without change the Proposed Statement's discussion regarding the statutory factor related to the effectiveness in combatting money laundering. The Final Statement communicates and elaborates upon the FDIC's expectation that approved merger transactions will result in IDIs with effective programs to combat money laundering and counter the financing of terrorism.

Other Matters and Consideration

The Final Statement retains without change the Proposed Statement's discussion of other matters and considerations, which alerts the public to the added requirements that apply to

interstate transactions, as well as the FDIC's approach to applications involving non-banks or banks that are not traditional community banks, and applications involving operating non-insured entities.

Conclusion

Staff recommends that the Board approve the publication of the attached Statement of Policy titled "Statement of Policy on Bank Merger Transactions" in the *Federal Register*, superseding the existing Statement of Policy on Bank Merger Transactions 30 days following publication in the *Federal Register*.

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