I. INTRODUCTION

This Section provides general guidance for developing and applying conditions related to a filing seeking the FDIC's approval or non-objection. While standard and commonly used non-standard conditions are referenced within other Sections of these Procedures, this Section provides guidance on developing additional non-standard conditions that are tailored or customized to address the particular facts and circumstances of each filing.

Important: While non-standard conditions may reference applicable laws, rules, and regulations, the conditions should not establish any expectation for an applicant to implement, comply, or otherwise conform to a statement of policy or other forms of guidance (guidance). Unlike a law or regulation, guidance does not have the force and effect of law, and the FDIC does not take enforcement actions based on guidance. Rather, guidance outlines the FDIC's supervisory expectations or priorities, and articulates the FDIC's general views regarding appropriate practices for a given subject area. Guidance often provides examples of practices that the federal banking agencies generally consider consistent with safety and soundness standards or other applicable laws and regulations, including those designed to protect consumers. Conditions that direct an applicant to follow particular guidance are inappropriate.

II. CONDITIONS

Standard Conditions

Section 303.2(bb) of the FDIC Rules and Regulations defines s*tandard conditions* as those conditions that the FDIC may impose as a routine matter when approving a filing, whether or not the applicant has agreed in writing to the conditions. The following conditions, or variations thereof, are standard conditions and must be included, as applicable, in all approvals and non-objections:

(1) That the applicant has obtained all necessary and final approvals from the appropriate federal, state, or other appropriate authorities;

(2) That if the transaction does not take effect within a specified time period and a request for an extension of time has not been approved before the expiration of that time period, the consent granted shall expire at the end of the specified time period;[1]

(3) That until the conditional commitment of the FDIC becomes effective, the FDIC retains the right to alter, suspend, or withdraw its commitment should any interim development be deemed to warrant such action;[2] and

(4) In the case of a merger transaction (as defined in 303.61(a)), , including a corporate reorganization, that the proposed transaction not be consummated before the 30th calendar day (or shorter time period as may be prescribed by the FDIC with the concurrence of the Attorney General) after the date of the order approving the merger transaction.[3]

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[1] Any approval of a written request to extend the approval date must be in writing.

[2] Any decision to alter, suspend, or withdraw the FDIC's approval or non-objection must be fully supported in an internal memorandum, and signed by the individual with authority to act on the original filing (but should not extend below the Assistant Regional Director). In all cases, the Case Manager should coordinate the decision with Regional Office management and Legal, and as appropriate, the Washington Office, prior to the decision being communicated to the applicant.

[3] Under Section 18(c)(6) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(c)(6), transactions solely between an insured depository institution and one or more of its affiliates do not necessitate a competitive factors report and may be consummated immediately upon FDIC approval. For merger transactions involving non-affiliates, which do necessitate a competitive factors report from the Attorney General, the Attorney General typically concurs with a 15-day post-approval waiting period.

Non-Standard Conditions

Non-standard conditions include all conditions (other than the standard conditions set forth in Section 303.2(bb)) that the FDIC imposes in connection with its approval or non-objection to a filing. A number of commonly used non-standard conditions for deposit insurance applications are addressed in the *Deposit Insurance Applications Procedures Manual* and in the corresponding Delegations of Authority – Filings matrix for deposit insurance applications. Other commonly used non-standard conditions that may be imposed in conjunction with other types of filings are addressed in the applicable Sections of these Procedures. Certain non-standard conditions are also included in the Delegations of Authority – Enforcement Actions matrix.

Non-standard conditions unique to the filing can also be used in addition to the standard conditions and the commonly used non-standard conditions referenced above.

III. PROCESS FOR USING NON-STANDARD CONDITIONS

Typically, non-standard conditions are used when it is determined through the filing review process that such conditions are necessary or appropriate. The non-standard conditions imposed can be proactive or restrictive and are designed to address, for instance, specific risks, unique elements of a filing, matters for which the FDIC would require prior review or approval, or required actions not yet completed at the time the approval or non-objection action is issued. In drafting new or adapting commonly used non-standard conditions, staff should consider the sources of potential concerns, such as, particular aspects of the business plan, management's depth or ability to address the requirements of the condition, or the timeframe the condition is intended to cover. Conditions should clearly and specifically address the requirement or restriction that is the subject of the condition, the timing of any action to be taken, the duration of the condition, and any follow-up activities such as reporting and monitoring.

Non-standard conditions (and the use of written agreements as discussed below) do not replace the need to favorably resolve the statutory factors applicable to an underlying filing. While non-standard conditions may address specific issues or concerns, their imposition will not lead to the favorable resolution of any statutory factor where the facts and circumstances are otherwise unfavorable.

An applicant's written agreement to all non-standard conditions must be obtained prior to taking action on a filing. For deposit insurance applications, all conditions (both standard and non-standard) must be agreed to in writing. If non-standard conditions are not agreed to by the applicant for which the region has delegated authority to act, the filing must be forwarded to the Washington Office (WO) for final action.

The following resources should be consulted with respect to standard and non-standard conditions:

- Section 303.2(bb) of the FDIC Rules and Regulations lists the standard conditions that the FDIC may impose as a routine matter when approving a filing, whether or not the applicant has agreed to their inclusion (excluding deposit insurance applications, where the applicant must also agree to the standard conditions).

- The Delegations of Authority – Filings matrix lists the standard and commonly used non-standard conditions for granting deposit insurance, and addresses other matters related to the imposition of conditions.

- Supervisory Filings, Enforcement Matters, Capital Determinations, and Information Sharing Agreements (Board Resolution Seal No. 086825), dated October 20, 2020, provides guidance on delegated authority when certain conditions are met and the applicant agrees to non-standard conditions in writing.

All conditions should be included within the transmittal letter conveying approval or non-objection to the filing or, if applicable, within the accompanying Order. The Case Manager should also document any non-standard conditions imposed in the Non-standard Conditions comments portion in the application tracking system. Compliance with conditions is typically assessed during risk management examinations or visitations, but depending on the circumstances, may also be monitored by the Case Manager on an interim basis. When each condition has been satisfied, the Case Manager should enter the date in the application tracking system.

IV. WRITTEN AGREEMENTS

Depending on the nature and complexity of the filing, the FDIC may impose non-standard conditions that require the institution and/or other applicable parties (such as certain affiliates or investors) to enter into a separate written agreement with the FDIC. Written agreements provide a supplemental tool that may address specific risks or supervisory matters with regard to an institution, and have been routinely used in conjunction with approving or non-objecting to certain deposit insurance applications, change in control notices, and other filings. They also may help ensure that a parent company serves as a source of strength for its subsidiary insured depository institution.[4]

Written agreements may include parent company agreements, capital and liquidity maintenance agreements (CALMAs), operating agreements, and passivity agreements. The Case Manager should consider whether the organizational structure, parental or affiliate relationships, nature or complexity of the business model, or circumstances involving certain investors may warrant the use of one or more written agreements. If a written agreement is contemplated, the RO should seek the input of Legal and the WO.

Generally, parent company agreements and CALMAs have been used in cases in which the organizational structure includes companies not subject by operation of law to supervision by the Federal Reserve Board (FRB) (*i.e.*, parents of non-bank banks). Such organizational structures often pose unique risks due to the lack of bank or savings and loan holding company supervision by the FRB, the potentially wide scope of operations of the parent company or its affiliates (which may include commercial activities), the inter-dependence on affiliated entities for key business functions or processes, and the potential for dual roles within the organization.

Parent company agreements may address a variety of circumstances regarding supervision, corporate governance, and the control exercised over the insured depository institution, and will include consent to examination by the FDIC. Among other items, a parent company agreement may help ensure that the institution’s board and executive officers are sufficiently independent of the parent company and any affiliates, that the institution operates under a separate and distinct business plan, and that the institution maintains separate books and records that adhere to U.S. Generally Accepted Accounting Principles.

CALMAs formally establish definitive commitments under which the parent company is required to provide any necessary capital or liquidity support to the insured depository institution. CALMAs will normally require that all capital contributions be in the form of cash unless other assets are approved. Liquidity provisions in a CALMA may require financial support to meet any ongoing liquidity obligations, as well as the establishment of a line of credit by the parent company that can be drawn upon at the option of the institution. CALMAs are often executed in conjunction with parent company agreements and have been used in cases involving non-bank banks and foreign ownership or control.

Both parent company agreements and CALMAs also generally include provisions under which the FDIC may pursue formal enforcement action under Sections 8 and 50 of the Federal Deposit Insurance Act if a

[4] Refer to Section 38A of the FDI Act.

party fails to comply with provisions of an agreement. Parent company agreements and CALMAs are generally executed by the FDIC, the institution, and the parent company (or companies).

Operating agreements have been used in limited cases to address certain risks or concerns regarding a proposed business model, primarily with respect to a proposed niche institution. Such agreements should not be pursued to overcome an otherwise unacceptable business plan. Rather, an operating agreement may be used to ensure that the institution's risk profile, growth, activities, and business relationships (including any relationships with affiliates) remain within the parameters established in an otherwise acceptable business plan. Operating agreements are generally executed by the institution and the FDIC.

Passivity agreements have been entered into with investors seeking to rebut the presumption of control under Section 303.82(b) of the FDIC Rules and Regulations. Generally, such investors seek to control, directly or indirectly, the power to vote at least 10 percent, but less than 25 percent, of the institution's outstanding shares. In cases involving parent companies not supervised by the FRB, the FDIC will evaluate the extent of control at the parent company level. Passivity agreements may address matters such as business transactions and relationships between the investor and the insured depository institution, as well as the investor's use of the control position to influence the institution's management or policies. Passivity agreements are generally executed by the FDIC and the subject investor.

Certain Written Agreements Required for Industrial Banks

Part 354 of the FDIC Rules and Regulations establishes certain requirements for filings involving an industrial bank or a "Covered Company," as that term is defined in Part 354. Refer to Part 354 for further details regarding the required commitments and provisions of the written agreement(s). Part 354 also includes restrictions on industrial bank subsidiaries of Covered Companies, which are typically included as conditions as part of the approval of, or non-objection to, the applicable filing.

V. REFERENCES

Section 303.2(bb) of the FDIC Rules and Regulations

Section 303.82(b) of the FDIC Rules and Regulations

Part 354 of the FDIC Rules and Regulations

Delegations of Authority – Enforcement Actions matrix

Delegations of Authority – Filings matrix

Deposit Insurance Applications Procedures Manual (DIAPM)

DIAPM Supplement – Applications from Non-Bank and Non-Community Bank Applicants