FEDERAL DEPOSIT INSURANCE CORPORATION
RIN 3064-ZA31

Final Statement of Policy on Bank Merger Transactions

FEDERAL AGENCY:

Federal Deposit Insurance Corporation (FDIC)

ACTION TYPE:

Final Statement of Policy on Bank Merger Transactions.

SUMMARY:

The FDIC is issuing this final Statement of Policy on Bank Merger Transactions (Final Statement) to provide transparency on how the FDIC administers its responsibilities under the Bank Merger Act (BMA). The Final Statement takes into consideration comments received in response to the FDIC's 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).

DATES:

The Final Statement supersedes the prior FDIC Statement of Policy on Bank Merger Transactions 30 days following publication in Federal Register.

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SUPPLEMENTARY INFORMATION:

I. Background

The Final Statement supersedes the prior FDIC Statement of Policy on Bank Merger Transactions (Superseded Statement), which was last amended in 2008. Since the Superseded Statement was last revised, the BMA has been amended and significant changes have occurred in the banking industry and financial system, which has prompted the FDIC to develop this Final Statement. Following the FDIC's 2022 request for information and comment (RFI)[1] on rules, regulations, guidance, and statements of policy regarding bank merger transactions, the FDIC published a request for comment on its Proposed Statement in the Federal Register on April 19,

[1] 87 FR 18740 (March 31, 2022).

2024.[2]

The FDIC received 23 letters in response to the Proposed Statement from the public, including representatives of the financial services industry, trade associations, consumer groups, university professors, and Members of Congress.[3] After reviewing the public comments received in response to the Proposed Statement, the FDIC has made revisions to address certain of the comments and is adopting this Final Statement. A summary and discussion of the comments and changes incorporated in the Final Statement are described in [Section III] of the Supplementary Information.

II. Overview of the Final Statement

The Final Statement updates, strengthens, and clarifies the FDIC's policies related to the evaluation of bank merger applications. 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 relative to each statutory factor and incorporates analytical considerations for these areas.

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.

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[2] 89 FR 29222 (April 19, 2024).

[3] Request for Comment on Proposed Statement of Policy on Bank Merger Transactions. *See* 89 FR 29222.

Jurisdiction and Scope

The Final Statement generally retains with minor modifications 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 on 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 processing, the Final Statement emphasizes the importance of pre-filing meetings, substantially complete applications, and public feedback. With respect to adjudication, the Final Statement retains the FDIC's longstanding tenet of the FDIC's applications processing policy and procedures,[4] 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 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 resolved. In addition, the FDIC Board notably reserves authority to act on any application for which the Attorney

[4] Applications Procedures Manual, Applications Overview, 1.1, https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-01-01-overview.pdf; APM, Standard and Nonstandard Conditions, 1.11; and Deposit Insurance Applications Procedures Manual Supplement – Applications from Non-Bank and Non-Community Bank Applicants, https://www.fdic.gov/regulations/applications/depositinshurance/procmanual-supplement.pdf

General has not notified the FDIC in writing that the proposed transaction would not have a significantly adverse effect on competition.

The Final Statement retains the Proposed Statement's non-exhaustive list of circumstances that could lead to an unfavorable finding on one or more statutory factors. Further, it asserts the FDIC Board's prerogative to release a statement regarding withdrawn transactions if such a statement is considered to be in the public interest for creating transparency for the public and future applicants. The FDIC emphasizes that such statements are not to be expected in every instance, but only when warranted by the circumstances, and would be in conformance with the FDIC's obligation to protect confidential information.

Statutory Factors

Consistent with the Proposed Statement, the Final Statement is organized around a discussion of the BMA's statutory factors. The BMA prohibits approval of monopolistic merger transactions, restricts otherwise anticompetitive transactions, and requires consideration of statutory factors related to financial and managerial resources and future prospects, convenience and needs of the community to be served, combatting money laundering, and financial stability.

As emphasized in the Final Statement and throughout this Supplementary Information, the FDIC Board reserves authority to act on any merger application for which FDIC staff has not found favorably on one or more statutory factors. Such action may be either an approval or a denial. The Final Statement describes the FDIC's approach to evaluating each statutory factor. The Final Statement is intended to provide greater clarity regarding what features of merger transactions may be consistent with a favorable finding on each respective statutory factor. When a merger transaction includes these features, and the facts and circumstances of such transaction clearly weigh in favor of favorable resolution of the statutory factors, the FDIC expects such applications to be approved expeditiously under delegated authority. When the facts and circumstances do not so clearly weigh in favor of favorable resolution of the statutory factors, it is appropriate that the judgment of the FDIC Board be brought to bear on the application. In addition, it is important to note that on June 18, 2024, the FDIC Board adopted a resolution requiring full FDIC Board briefings on merger, and certain other, applications that have been outstanding for more than 270 days since the application's filing (Board Briefings Resolution).[5] The Board Briefings Resolution ensures that the FDIC Board has the opportunity to be informed of, and provide direction on, merger, and certain other, applications for which obstacles to favorable resolution of the statutory factors may be materializing.

Certain aspects of the Final Statement, such as the expectation that mergers resulting in IDIs with $50 billion or more in total assets should be the subject of public meetings and the expectation that mergers resulting in IDIs with $100 billion or more in total assets be the subject of a heightened financial stability analysis are intended to position the FDIC to conduct an informed evaluation of the statutory factors for highly consequential merger proposals.

Monopolistic or Anticompetitive Effects

The Final Statement retains and builds upon the Proposed Statement's discussion of how the FDIC evaluates the competitive effects of a merger transaction. The Final Statement describes the FDIC's approach to considering concentrations in relevant geographic and product markets, which begins with measuring concentrations based on local deposit shares, but as necessary will take into account any appropriate data sources and analytical approaches relevant to fully assessing the competitive effects of the transaction.

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. While the FDIC will

[5] FDIC Board Resolution Seal No. 088980 (June 20, 2024). This resolution also applies to outstanding deposit insurance applications.

consider such competitors when relevant, the FDIC expects that the presence of such competitors may be especially salient for mergers involving rural markets. 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 meet the convenience and needs of the community. Finally, a footnote was added to clarify that competitors in the market include, but are not limited to, credit unions, thrifts, and Farm Credit System institutions.

The FDIC continues to recognize the July 9, 2021, Executive Order addressing competition in the American economy.[6] The FDIC continues to coordinate with the Department of Justice (DOJ) and the other federal banking agencies in modernizing bank merger oversight, and the Final Statement emphasizes that the analytical methods the FDIC employs in conducting its independent analysis will continue to be informed by the DOJ's approach to evaluating competitive effects. As previously stated, the FDIC Board reserves authority to act on any application in which the merging institutions operate in the same relevant geographic markets(s) and for which the Attorney General has not notified the FDIC 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 application would have a significantly adverse effect on competition. In such cases, applicants would need to demonstrate that the anticompetitive effects of the merger transaction would be outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

The Final Statement discusses divestitures as a means to mitigate competitive concerns before allowing the merger to be consummated. To promote the effectiveness of the divestiture(s) in mitigating anticompetitive concerns, the FDIC generally expects that the selling IDI will neither enter into non-compete agreements with any employee of the divested entity nor enforce any

[6] E.O. 14036 "Promoting Competition in the American Economy" (July 9, 2021).

existing non-compete agreements with any of those entities. In addition, the Final Statement communicates the FDIC's expectation that in situations where an IDI is divesting or otherwise closing a branch in connection with the transaction, the FDIC also expects the IDI to waive any terms or conditions (*e.g.,* exclusive use clauses) that preclude the ability of other IDIs to lease or purchase 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. It was replaced with language affirming that a favorable finding on the financial resources factor would only be appropriate 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.

This language is consistent with the FDIC's historical approach to the analysis of this factor. While a resultant IDI may be weaker post-acquisition, the FDIC broadly considers the long-term financial impacts over the near-term implications of a merger. For example, when a proposed merger transaction involves an IDI in less than satisfactory condition (or experiencing potentially significant financial or managerial concerns), emphasis is placed on the capacity of the acquiring IDI to absorb the weaker IDI and address the problems or concerns identified. Furthermore, purchase accounting rules generally require an acquiring IDI to recognize the target's assets and liabilities at fair value, which often causes the resulting IDI to look weaker financially on day one, post-merger.

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[7] 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 for FDIC staff to find favorably on this factor. As noted above, the FDIC Board retains authority to evaluate any merger transaction for which one or more of the statutory factors are not favorably resolved. Further, the FDIC Board expects a favorable resolution of the convenience and needs factor to be clearly

[7] The Final Statement emphasizes the importance of a merger enabling a resulting IDI to *better* meet the convenience and needs of the community in the context of mergers involving two IDIs. The FDIC has jurisdiction to act on any merger transaction involving an IDI and a noninsured institution. For transactions that have a negligible impact on consumers, such as where an IDI merges with a non-customer facing subsidiary, the FDIC will consider the IDI's record in meeting the convenience and needs of the community to be served as the primary means for resolving this factor.

supported by a demonstration of how the merger transaction would position the resulting IDI to better meet the needs of the communities it serves. A favorable finding on the convenience and needs of the community to be served factor may not be sufficient to support approval of the application when anticompetitive effects are identified. In situations where anticompetitive effects are identified, the FDIC will evaluate whether the applicant has demonstrated that the benefits to the convenience and needs of the community will clearly outweigh the anticompetitive effects.

Absent such a demonstration, the FDIC Board reserves the authority to evaluate and act upon the merger by taking into account all of the facts and circumstances of the transaction in the context of the statutory factors.

In addition, 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 consolidated 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, but the Final Statement reflects the FDIC's policy that an additional forum for public input for the most consequential merger transactions would be appropriate.

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 discussion explains that the FDIC evaluates the financial stability factor with respect to: the size of the entities involved in the transaction; the availability of substitute providers for any critical products or services to be offered by the resulting IDI; the resulting IDI's degree of interconnectedness with the U.S. banking or financial system; the extent to which the resulting IDI contributes to the U.S. banking or financial system's complexity; and the extent of the resulting IDI's cross-border activities.

The Final Statement emphasizes that size alone is not dispositive for determining the risk to the United States banking of financial system's stability, but nonetheless recognizes that transactions that result in a large IDI are more likely to present potential stability concerns. The Final Statement communicates the FDIC's expectation that additional scrutiny will be applied to the evaluation of such mergers. For the purposes of clarifying expectations, the Final Statement reflects that this additional scrutiny will apply to transactions resulting in IDIs with $100 billion or more in total consolidated assets. The FDIC further emphasizes that such bank merger applications are typically accompanied by companion applications at the holding company level, which are subject to approval by the Board of Governors of the Federal Reserve System (Federal Reserve Board). The expectation related to a resulting IDI with total assets over $100 billion as identified in the Final Statement aligns with the Federal Reserve Board's delegations of authority.[8]

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 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.

III. Summary and Discussion of Comments

Many commenters recommended some type of revision or alteration with respect to the discussion of how the FDIC analyzes the statutory factors, with particular emphasis on competitive

[8] 12 CFR 265.20(c)(12)(vii).

effects, convenience and needs of the community, and risk to the stability of the United States banking or financial system. Additionally, many commenters provided feedback or recommendations for process changes that are outside the scope of what was initially proposed. For example, multiple commenters discussed a need to increase the scrutiny applied to acquisitions of banks by nonbanks such as credit unions. Other items suggested include:

- adopting a separate review framework for mergers involving community banks and nonbank acquirers;
- ending expedited reviews/processing of bank merger applications;
- adopting metrics and benchmarks for a streamlined application and an expedited review for transactions between small IDIs that do not raise significant supervisory or financial stability concerns and where no adverse public comments have been filed;
- disallowing banks with over 10 percent of U.S. deposits from buying failing banks unless there are no other buyers;
- developing an interagency Statement of Policy; and
- consulting the Consumer Financial Protection Bureau on all merger applications.

Some commenters that were largely supportive of aspects of the Proposed Statement recommended further refinements or additional elements for consideration. For example, one such commenter suggested that a merger must enhance the resulting IDI's ability to serve the public for it to warrant approval. However, the same commenter also suggested including a statement that the FDIC would add a condition to approval orders restricting the ability of IDIs to close branches beyond those identified for closing in the application. Some commenters were broadly opposed to certain aspects of the Proposed Statement. These commenters argued that the FDIC's current framework for reviewing proposed merger transactions was sound and warned of negative consequences from the proposed revisions.

Jurisdiction and Scope

Some commenters suggested that the Proposed Statement's jurisdiction and scope section exceeds the FDIC's statutory authority, contending that statements regarding the FDIC's jurisdiction are overly broad as they suggest that applications are necessary for various types of transactions that are not true mergers. The BMA expressly subjects a wide range of transactions to regulatory approval, and the Final Statement generally retains the Proposed Statement's approach to jurisdiction and scope, which reflects statutory requirements and the FDIC's longstanding practice. With respect to asset acquisitions that do not involve deposits or similar liabilities, the Final Statement maintains that the FDIC considers transactions to be mergers in substance when a target would no longer compete in the market, regardless of whether the target plans to liquidate immediately after consummating the transaction. Similar to the Proposed Statement, the Final Statement offers as an example of a substantive merger a transaction in which "an IDI absorbs all (or substantially all) of a target entity's assets and the target entity dissolves (or otherwise ceases to engage in the acquired lines of business such that the target is no longer a viable competitor)."[9] The Final Statement adopts the language related to the target no longer being a viable competitor in order to reflect the BMA's emphasis on competitive considerations.

In response to the Proposed Statement, it was suggested that the FDIC should assert that asset acquisitions that would not qualify as *de facto* mergers under state common law would not be subject to a filing requirement under the BMA. The Final Statement makes no such reference to state common law, as the scope of transactions subject to the BMA for the purposes embodied by its statutory factors is not perfectly coextensive with the scope of transactions that qualify as *de facto* mergers under divergent state law doctrines for the purpose of establishing successor liability. In addition, the Final Statement retains the Proposed Statement's explanation that an IDI's

[9] This is generally consistent with interpretations of the OCC regarding section 18(c)(2) of the Bank Merger Act. *See* Office of the Comptroller of the Currency, Comptroller's Licensing Manual: Business Combinations ("The OCC interprets 'acquire the assets' for BMA filing purposes to include the acquisition of assets such that the target is no longer a viable competitor, regardless of whether the target plans to liquidate immediately after consummating the transaction.")

assumption of any deposit or other similar liabilities is subject to the BMA; and the FDIC emphasizes that any transaction that consists of an assumption of deposits or other similar liabilities is subject to the BMA regardless of whether the transaction as a whole represents a substantive merger.

Although the scope of transactions subject to the BMA is broad and there is no *de minimis* exception to the BMA, the Final Statement acknowledges that the FDIC will evaluate the applicable statutory factors in a manner that is appropriate to each transaction.[10]

Process and Adjudication

Multiple commenters requested the adoption of specific approval metrics and benchmarks and the removal of general terms. One commenter requested that the Final Statement include benchmarks for a streamlined application and expedited review for transactions between small IDIs that do not raise significant supervisory concerns and where no adverse public comments have been filed. Several commenters requested a *de minimis* exception for a merger in which the resulting IDI would have less than $10 billion in total assets. Some commenters requested that the FDIC terminate expedited processing of applications. However, other commenters stated an opposing view.

No specific bright lines or performance thresholds were included in the Final Statement to retain flexibility to evaluate the facts and circumstances of each individual application; and no *de minimis* thresholds were adopted. Section 303.64 of the FDIC Rules and Regulations codifies the requirements for expedited processing of merger applications. The regulation has not been changed. Applications that qualify will receive expedited processing when appropriate, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. The FDIC may remove an application from expedited processing for any of the reasons set forth in

[10] For example, the BMA would apply to a transaction in which an IDI merges with a non-customer-facing operating subsidiary. Even in cases where the IDI is over $50 billion in assets, it may not be necessary for the evaluation of the convenience and needs factor to hold public hearings given the nature of the transaction.

Section 303.11(c)(2) of the FDIC Rules and Regulations. It is important to note that if the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

Multiple commenters noted that the Final Statement should expressly authorize conditions to be used to find favorably on a statutory factor. The Final Statement does not state that conditions can be used to find favorably on a statutory factor that otherwise presents material concerns. However, the FDIC may impose targeted conditions to mitigate specific risks. Conditions are not a substitute for the resolution of, and do not in and of themselves favorably resolve, an applicable statutory factor. As noted in the Final Statement, 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. This is consistent with the FDIC's long-standing applications processing policy.[11]

Commenters suggested that the process for the FDIC Board to post a statement about a withdrawn application be eliminated. Further, commenters indicated that the FDIC should confirm that detailed nonpublic information provided in merger applications would remain confidential. The Final Statement retains the FDIC Board's discretion to release a statement regarding the concerns with a withdrawn application if such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants. Publishing such a statement provides the industry with insights and understanding of what features of a proposal may be inconsistent with approval. If such a statement is not published, the industry and consumers would not understand the rationale for the withdrawal and the issues/concerns identified during the review process. The publication of such a statement is not expected for most transactions and the FDIC intends that any such statement would be fully consistent with the confidentiality

[11] FDIC Applications Procedures Manual, Section 1.11, Standard and Nonstandard Conditions.

requirements of applicable laws and regulations and would not disclose confidential business information of applicants.

Statistory Factors

Monopolistic or Anticompetitive Effects

Commenters stated that pre-consummation divestitures would add significant delay and complexity to an already lengthy and costly merger process. The Final Statement retains the language as presented. Any potential divestitures would follow regulatory approval. Divestitures, when required, may be included as a condition that must be addressed prior to consummation of the merger. Such actions would not delay the merger application submission, review, and approval processes; as such, the length of time for regulatory review and adjudication is not expected to change.

Multiple commenters suggested revisions to the competitive effects analysis. Several commenters raised concerns with credit union acquisitions of IDIs and requested a special analysis of the competitive impacts of such transactions. It was also suggested that credit union competition should be given a multiplier when used as part of the competitive analysis. No changes were made to the Final Statement to address the competitive effects analysis of credit union acquisitions of IDIs; as such, transactions are subject to the same statutory factors. When assessing the competitive effects, the FDIC considers all relevant market participants; however, no multiplier is used to increase the credit union impact on the Herfindahl–Hirschman Index (HHI),[12] which could inaccurately reflect the influence of credit unions in the relevant geographic market. This is consistent with historical practice and remains unchanged in the Final Statement.

[12] The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI calculation can also be applied to other relevant Consolidated Reports of Condition categories or other appropriate sources of data, aside from deposits. For example, the HHI analysis may also include data relative to commercial and industrial loans.

Other commenters noted that the Final Statement should include specific metrics for transactions to be considered anti-competitive, including specific HHI thresholds that would be consistent with approval. Other commenters requested to preserve the current thresholds since it provides a level of certainty by which mergers are presumed not to raise competitive concerns. Commenters also suggested that the Final Statement should use a higher HHI threshold in rural markets and that use of the Federal Reserve Board's banking markets should be revisited. The Final Statement does not include specific HHI metrics or benchmarks at this time. With respect to the Federal Reserve Board's banking markets, the FDIC will employ a geographic market definition that is appropriate to the facts and circumstances of the application. The evaluative considerations for competitive effects analysis are described in the Final Statement, and HHI calculations are described in the Applications Procedures Manual Section 4, Mergers. Section 4 is currently being revised to reflect the Final Statement.

With respect to the evaluation of competition in rural markets, the Final Statement emphasizes the FDIC's statutory obligation to weigh any potential anticompetitive effects of a merger against the convenience and needs of the community to be served, and that it is possible for consideration of convenience and needs to outweigh a concern with potential anticompetitive effects. The FDIC recognizes that in rural communities, typical concentration measures such as HHI based purely on IDI deposit concentrations might be incomplete, particularly to the extent that residents receive banking services from credit unions, Farm Credit System institutions, or other nonbanks or banks that are not traditional community banks. While the FDIC does not introduce a tailored approach to the evaluation of competitive effects in rural markets, in cases where the relevant geographic market is rural, the FDIC considers all relevant measures of concentration, including the potential public interest benefits of a merger of two local entities in the local market.

A few commenters indicated that the competitive effects analysis should be conducted on a county-level and capture county-level demographics such as median income levels or percentage of people of color or low-to-moderate income (LMI) people. These comments suggested that such analysis should consider additional divestitures or mandate commitments to increase lending and banking services. It was also suggested that concentrations should be measured nationally. As stated in the Final Statement, the FDIC generally employs a framework for evaluating competitive effects involving a transaction between IDIs with traditional community banking operations within their local geographic markets. However, the FDIC will tailor its evaluation to consider the size and competitive effects of the resulting IDI. Further, the Final Statement notes that the FDIC identifies all relevant geographic markets (local, regional, and national) based on the geographic areas in which the merging entities operate and in which customers may practically turn to competitors for alternative products and services. If the relevant geographic market is shown to be at the county level, the county will be the focus of the analysis; if the relevant market is wider, the assessment will reflect that area. With respect to divestitures and commitments to increase services, such determinations are made depending on the facts and circumstances of the application.

A couple of commenters urged the FDIC to de-emphasize local deposit concentration as a key criterion for deciding mergers. Other commenters disagreed saying evaluating the competitive effects of mergers based on product or consumer sector concentrations introduces unpredictability with unclear benefits. It was suggested that evidence from traffic patterns could also be evaluated as a means to assess customer use of services in wider areas. As noted in the Final Statement, deposit concentration is an initial proxy for commercial banking products and services. The FDIC will consider concentrations beyond those based on deposits. As appropriate, the FDIC may consider concentrations in any specific products or customer segments, such as, for example, the volume of small business or residential loan originations or activities requiring specialized expertise. Additionally, the Final Statement confirms that, when relevant, the analysis may incorporate other products offered by the merging entities with consideration given to whether consumers retain meaningful choices.

Some commenters indicated that the FDIC should not disfavor non-compete agreements, and others indicated that non-compete clauses for workers should be eliminated in all mergers. Consistent with current practice, the Final Statement retains the language as proposed, which states that the FDIC will generally not view favorably situations where the selling institution enters into non-compete agreements with any employee of the divested entity or seeks to enforce any existing non-compete agreements with any of those entities.

Two commenters noted that a *de minimis* exception is warranted for transactions involving highly concentrated rural markets. As previously stated, no specific metrics or thresholds are included as predicates to an evaluation of the competitive effects factor.

Financial and Managerial Resources and Future Prospects

Many commenters requested that the following statement in the proposed Statement be removed: "[t]he FDIC will not find favorably on the financial resources factor if the merger would result in a weaker IDI from an overall financial perspective." Commenters contended that the statement appears to preclude the acquisition of weaker institutions during periods of economic distress. Commenters noted that the FDIC should clarify or revise its position regarding how it will evaluate a merger resulting in a weaker IDI from an overall financial perspective. It was also suggested that the FDIC could dispel concerns regarding how it will evaluate such mergers by noting it will balance the risks posed by the resulting IDI in light of the risks of denying a merger.

The statement that "[t]he FDIC will not find favorably on the financial resources factor if the merger would result in a weaker IDI from an overall financial perspective" has been removed from the Final Statement. Inclusion of such language created confusion regarding the acquisition of a weaker target by a stronger acquirer with adequate resources to absorb and integrate the target. On balance, the FDIC determined that retention of the statement could be viewed as an indication that certain transactions would be precluded from receiving approval. The language was replaced with a statement 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.

With respect to the evaluation of the financial and managerial resources, commenters noted that outstanding or pending matters that can be resolved in the normal supervisory course should not bar an institution from pursuing merger transactions. The Final Statement affirms that the assessment of managerial resources includes the responsiveness to issues or supervisory recommendations raised by regulators or auditors as well as any existing or pending enforcement actions. Additionally, the Final Statement discusses the FDIC's expectation that a resulting IDI will have the managerial and operational capacity, and devote adequate resources, to ensure full and timely compliance with any outstanding corrective programs or supervisory recommendations. The FDIC does not view the existence of outstanding or pending enforcement actions as a bar to the pursuit of a merger.

Some commenters noted that the Final Statement should ensure that IDIs have more equity capital funding as a prerequisite for mergers (a 10 percent tier 1 leverage ratio was suggested). The Final Statement does not identify a specific capital threshold that would facilitate merger approvals; however, it does state that a critical component of the analysis of financial resources is the resultant IDI's ability to meet applicable capital standards (including maintenance of appropriate allowances for loan or credit losses). The Final Statement affirms that, depending on the anticipated risk profile of the resulting IDI, the FDIC may impose, as a non-standard condition, capital requirements that are higher than applicable capital standards. However, no specific threshold is included to retain flexibility to assess the facts and circumstances of a particular transaction.

Commenters noted that management should demonstrate the prioritization of diversity, equity, and inclusion in their practices, products, and services. They recommended that the FDIC take into consideration data from Equal Employment Opportunity Reports and evaluate the applicant's efforts to promote gender, racial, and ethnic diversity in their boards, senior management, and branch personnel. The Final Statement was not amended to address these items.

A commenter suggested that IDIs with poor records of compliance with climate-related goals should not be allowed to merge. Discussion of climate-related goals has not been added to the Final Statement. However, if the management, compliance rating, and/or risk profile of the merging parties were adversely impacted by climate change challenges, the ability of the resulting IDI's management team to ameliorate and address the climate-related risks may be considered in the context of the applicable statutory factors.

Convenience and Needs of the Community to be Served

Multiple commenters recommended revisions to the discussion of the FDIC's analysis of the convenience and needs of the community to be served. Multiple commenters asserted that there is no statutory requirement that the resulting IDI should *better* meet the convenience and needs of the community. These commenters stated that such an expectation is unnecessary and leaves the matter of determining whether it does so primarily at the discretion of the FDIC. Other commenters expressed support for this expectation, indicating that increased public benefit is of paramount importance. The Final Statement generally retains the approach as proposed, consistent with Congressional intent[13] and the FDIC's longstanding policy. Since October 1998, the FDIC's existing Statement of Policy has indicated the FDIC would consider the extent to which the proposed merger would likely benefit the general public and referenced examples of better banking services as factors for consideration of the convenience and needs of the community to be served.[14]

[13] *See, e.g.,* Statement by Senator A. Willis Robertson, Chairman of the Senate Committee on Banking and Currency 112 Cong. Rec. 2542 (1966) ("The banking agency may approve the merger if it thinks the merger will be *beneficial* from these points of view ...")[emphasis added].

[14] *See* FDIC Statement of Policy on Bank Merger Transactions 63 FR 44761, 44764 (Aug. 20, 1998) ("In assessing the convenience and needs of the community to be served, the FDIC will consider such elements as the extent to which the proposed merger transaction is likely to benefit the general public […]"); *see also*, FDIC Statement of Policy on Bank Merger Transactions 54 FR 39042, 39047 (Sep. 22, 1989) ("The FDIC will also consider the extent to which the proposed merger is likely to improve service to the general public […]").

The Final Statement includes examples as to how the FDIC anticipates the resulting IDI could meet this expectation. For example, an applicant may demonstrate how the transaction will benefit the public through higher lending limits, greater access to existing products and services, introduction of new or expanded products or services, reduced prices and fees, increased convenience in utilizing the credit and banking services and facilities of the resulting IDI, or other means. While not explicitly stated, the evaluation also considers the implications if the transaction was not approved and how that decision affects the convenience and needs of the community. The expectation for a favorable finding on this factor is for the community to gain from the transaction post-consummation. Applications that project reduced or diminished banking services will generally result in unfavorable findings on this factor. This approach is consistent with current policy and is intended to clarify the FDIC's approach to the evaluation of this statutory factor.

Commenters requested that the Final Statement clarify that only public comments that meet a level of significance would lead to additional FDIC review. One commenter suggested that the FDIC should implement a vetting procedure and criteria for submitting a comment and not automatically consider all comments as warranting the same consideration. Commenters also stated that Community Reinvestment Act (CRA) protests that are unsubstantiated from factual or legal perspectives (including, for example, form protests) should not be considered in determining whether a public hearing will be held.

As noted in Section 303.2 of the FDIC Rules and Regulations, "adverse comment(s) also shall not include any other comment...determine(d) to be frivolous (for example, a non-substantive comment submitted primarily as a means of delaying action on the filing)." While the Final Statement affirms that the FDIC will review and evaluate any public comments received in accordance with Section 303.9 of the FDIC Rules and Regulations, consideration is not given to frivolous letters or statements. The FDIC will consider substantive public comments received regarding the ability of the applicant to meet the convenience and needs of the community to be served and will provide the applicant an opportunity to respond to any comment that is determined to be a CRA protest.

Commenters were mixed on the need for hearings. Some commenters agreed that hearings should be conducted when there are a significant number of CRA protests or the resulting IDI has over $50 billion in total assets; others disagreed with using $50 billion in total assets as a level for which hearings will be conducted. One letter suggested that any merger protest should trigger a public hearing or meeting. Finally, clarification was sought regarding the process for requesting a public hearing, the appropriate channels, and specific contacts in the process.

The Final Statement retains the expectation that mergers resulting in an IDI with over $50 billion in total assets will be the subject of hearings; however, the FDIC historically has, and will continue to, conduct hearings for transactions under this level when deemed appropriate. Such a determination will depend on the facts and circumstances of the proposed merger. In making such a determination, the FDIC would consider the risk profile of the resultant IDI, the volume and nature of protest letters, and the likely prospective impact to the convenience and needs of the community to be served. With regard to the process for conducting public hearings, such guidelines are enumerated in Section 303.10 of the FDIC Rules and Regulations. When the application is filed, the publication notice indicates the appropriate channel to provide comments by listing the address of the appropriate FDIC office where comments may be sent. Such information provides the public with initial contacts to discuss concerns with the filing that may precipitate public hearings.

A few commenters stated that the FDIC should clarify what is meant by a "significant number" of CRA protests. The Final Statement does not state a specific number of CRA protests to be considered "significant;" rather, the FDIC considers all adverse comments from the public related to a pending filing when determining if the comment is deemed to rise to the level of a protest. Frivolous letters are not included. Additionally, the receipt of only one or two CRA protest letters may not be considered significant enough to lead to a public hearing; however, the FDIC retains the ability to hold a hearing in these instances. The decision to hold such hearings depends on issues raised during the comment period and the significance of the merger transaction to the public interest, banking industry, and communities affected.

One commenter stated that the FDIC should use the most recent CRA exam, with the qualification that if the applicant has had a less than Satisfactory rating in any of the last three exams, the merger should not be approved until remediation plans are in place. No changes were made to the Final Statement to adopt such a practice; however, as stated in the Final Statement, a less than Satisfactory historical rating or significant deterioration in CRA performance will generally result in unfavorable findings. The FDIC's consideration of the convenience and needs statutory factor is not limited solely to the CRA record of the IDIs. The consideration will encompass a broad review, which includes, but is not limited to, existing products and services, record of consumer compliance, and whether the products and services proposed by the applicants will meet the convenience and needs of the community to be served.

A commenter requested that the FDIC extend comment periods for community members to participate in the process from 30 days to 60 days and stated that clarity is needed around comment letter deadlines, particularly if comment letters received after the deadline are used to inform bank merger decisions. The comment period and deadlines for submitting comment letters are codified in Section 303.65 of the FDIC Rules and Regulations and have not been changed.

Some commenters requested that clear points of contact should be listed on regulatory and applicant websites, along with email addresses and phone numbers, to facilitate requests for the public file and/or to engage bank applicants and the regulator. The FDIC's current website includes detailed instructions for the public to both file a Freedom of Information Act (FOIA) request, as well as to request the public portion of applications subject to the CRA.[15]

[15] Information on public applications can be located here: https://cra.fdic.gov/. Information on FOIA requests can be located here: https://www.fdic.gov/foia/.

A couple of commenters stated that approval Orders should address comments submitted by the public; the FDIC should summarize communications with the applicant for the public record; and there should be an administrative appeals process for community groups to challenge approvals that are inconsistent with an agency's own procedures. The regulations governing the processes for filing comment letters and conducting public hearings have not changed and the Final Statement affirms the FDIC's approach to these matters.

One commenter suggested that the FDIC should require public statements, public plans, or community benefit agreements (CBAs); and regulators should examine for compliance with commitments during future examinations. Other commenters disagreed with requiring and enforcing CBAs, stating that if the FDIC required CBAs, then the FDIC must enforce the requirements of the agreements, which is inconsistent with current practice. Further, there is no statutory basis for requiring and enforcing CBAs. The Final Statement does not address CBAs, which are private agreements between merger parties and community groups. The FDIC does not require CBAs or enforce their requirements. The Final Statement retains language that claims and commitments made to the FDIC may be included in the Order and enforced post-merger through its ongoing supervision.

Commenters were mixed on having applicants provide a three-year plan regarding branch actions. Commenters who concurred with this approach noted that applicants should be required to describe the impact branch closures will have on the job, credit, and reinvestment needs of local communities. Commenters who disagreed with this approach indicated that the FDIC should not force IDIs to hardwire plans with respect to branch actions, thus limiting their flexibility to address changing circumstances. Another commenter requested that closings should be prohibited during the ensuing three years. One commenter noted that a focus on proposed branch closures fails to consider the numerous innovations in customer service channels in recent decades.

The Final Statement affirms the expectation for applicants to provide three years of information regarding projected branch actions consistent with current practice. Retaining this guidance clarifies the expectations for branch retention, expansion, closing, or consolidation and provides transparency on the timeframes that the FDIC will evaluate, consistent with its current practices. It also provides transparency to the industry on how the FDIC considers proposed changes to the physical locations of branches.

Other commenters indicated that the evaluation of convenience and needs of the community should not consider job losses. The FDIC agrees with commenters that the provision about the impact of future branch closings on the loss of job employment opportunities in the local market area may depend on factors not readily predictable at the time of a merger transaction. However, the impact of any proposed merger on employment opportunities is relevant to understanding how the transaction will serve the convenience and needs of the community. Accordingly, the Final Statement will request that applicants quantify or provide information regarding job losses to the extent those are known or knowable.

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

Commenters provided differing views with respect to language indicating that a transaction that would result in an IDI with $100 billion or more in assets would be subject to additional scrutiny in connection with evaluating its impact on U.S. financial stability. One commenter indicated this level is too low, as a merger resulting in an IDI having $100 billion of assets, would involve only 0.4 percent of industry assets, and its effects on industry concentration would be minor. This commenter pointed out that identifying $100 billion in total assets as the basis for additional scrutiny protects the very largest institutions from regional banks gaining scale and competing with them more directly. Conversely, another commenter stated the $100 billion benchmark for potential financial stability concerns is appropriate and should be retained; however, the commenter argued that the focus should be on domestic financial stability and not whether the resulting IDI would be a globally systemically important bank. Yet another commenter indicated that an asset size below $100 billion should be identified as the benchmark above which additional scrutiny should be applied to transactions. Commenters also requested that the FDIC clarify that mergers resulting in an IDI over $100 billion in total assets will not result in a presumptive denial, as well as what kind of "additional scrutiny" the FDIC may apply to a transaction that would result in an IDI with $100 billion or more in total assets. One commenter suggested that the FDIC should consult with the DOJ when a transaction results in an IDI with more than $100 billion in assets to determine whether the benefits of the merger outweigh the risk that the IDI will pose systemic risk or be "too big to fail." Additionally, it was suggested that concerns about mergers creating larger banks that might fail should be counterbalanced by the recognition that larger banks can better diversify across regions than smaller banks. Finally, it was noted that the financial stability considerations relate primarily to how a merger may increase risk to financial stability. It was recommended that the Final Statement address ways in which a merger could decrease risk to financial stability by fostering competition with the largest banks or improving the financial condition of a weaker bank.

The Final Statement retains the expectation that transactions resulting in an IDI with $100 billion in total assets or more would be subject to additional scrutiny. This is not a threshold for a presumptive denial. Identifying thresholds for transactions that do not present concern is inconsistent with the FDIC's practice of evaluating all filings based on their specific facts and circumstances.

The term "additional scrutiny" signals to the industry and consumers that a proposed transaction that results in an IDI with over $100 billion in assets will likely engender additional information requests, more frequent discussions and correspondence with application parties, and supplementary meetings and discussions with regulators and community groups. Such heightened analysis also provides the FDIC with additional information/data to evaluate. While the filing is still subject to the same statutory factors as all merger applications, and there are no additional elements to achieve regulatory approval, the timeline for a review of these filings may be extended compared to other types of filings.

Commenters were mixed on the consideration of the prudential regulatory framework when assessing financial stability. One commenter stated the framework is inadequate to prevent financial instability, as evidenced by the IDI failures that occurred in 2023. Another commenter suggested that the FDIC should leverage the quarterly systemic risk data that firms with greater than $100 billion in assets file on Form FR Y-15 to analyze the resulting firm's operations. One commenter suggested that the FDIC articulate how the existing framework does not address financial stability concerns. Another commenter advised that it is not appropriate to impose resolution-planning requirements via the Final Statement, which should be subject to notice and comment rulemaking. A commenter stated that the FDIC must assess and consider the resolvability of the resulting IDI when reviewing a merger transaction. This commenter also noted that the Final Statement should make it clear that the FDIC will consider the resulting the regulatory framework when assessing financial stability risk.

The Final Statement states that the FDIC will evaluate any additional elements that may affect the risk to the U.S. banking or financial system's stability. This may include the resulting IDI's regulatory framework; however, the framework alone would not result in a favorable finding on this factor when other financial stability concerns exist. The framework is merely one aspect in the evaluation of this statutory factor, and the FDIC recognizes the limitations in relying exclusively on the regulatory framework as a mechanism to limit financial stability risks.

Some commenters requested the inclusion of specific metrics to identify what transactions would not present financial stability concerns. Commenters also suggested that the Final Statement include a presumption that *de minimis* acquisitions (i.e., $10 billion or less) do not raise new financial stability risks or affect the acquirer's financial stability profile. No specific metrics or thresholds have been included in the Final Statement to identify transactions that do not present financial stability risks. The Final Statement has been revised to clarify that the evaluation considers the implications for the industry if the transaction is not approved or does not consummate.

Effectiveness in Combatting Money Laundering Activities

Only one comment letter addressed the effectiveness of each IDI involved in the proposed merger transaction in combating money-laundering activities. This commenter stated that the Financial Crimes Enforcement Network (FinCEN) should be consulted regarding the effectiveness of efforts to combat money laundering, terrorist financing, and other illicit activity. Further, the commenter suggested that FDIC should require banks to submit a pro-forma anti-money laundering risk assessment with the merger application and require institutions to conduct a comprehensive risk assessment within a reasonable time after a merger is completed. No changes were made to the Final Statement with respect to these items. The FDIC works collaboratively with FinCEN, but has sufficient information available to independently assess the effectiveness of efforts to combat money laundering and counter terrorist financing. For applicants that have less than satisfactory anti-money laundering programs, the FDIC may request a risk assessment to be conducted after consummation as a non-standard condition.

Other Matters and Considerations

Commenters also provided suggestions and recommendations outside of the Final Statement. Several commenters requested that the FDIC review, to the extent possible, the effects of past mergers to evaluate the appropriateness of any revised merger guidelines. Another commenter requested that the FDIC clarify that it is unlikely to approve a merger when the applicant has (1) recently switched its charter in anticipation of filing a merger application, or (2) has restructured the transaction after it (or its merger partner) previously submitted a merger application to a different banking agency. A commenter suggested that the FDIC should not approve mergers by IDIs that switched regulators in the last five years before the merger.

A couple of commenters requested that the FDIC increase the scrutiny applied to acquisitions of IDIs by nonbanks such as credit unions. Such transactions may have a negative impact on state and local government budgets and communities, which could necessitate an increase in taxes. One commenter stated that it is entirely inappropriate for federal bank regulators, in absence of a specific statutory grant of authority, to arrogate legislative power to consider, let alone approve such transactions. The Final Statement does not address the evaluation of credit union acquisitions of IDIs specifically; however, it does indicate that a credit union may need to provide additional information to enable the FDIC to evaluate the convenience and needs statutory factor, as credit unions are not subject to the CRA.

One commenter stated that the FDIC should adopt a separate review framework for mergers involving community banks and nonbank acquirers to ensure the maintenance of existing community development lending and investments. One commenter stated that it would be illustrative for the FDIC to publish information regarding the number of rounds of staff review of an application, the dynamic between regional and Washington office staffs, the amount of subsequent questions, or any estimated time under which action is taken on an application. The letter urges the FDIC to provide more detailed and accurate timing guidance in the FDIC's Applications Procedures Manual. Finally, one commenter requested that the FDIC explain the weight given to each statutory factor; however, the FDIC does not assign specific weights to the statutory factors.

Section 4 of the FDIC's Applications Procedures Manual will be revised and issued subsequent to the publication of the Final Statement. The revised Section 4 addresses the review process and the dynamic between regional and Washington office staffs, and the prospective timeframes for processing.

IV. Administrative Law Matters

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),[16] the agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The Final Statement does not create any new or revise any existing collections of information under the PRA. Therefore, no information collection request will be submitted to the OMB for review.

V. Final Statement of Policy

The text of the Final Statement follows:

FDIC Statement of Policy on Bank Merger Transactions

I. Introduction

This Statement of Policy (SOP) communicates the FDIC's expectations and views regarding applications filed pursuant to Section 18(c) of the Federal Deposit Insurance Act (FDI Act), which is referred to herein as the Bank Merger Act (BMA). The SOP reflects the FDIC's interpretations of the BMA and its implementing regulations. The structure of the SOP follows the BMA's core statutory provisions, and its content highlights the principles that guide the FDIC's evaluation of the statutory factors for a merger application.

[16] 44 U.S.C. 3501-3521.

The BMA prohibits an insured depository institution (IDI) from engaging in a merger transaction without regulatory approval. It identifies the types of undertakings that constitute "merger transactions" and outlines which of the three federal banking agencies is the "responsible agency" for acting on a given merger application.[17] In addition, the BMA sets forth advance public notice requirements[18] and generally requires the responsible agency to request a report on the competitive factors for a merger transaction from the Attorney General.[19]

The BMA generally prohibits the responsible agency from approving a monopolistic or otherwise anticompetitive merger transaction.[20] In addition to competitive considerations, the BMA requires the relevant agency to evaluate a merger transaction in light of the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, the risk to the stability of the United States (U.S.) banking or financial system,[21] and the effectiveness of the IDIs involved in the merger transaction in combatting money laundering.[22]

II. Jurisdiction and Scope

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,[23] and those that solely involve IDIs in which the

[17] 12 U.S.C. § 1828(c)(1) and (2).
[18] 12 U.S.C. § 1828(c)(3).
[19] 12 U.S.C. § 1828(c)(4).
[20] 12 U.S.C. § 1828(c)(5).
[21] *Ibid.*
[22] 12 U.S.C. §1828(c)(11).
[23] 12 U.S.C. § 1828(c)(1). A non-insured entity refers to any entity that is not FDIC insured.

acquiring, assuming, or resulting institution is an FDIC-supervised IDI.[24] The BMA requires regulatory approval for any merger transaction involving an IDI.[25] The applicability of the BMA will depend on the facts and circumstances of the proposed transaction. In addition to transactions that combine institutions into a single legal entity through merger or consolidation, the scope of merger transactions subject to approval under the BMA encompasses transactions that take other forms, including purchase and assumption transactions or other transactions that are mergers in substance, and assumptions of deposits or other similar liabilities.[26]

For BMA purposes, the FDIC considers transactions to be mergers in substance when a target would no longer compete in the market, regardless of whether the target plans to liquidate immediately after consummating the transaction. An example of a transaction that is a merger in substance, and therefore subject to the BMA, is when an IDI absorbs all (or substantially all) of a target entity's assets and the target entity dissolves (or otherwise ceases to engage in the acquired lines of business such that the target is no longer a viable competitor).

An FDIC-supervised IDI's assumption of a deposit from another IDI, or any IDI's assumption of a deposit from a non-insured entity, is likewise subject to FDIC approval even in the absence of an express agreement for a direct assumption. Similarly, a transfer of deposits from any IDI to a non-insured entity is subject to FDIC approval.[27] The definition of "deposit" per Section 3(*l*) of the FDI Act extends beyond traditional demand deposits to include trust funds and escrow

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[24] The Office of the Comptroller of the Currency has jurisdiction for any merger transaction between IDIs in which the acquiring, assuming, or resulting institution is a national bank or a federal savings association. The Board of Governors of the Federal Reserve System (FRB) has jurisdiction for any merger transaction between IDIs in which the acquiring, assuming, or resulting institution is a state-chartered bank that is a member of the Federal Reserve System. The FRB also has approval authority under the Bank Holding Company Act for mergers involving bank holding companies and the Home Owners' Loan Act for mergers involving savings and loan holding companies. Merger transactions that are subject to the FDIC's review may also be subject to the review of state authorities.

[25] 12 U.S.C. 1828(c).

[26] A merger that includes the establishment or relocation of branches is also subject to approval under 12 U.S.C. § 1828(d).

[27] 12 U.S.C. § 1828(c)(1)(C).

funds, among other items.

Merger and other corporate transactions may be conducted through a single transaction or through a series of related transactions that each require an application, such as transactions effected through interim institutions. In all cases, the FDIC will evaluate the substance of all of the facts and circumstances of the transaction and any related transactions, identify which aspects of the transaction(s) are subject to FDIC approval, and fully evaluate the applicable statutory factors in a manner that is appropriate to each transaction.

III. Application Process and Adjudication

Overview of the Application Process

The FDIC encourages prospective applicants to engage in a pre-filing process to discuss regulatory expectations. It is particularly important for the application to be substantially complete when initially filed.[28] The quality and comprehensiveness of a filing are critical to the FDIC's evaluation of the application under the statutory factors and other regulatory requirements.[29] The FDIC expects all submitted materials, including the financial projections and any related analyses, to be well supported and sufficiently detailed. The narrative describing the analysis and evaluation of the transaction should be supported by studies, surveys, analyses and reports, including those prepared by or for officers, directors, or deal team leads. Incomplete filings or non-responsiveness to additional information requests impede the FDIC's ability to fully evaluate and resolve the statutory factors.

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[28] As noted in Section 1.1 of the Applications Procedures Manual, a filing that is not substantially complete lacks the substance necessary for the FDIC to evaluate the statutory factors.

[29] Regulatory requirements for merger applications are provided in Part 303 of the FDIC Rules and Regulations (including Subparts A and D) and any other federal or state regulations, statutes, or laws applicable to the filing.

Public feedback is an important component of the FDIC's review of a merger application. Section 18(c)(3) of the FDI Act requires that public notice of the proposed merger transaction be published in an approved form and at appropriate intervals in a newspaper or newspapers of general circulation. A list of pending merger applications subject to the Community Reinvestment Act (CRA) is available on the FDIC's website using the Applications in Process Subject to the CRA Report Selection Options.[30] In all cases, the FDIC will review and evaluate any public comments received regarding the merger application, and will provide the applicant an opportunity to respond to any comment that is determined to be a CRA protest.[31] The FDIC will also consider the views of each relevant federal and state agency. Generally, the FDIC will not approve a merger application if adverse CRA comments have not been resolved.[32] In certain cases, the FDIC may hold hearings or other proceedings in connection with evaluating a merger application.[33]

Section 18(c)(4) of the FDI Act requires the FDIC to request a competitive factors report from the Attorney General of the United States for any merger transaction between an IDI and a non-affiliated entity, unless the FDIC finds that it must act immediately in order to prevent the probable failure of an IDI involved in the transaction.[34] As circumstances warrant, the Department of Justice (DOJ) and the FDIC will coordinate the review when there are concerns or questions regarding the competitive effects of the transaction. As described below, the FDIC undertakes an independent review consistent with the statutory factors of the BMA.

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[30] Applications In Process Subject to the CRA Report Selection Options, https://cra.fdic.gov/

[31] 12 CFR 303.2(*l*) defines the term "CRA protest" to mean any adverse comment from the public related to a pending filing that raises a negative issue relative to the CRA, whether or not it is labeled a protest and whether or not a hearing is requested. An "adverse comment" is defined under Section 303.2(c) of the FDIC Rules and Regulations, as any objection, protest, or other adverse written statement submitted by an interested party relating to a filing.

[32] *See* 12 CFR 303.2(c) and 303.2(*l*).

[33] *See* 12 CFR 303.10.

[34] 12 U.S.C. § 1828(c)(4). In addition to acting to prevent the probable failure of an IDI, Section 18(c)(4)(C) of the FDI Act includes exceptions for merger transactions involving solely an IDI and one or more of its affiliates.

Generally, if all statutory factors are favorably resolved, and all other regulatory requirements are satisfied, the FDIC will approve the merger application. Approvals will be subject to the standard conditions detailed in Section 303.2(bb) of the FDIC Rules and Regulations and any non-standard conditions deemed appropriate by the FDIC. Generally, 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. The Order and Basis (Order) will be posted to the FDIC's public webpage. The Order will address all statutory factors, as well as summarize information regarding any CRA protests. The FDIC will summarize the related analysis and conclusions, and in the cases of approval, will include any conditions imposed in conjunction with the approval.

The FDIC's publicly available Delegations of Authority set forth criteria that must be satisfied in order for staff in the FDIC Regional Offices or Washington Office to approve a merger application.[35] Notably, the FDIC Board of Directors (FDIC Board) reserves the authority to deny any merger application or act on certain types of proposed transactions, including any transaction for which one or more statutory factors are not favorably resolved.[36] Therefore, applications that do not warrant a favorable finding on one or more statutory factors are required to be elevated to the FDIC Board for additional review and final disposition. In addition, the FDIC Board notably

[35] FDIC Delegations of Authority for Supervisory Filings, Enforcement Matters, Capital Determinations, and Information Sharing Agreements, Seal No. 086825 (October 20, 2020); available at https://www.fdic.gov/bank-examinations/delegations-authority.

[36] *Id.* at (K)(4)(i)(ii) (Reserving to the FDIC Board the authority to approve merger applications where "[o]ne or more of the statutory factors enumerated in section 18(c)(5) and (11) of the FDI Act (12 U.S.C. § 1828(c)(5) and (11)) is not favorably resolved").

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.

Generally, applications which include one or more of the following circumstances will present significant concerns and will likely result in unfavorable findings with regard to one or more statutory factors:

- Non-compliance with applicable federal or state statutes, rules, or regulations (this includes, for example, transactions that would exceed the 10 percent nationwide deposit limit, as well as both issued and pending enforcement actions);
- Unsafe or unsound condition relating to the existing merger parties or the resulting IDI;
- Less than satisfactory examination ratings, including for any specialty areas (*i.e.,* information technology or trust examinations);
- Significant concerns regarding financial performance or condition, risk profile, or future prospects;
- Inadequate management, including significant turnover, weak or poor corporate governance, or lax oversight and administration; or
- Incomplete, unsustainable, unrealistic or unsupported projections, analyses, and/or assumptions.

Additionally, the FDIC may not be able to find favorably on any given statutory factor (and the application as a whole) if there are unresolved deficiencies, issues, or concerns (including with respect to any public comments). A lack of sustained performance under corrective programs would also be inconsistent with a favorable finding on one or more statutory factors, particularly when the transaction implicates the areas that are the subject of the corrective program. Further, the inability or unwillingness of the applicant to agree to proposed conditions or execute written agreements, if deemed necessary, would result in unfavorable findings and would require action by the FDIC Board on the application.

If FDIC staff finds unfavorably on one or more statutory factors based on the application review, staff generally will recommend denial of the application. At the FDIC's discretion, applicants may be offered the opportunity to withdraw the filing. If an applicant withdraws their filing, the FDIC Board may release a statement regarding the concerns with the transaction if such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants.

IV. Statutory Factors

Merger applications are evaluated under the framework of statutory factors as described in the BMA. Generally, the BMA prohibits approval of monopolistic or otherwise anticompetitive transactions; and requires the responsible agency to consider specific statutory factors related to financial and managerial resources and future prospects, convenience and needs of the community to be served, combatting money laundering, and financial stability. The BMA also prohibits interstate mergers in which the resulting IDI would control more than 10 percent of the deposits of IDIs in the United States.[37] Evaluations of each statutory factor consider the respective entities' supervisory records, potential risks and compensating controls, and any other available information

[37] 12 U.S.C. §§ 1828(c)(5), 1828(c)(11), and 1828(c)(13).

deemed appropriate.

Monopolistic or Anticompetitive Effects

The FDIC strives to ensure that resulting IDIs continue as participants in a competitive environment. Section 18(c)(5) of the BMA prohibits the FDIC from approving a merger transaction that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking in any part of the U.S. The BMA also prohibits the FDIC from approving a merger transaction that may substantially lessen competition in any section of the country, unless the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[38] For example, such a circumstance may exist where a transaction is necessary to prevent the probable failure of an IDI. In addition, the FDIC recognizes that mergers in rural markets involving local community IDIs may result in concentrated markets, and the FDIC will carefully balance the competitive effects of such a merger with the public interest served by the ability of the resulting IDI to serve the convenience and needs of the community.

The FDIC will evaluate the competitive effects of a proposed merger in a manner that is most relevant to each transaction. Consistent with the majority of merger transactions typically presented to the FDIC, the FDIC generally employs a framework for evaluating competitive effects involving a transaction between IDIs with traditional community banking operations within their local geographic markets. However, the FDIC will tailor its evaluation to consider the size and competitive effects of the resulting IDI. Additionally, the FDIC will consider all relevant market participants. For example, the FDIC may include any other financial service providers that the

[38] 12 U.S.C. § 1828(c)(5).

FDIC views as competitive with the merging entities, including providers located outside the geographic market when it is evident that such providers materially influence the market.[39] Further, in cases involving merging entities with specialty lines of business or non-traditional products, services, or delivery methods, the FDIC will take into account any additional data sources or appropriate analytical approaches to fully assess the competitive effects of the transaction.

In assessing competitive effects, the FDIC considers concentrations with respect to both geographic and product markets. The FDIC identifies all relevant geographic markets (local, regional, and national) based on the areas in which the merging entities operate and in which customers may practically turn to competitors for alternative products and services.[40] The FDIC uses deposits as an initial proxy for commercial banking products and services. The FDIC will initially measure the respective shares of total deposits held by the merging entities and the various other participants with offices in the geographic market. The FDIC evaluates the market concentration and change in market concentration in each geographic and product market.[41]

In addition, the FDIC will consider concentrations beyond those based on deposits. As appropriate, the FDIC may consider concentrations in any specific products or customer segments, such as, for example, the volume of small business or residential loan originations or activities requiring specialized expertise. Additionally, when relevant, the analysis may incorporate other products offered by the merging entities, and will consider whether consumers retain meaningful choices. In its analysis, the FDIC will evaluate a market with a scope that is appropriate to the products or services offered or planned. Moreover, the FDIC will consider the emergence of new

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[39] Such competitors may include, but are not limited to, credit unions, thrifts, and Farm Credit System institutions.
[40] *See* United States v. Philadelphia National Bank, 374 U.S. 321 (1963).
[41] Indicators of market concentration and change in concentration include calculations using the Herfindahl-Hirschman Index (HHI).

competitors for products or services in relevant markets; and the expansion of products and services offered by the merging entities and other market participants. Finally, as necessary or appropriate, the FDIC will consider other products or services and additional methods of assessing the competitive nature of markets. In particular, the FDIC may consider information on the pricing of products and services to assess the competitive effects of a proposed merger when practicable and relevant.

The FDIC will continue to undertake an independent analysis of the competitive factors associated with a given merger transaction. The FDIC's analysis is guided by the principles outlined above, but is also informed by the Department of Justice's approach to evaluating competitive effects. As noted above, the FDIC Board reserves authority to act on any application for which the Attorney General has not notified the FDIC that the proposed transaction would not have a significantly adverse effect on competition. In such cases, applicants would need to demonstrate that the anticompetitive effects of the merger transaction would be outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

The FDIC may require divestitures of business lines, branches, or portions thereof as a means to mitigate competitive concerns before allowing the merger to be consummated. In such cases, the FDIC generally expects that the selling IDI will neither enter into non-compete agreements with any employee of the divested entity nor enforce any existing non-compete agreements with any of those entities. Additionally, the FDIC may request an IDI divesting or otherwise closing a branch in connection with the transaction to waive any terms or conditions that preclude the ability of other IDIs to lease or purchase the property.

The BMA prohibits approval of an interstate merger that results in an IDI (and its affiliates) controlling more than 10 percent of the total deposits of IDIs in the U.S.[42] This prohibition does not apply to transactions that involve one or more IDIs in default or in danger of default.[43] Consistent with the competitive effects review, the FDIC will use the most current Summary of Deposits data to confirm the nationwide deposit share of the resulting IDI following the proposed transaction.

Financial Resources

The BMA requires the responsible agency to consider the financial resources of the existing and proposed entities involved in a merger transaction.[44] The FDIC expects that the resulting IDI will reflect sound financial performance and condition.[45] Generally, 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.[46]

A critical component of the analysis of financial resources is the resultant IDI's ability to meet applicable capital standards (including maintenance of appropriate allowances for loan or credit losses). Depending on the anticipated risk profile of the resulting IDI, the FDIC may impose, as a non-standard condition, capital requirements that are higher than applicable capital

[42] 12 U.S.C. § 1828(c)(13).
[43] 12 U.S.C. § 1828(c)(13)(B).
[44] 12 U.S.C. § 1828(c)(5).
[45] This evaluation encompasses capital, asset quality, earnings, liquidity, and sensitivity to market risk, as described in the Uniform Financial Institution Rating System (UFIRS); see 61 Fed Reg. 67021 (December 19, 1996).
[46] *See generally* note 41.

standards.[47] Further, as appropriate, the FDIC may impose a non-standard condition that requires the resulting IDI and other relevant parties (such as certain affiliates or investors) to enter into one or more written agreements that address, as applicable, capital maintenance requirements, liquidity or funding support, affiliate transactions, and other relevant provisions. The FDIC also expects the resulting IDI to maintain sufficient liquidity and appropriate funding strategies given its size, complexity, and risk profile.

The FDIC will also consider the current and projected financial impact of any related entities on the IDI, including the parent organization and any key affiliates. For each relevant entity, the FDIC will consider, among other items, the size and scope of operations, capital position, quality of assets, overall financial performance and condition, compliance and regulatory history, primary revenue and expense sources, and funding strategies.

Managerial Resources

The BMA requires the responsible agency to consider the managerial resources of the existing and proposed entities involved in a merger transaction.[48] The FDIC expects that the directors, officers, and as appropriate, principal shareholders (collectively, management) possess the capabilities to administer the resultant IDI's affairs in a safe and sound manner, and effectively implement post-merger integration plans and strategies.

The capability of management to identify, measure, monitor, and control risks and ensure a safe and sound operation in compliance with applicable laws and regulations is included in the

[47] Refer to the applicable capital regulations for the relevant parties. The minimum capital ratios for FDIC-supervised IDIs are set forth at 12 CFR 324.10, and the capital measures and capital category definitions for the purposes of Prompt Corrective Action are set forth at 12 CFR 324.403 for FDIC-supervised IDIs.
[48] 12 U.S.C. § 1828(c)(5).

evaluation of managerial resources. The FDIC will consider the background and experience of each member of management relative to the size, complexity, and risk profile of the resulting IDI, including the managerial performance and supervisory record of affiliates and subsidiaries.

The FDIC will review supervisory assessments of management made by the relevant regulatory authorities, as well as the nature and extent of organizational relationships. The FDIC will also evaluate the effect of such relationships on the IDI, as well as the operating history, risk management, and control environment of the parent organization. Inherent in these considerations are the condition, performance, risk profile, and prospects of the organization as a whole, as well as the consistency of the proposed merger with the resulting IDI's strategic (or business) plan.

The FDIC will assess each IDI's record of compliance with respect to consumer protection, fair lending, and other relevant consumer laws and regulations. The FDIC will analyze the compliance management system of each of the IDIs, as well as the compliance management system for the resulting IDI to ensure that appropriate controls will be implemented to identify, monitor, and address consumer compliance risks. Consideration will also be given to the consumer compliance rating pursuant to the Uniform Interagency Consumer Compliance Rating System and the CRA rating.[49]

Additional managerial resource considerations include:

- The supervisory history of each entity involved in the proposed merger, including the management rating[50] for any IDI involved in the transaction;

[49] 81 Fed. Reg. 79473, (Nov. 14, 2016).
[50] The management rating is defined in the UFIRS. See footnote 28.

- The breadth and depth of management, and adequacy of succession planning;
- Management's responsiveness to issues or supervisory recommendations raised by regulators or auditors;
- Any existing or pending enforcement actions;
- Any issues or concerns with regard to specialty areas including information technology, trust, consumer compliance, CRA, or Anti-Money Laundering (AML)/countering the financing of terrorist activities (CFT);[51]
- The reasonableness of fees, expenses, and other payments made to insiders; and
- Recent rapid growth and the record of management in overseeing and controlling risks associated with such growth.

The FDIC expects management to develop and implement effective plans and strategies, and the resulting IDI to have the managerial and operational capacity to integrate the acquired entity. Effective integration includes, but is not limited to, human capital; products and services; operating systems, policies, and procedures; internal controls and audit coverage; physical locations; information technology; and risk management programs. In conjunction with the integration, the FDIC expects a resulting IDI to have the managerial and operational capacity, and to devote adequate resources, to ensure full and timely compliance with any outstanding corrective programs or supervisory recommendations.

Future Prospects

[51] The Anti-Money Laundering Act of 2020 (the AML Act), amended subchapter II of chapter 53 of title 31 United States Code (the legislative framework commonly referred to as the Bank Secrecy Act or BSA). The AML Act requires the Financial Crimes Enforcement Network (FinCEN), in consultation with federal functional regulators, to promulgate AML/CFT regulations. Due to the addition of the CFT, and for consistency with FinCEN, the FDIC will use the term AML/CFT (which includes BSA) when referring to, issuing, or amending regulations to address the requirements of the AML Act of 2020.

The BMA requires the responsible agency to consider the future prospects of the existing and proposed entities involved in a merger transaction.[52] The FDIC expects that the resulting IDI will operate in a safe and sound manner on a sustained basis following consummation of the merger. Among other items, the FDIC will consider the economic environment, the competitive landscape, the acquiring IDI's history in integrating merger targets and managing growth, the anticipated scope of the resulting IDI's operations, the quality of its supporting infrastructure, and other pertinent factors. Any significant planned changes to the resulting IDI's strategies, operations, products or services, activities, income or expense levels, or other key elements of its business will be closely assessed. The FDIC will review the pro forma financial projections, the underlying assumptions, and any accompanying valuations (such as those related to the target entity, goodwill, or other assets) for both the existing and proposed entities to ensure they demonstrate and support that the resulting IDI will maintain an acceptable risk profile.

Convenience and Needs of the Community to be Served

The BMA requires the responsible agency to consider the convenience and needs of the community to be served when evaluating a merger transaction.[53] The FDIC expects that a merger between IDIs will enable the resulting IDI to *better* meet the convenience and the needs of the community to be served than would occur absent the merger in order to find favorably on this factor.[54] Applicants are expected to demonstrate how the transaction will benefit the public through higher lending limits, greater access to existing products and services, introduction of new or expanded products or services, reduced prices and fees, increased convenience in utilizing the credit and banking services and facilities of the resulting IDI, or other means.

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[52] 12 U.S.C. § 1828(c)(5).
[53] 12 U.S.C. §§ 2902(3)(E) and 2903(a)(2).
[54] *See generally* note 41.

The FDIC expects applicants to provide specific and forward-looking information to enable the FDIC to evaluate the expected benefits of the merger on the convenience and needs of the community to be served. As appropriate, claims and commitments made to the FDIC to support the evaluation of the expected benefits of the merger may be included in the Order, and through ongoing supervisory efforts, the FDIC will evaluate the IDI's adherence with any such claims and commitments. The FDIC will evaluate the community to be served broadly, which will include the proposed assessment area(s), retail delivery systems, populations in affected communities, and identified needs for banking services.

As part of its evaluation, the FDIC will review the CRA record of the IDIs. The CRA requires the FDIC to take into account each IDI's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution.[55] As such, the FDIC will consider each IDI's CRA performance evaluation record of helping to meet the credit needs of its assessment areas, including low- and moderate-income neighborhoods, and record of community development activity, as applicable.[56] A less than Satisfactory historical rating or significant deterioration in CRA performance will generally result in unfavorable findings.[57] The FDIC's review is not limited to the CRA record of the IDIs and will encompass a broad review of the institutions' existing products and services and whether the products and services proposed by the applicants will meet the convenience and needs of the community to be served.

In addition, the FDIC will consider the record of each IDI in complying with consumer

[55] 12 U.S.C. §§ 2902(3)(E) and 2903(a)(2).
[56] Transactions involving a credit union may require additional information to evaluate the convenience and needs statutory factor, as credit unions are not subject to CRA.
[57] *See generally* note 41.

protection requirements and maintaining a sound and effective compliance management system. This review will include consideration of any existing or pending orders, ongoing enforcement actions, and pending reviews or investigations of violations of consumer protection laws and regulations. A less than Satisfactory consumer compliance rating[58] may present significant concerns in resolving this factor.

The CRA assessment area(s) and branch locations resulting from the merger are evaluated as part of this factor. The assessment area(s) should be delineated in accordance with Part 345 of the FDIC Rules and Regulations (or other appropriate regulations), and should not reflect illegal discrimination. The FDIC will evaluate all projected or anticipated branch expansion, closings, or consolidations for the first three years following consummation of the merger.[59] Branch closings are subject to both Section 42 of the FDI Act and the Interagency Policy Statement Concerning Branch Closing Notices and Policies.[60] Information regarding any proposed or expected closures, including the timing of each closure, the effect on the availability of products and services, particularly to low- or moderate-income individuals or designated areas, any job losses or lost job opportunities from branching changes, and the broader effects on the convenience and needs of the community to be served will be closely evaluated. Applications that project material reductions in service, especially to low- and moderate-income communities or consumers, will generally result in unfavorable findings.[61]

The FDIC will consider all substantive public comments received in accordance with

[58] Uniform Interagency Consumer Compliance Rating System, 81 Fed. Reg. 79473, (Nov. 14, 2016).
[59] Generally, the FDIC considers a substantially complete merger application to include, among other items, at least three years of information regarding projected branch expansions, closings, or consolidations. Short-distance consolidations that may not be subject to Section 42 outside of a merger context should be included in this information. In certain cases, the FDIC may impose non-standard conditions requiring prior approval or additional notice in connection with branch closings or consolidations.
[60] 64 Fed. Reg. 34845, (June 29, 1999).
[61] *See generally* note 41.

Section 303.9 of the FDIC Rules and Regulations,[62] as well as the views of relevant state and federal regulators regarding the ability of the applicant to meet the convenience and needs of the community to be served. Non-standard conditions may be imposed, as appropriate, in response to CRA weaknesses, relevant regulator input, bank commitments, or public comments. The FDIC will consider whether it is in the public interest to hold a hearing for merger applications, and generally expects to hold a hearing for any application resulting in an IDI with greater than $50 billion in assets or for which significant CRA protests are received. The FDIC may also hold public or private meetings to receive input on the transaction. The decision to hold such meetings depend on issues raised during the comment period and the significance of the merger transaction to the public interest, to the banking industry, and communities affected.

As noted above, the BMA prohibits the FDIC from approving a merger transaction that may substantially lessen competition in any section of the country, unless the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[63] A favorable finding on the convenience and needs of the community to be served factor may not be sufficient to support approval of the application when anticompetitive effects are identified. In situations where anticompetitive effects are identified, and as described above, the FDIC will evaluate whether the applicant has demonstrated that the benefits to the convenience and needs of the community will clearly outweigh the anticompetitive effects.

<u>Risk to the Stability of the United States Banking or Financial System</u>

[62] 12 CFR § 303.9.
[63] 12 U.S.C. § 1828(c)(5).

Section 604 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the BMA to require the FDIC to consider the risk posed by a merger transaction to the stability of the U.S. banking or financial system. The FDIC expects that the resulting IDI (or consolidated company) will not materially increase the risk to the stability of the U.S. banking or financial system.[64] Consistent with the other federal banking agencies,[65] the FDIC evaluates this factor with respect to the following:

- The size of the entities involved in the transaction;
- The availability of substitute providers for any critical products or services to be offered by the resulting IDI;
- The resulting IDI's degree of interconnectedness with the U.S. banking or financial system;
- The extent to which the resulting IDI contributes to the U.S. banking or financial system's complexity; and
- The extent of the resulting IDI's cross-border activities.

Generally, the FDIC will not view the size of the entities involved in a proposed merger transaction as a sole basis for determining the risk to the U.S. banking or financial system's stability. However, transactions that result in a large IDI (e.g., in excess of $100 billion) are more likely to present potential financial stability concerns with respect to substitute providers, interconnectedness, complexity, and cross border activities, and will be subject to added scrutiny. The FDIC will consider the nature and scope of operations of the target entity, the resulting IDI, and any other elements that may also influence the risk to the U.S. banking or financial system's stability.

[64] 12 U.S.C. 1828(c)(5).
[65] The FDIC will consider data collected by the Federal Reserve to monitor the systemic risk profile of the IDIs, which are subject to enhanced prudential standards under Section 165 of the Dodd-Frank Act.

With regard to substitute providers, the FDIC will consider whether the resulting IDI provides critical products or services that may be difficult to replace, or conducts activities (including specific business lines) that comprise a relatively large share of system-wide activities. Concerns are heightened, and may preclude favorable resolution of this factor, in situations where there are limited readily available substitutes; as such, services may be disrupted or discontinued if the resulting IDI encounters financial distress or fails.[66]

In assessing the resulting IDI's interconnectedness, the FDIC will consider the degree to which the merging entities are engaged in transactions or relationships with IDIs, affiliates of banking organizations, or other financial service providers. Consideration will be given to whether any exposures with creditors, counterparties, investors, or other market participants could affect the U.S. banking or financial system. A resulting IDI may present financial stability concerns if key aspects of its business (including any on- or off-balance sheet activities) are highly interconnected with other financial system participants.

The FDIC's evaluation of the resulting IDI's contribution to the U.S banking or financial system's complexity will consider the full scope of the IDI's operations. This includes the IDI's business lines, products and services, on- and off-balance sheet activities, branch network and delivery channels, number of account holders (including the volume of uninsured deposits), extent of information technology systems, and any material affiliate or other third-party relationships. As part of evaluating the resulting IDI's impact on complexity, the FDIC will also consider its resolvability in a potential failure situation. The FDIC may not be able to find favorably on this

[66] *See generally* note 41.

factor[67] when the resultant IDI's organizational and funding structure preclude its ability to: (i) continue operations and activities until they can be sold or wound down, (ii) sell key business lines or large asset portfolios, and (iii) be marketed for sale in a manner that limits the potential for losses to the Deposit Insurance Fund.[68]

The extent of a resulting IDI's cross-border activities may also have implications with regard to a favorable finding on this factor.[69] The FDIC will consider whether cross-border activities comprise a material component of the resulting IDI's operations and present a significant degree of cross-jurisdictional claims or liabilities. Such activities may present challenges from both supervisory and resolution perspectives given the potential exposure to differing legal requirements, geopolitical events, and competing national interests.

Other Stability Considerations

The above list of items is not exhaustive. The FDIC will evaluate any additional elements that may affect the risk to the U.S. banking or financial system's stability. This may include the resulting IDI's regulatory framework; however, the framework alone would not result in a favorable finding on this factor when other financial stability concerns exist.[70] As appropriate, consideration may be given to the merging IDIs' records with respect to cybersecurity and stress-testing results. The FDIC may also evaluate the degree to which the resultant IDI's potential financial distress or rapid liquidation could cause other market participants with similar activities or business profiles to experience a loss of market confidence, falling asset values, or decreased

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[67] *See generally* note 41.
[68] In addition to considering the FDIC's potential role as receiver of the resulting IDI under Section 11 of the FDI Act, it will also take into account possible alternative resolution scenarios.
[69] *See generally* note 41.
[70] *See generally* note 41.

funding options.

Proposed transactions that solely involve affiliates that were related at the time a merger application is filed generally will not raise concerns with regard to this factor. However, each proposal will be reviewed to ensure that the resulting IDI would not present any new or unforeseen financial stability risks that may not have existed when the merging entities operated as affiliates or on a standalone basis.

Effectiveness in Combatting Money Laundering Activities

The BMA requires the responsible agency to consider the effectiveness of any IDI involved in a merger transaction in combatting money-laundering activities, including in overseas branches.[71] The FDIC expects that approved merger transactions will result in IDIs with effective programs to combat money laundering (Anti-Money Laundering or AML) and counter the financing of terrorism (CFT). A favorable finding on this factor[72] will be based on a comprehensive evaluation of each entity's AML/CFT program that includes overseas branches; policies, procedures, and processes; risk management programs; the supervisory record of each participating entity, the entity's compliance with the Bank Secrecy Act (BSA) and its implementing regulations; and remediation efforts pursuant to an outstanding corrective program.[73] In all cases, the FDIC will consider whether the resulting IDI has developed an appropriate plan for the integration of the combined operations into a single, comprehensive, and effective program to combat money laundering and terrorist financing. Additionally, the FDIC expects the applicant to demonstrate how the resulting IDI will comply with the BSA and its implementing regulations

[71] 12 U.S.C. § 1828(c)(11).
[72] *See generally* note 41.
[73] An IDI under an outstanding formal enforcement action should make substantial progress to correct problem(s) addressed in the action. Progress should be sufficient to determine that the AML/CFT program is now adequate.

following consummation of the merger.

Significant unresolved AML/CFT concerns or uncorrected problems, or an outstanding or proposed formal or informal enforcement action that includes provisions related to AML/CFT, will generally result in unfavorable findings on this factor.[74] In limited cases, sufficient mitigating factors may support a favorable finding, such as when an acquirer with a strong AML/CFT program replaces a target entity's less than satisfactory program and presents an appropriate plan to address the target entity's deficiencies.

V. Other Matters and Considerations

Interstate Merger Transactions

In cases where Section 44 of the FDI Act applies to an interstate merger transaction, the FDIC will ensure that the additional requirements and restrictions of Section 44 are satisfied.[75]

Applications Involving Non-Banks or Banks that are Not Traditional Community Banks

Historically, most merger transactions considered by the FDIC have involved traditional community banks. In general, traditional community banks focus on providing the banking services, including loans and core deposits, typically relied on by individuals and businesses in their local communities. However, merger applications may also involve non-banks[76] or banks

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[74] *See generally* note 41.
[75] *See* 12 U.S.C.1831u.
[76] A "non-bank" refers to an IDI that is a bank for purposes of the FDI Act, but that is not a bank for purposes of the Bank Holding Company Act (BHCA). Non-banks may be owned by parent companies that are not subject to the BHCA, and therefore may not regulated or supervised by the FRB.

that are not traditional community banks, which may involve more complexity than a traditional community bank in terms of its business model, products, services, activities, market segments, funding, delivery channels, geographic footprint, operations, or intercompany or other third-party relationships. Merger applications where the resulting IDI will be a non-bank or not a traditional community bank are subject to the same statutory factors as any other merger application. However, the FDIC will appropriately tailor its review to the nature, complexity, and scale of the entities involved in the transaction and the underlying business model. The FDIC's Washington Office or FDIC Board reserve authority to act on certain merger applications that do not involve traditional community banks.

Applications Involving Operating Non-Insured Entities

Applications may involve an existing IDI merging with an operating entity that is not FDIC-insured. Operating non-insured entities may vary widely in the type of business and activities conducted (*e.g.,* credit unions, which typically offer products and services consistent with a traditional community bank, mortgage companies, financing companies, payment services firms, or other types of entities whose business model may have elements more consistent with that of a non-community bank). Merger applications that involve an operating non-insured entity are subject to the same statutory factors as any other merger application. However, in reviewing such applications, the FDIC will also consider the nature and complexity of the non-insured entity, its scale relative to the existing IDI, its current condition and historical performance, and any other relevant information regarding the entity's operations or risk profile.

The FDIC will review audited financial statements (covering at least three years, unless the entity's operating history is shorter) and assess any deferred tax assets or liabilities, intangible assets, contingent liabilities, and any recent or pending legal or regulatory actions. Further, independent appraisals or valuations may be necessary to support the projected value of any business (or assets) expected to be transferred from the operating non-insured entity to the resultant IDI through the merger transaction.

VI. Resources

FDIC Bank Application Resource page, https://www.fdic.gov/regulations/applications/resources/

FDIC Regional Offices, https://www.fdic.gov/about/contact/directory/region.html

FDIC Law, Regulations, Related Acts, https://www.fdic.gov/regulations/laws/rules/

Section 18(c) of the FDI Act, 12 U.S.C. 1828(c)

Section 42 of the FDI Act, 12 U.S.C. 1831r-1

Section 44 of the FDI Act, 12 U.S.C. 1831u

12 CFR Part 303, Subparts A and D

Interagency Policy Statement Concerning Branch Closing Notices and Policies, 64 Fed. Reg. 34845, (June 29, 1999)

Applications Procedures Manual (APM), https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/index.html

Section 1 of the FDIC APM, https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-01-01-overview.pdf

Section 4 of the FDIC Application Procedures Manual, https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-04-mergers.pdf

FDIC Delegations of Authority – Filings, https://www.fdic.gov/regulations/laws/matrix/index.html

Interagency Bank Merger Act Form, https://www.fdic.gov/formsdocuments/f6220-01.pdf

Deposit Market Share Reports - Summary of Deposits, http://www2.fdic.gov/sod

Federal Reserve Bank of St. Louis, Competitive Analysis and Structure Source Instrument for Depository Institutions, https://cassidi.stlouisfed.org/index