

Memorandum to: Board of Directors

From: Doreen R. Eberley
Director
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Director
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Subject: Proposed Statement of Policy on Bank Merger Transactions

Summary

The proposed Statement of Policy (SOP) updates, strengthens, and clarifies the FDIC's policies related to the evaluation of bank merger applications subject to FDIC approval under the Bank Merger Act (BMA). The proposed SOP reflects legislative and other developments that have occurred since the SOP was last updated, including the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank Act) amendment to the BMA adopting the statutory factor related to the risk to the stability of the United States banking or financial system. The proposed SOP also reflects feedback received in response to the FDIC's 2022 Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions.¹

The proposed SOP includes new content; is more principles based; addresses each statutory factor separately; highlights other matters and considerations such as applications from non-banks, banks that are not traditional community banks, and operating non-insured entities; and includes a list of reference sources.

¹ <https://www.govinfo.gov/content/pkg/FR-2022-03-31/pdf/2022-06720.pdf>.

Recommendation:

Staff recommends that the FDIC Board (Board) approve the publication of the attached Statement of Policy on Bank Merger Transactions (proposed SOP) in the *Federal Register* for a 60-day public comment period.

Concur:

Harrel Pettway
General Counsel

Background

Section 18(c) of the Federal Deposit Insurance Act (FDI Act), which codifies the BMA, prohibits an insured depository institution (IDI) from engaging in a merger transaction without regulatory approval. The FDIC is one of three federal banking agencies with responsibility for evaluating transactions subject to the BMA. The FDIC has jurisdiction to act on merger applications that involve an IDI and any non-insured entity, notwithstanding the IDI's charter.² The FDIC also has jurisdiction to act on transactions that solely involve IDIs in which the acquiring, assuming, or resulting institution is an FDIC-supervised institution.³

In order to implement its responsibilities under the BMA, the FDIC has codified regulations in 12 CFR Part 303, Subpart D; issued the current SOP; and adopted and published a chapter on mergers in its Applications Procedures Manual (APM). The APM provides direction for professional staff assigned to review and process applications, notices, and other requests submitted to the FDIC. The merger chapter of the APM provides detailed procedural instruction to staff, including guidance for the assessment of each statutory factor.⁴

The current SOP addresses certain aspects of the FDIC's process for reviewing merger applications.⁵ Public comments on revisions to the current SOP were last solicited in October 1997.⁶ Since that time, revisions were made on three separate occasions (without public comment). In July 2002, the current SOP was updated to incorporate a statutory change to the BMA included in the USA PATRIOT Act, which made an IDI's effectiveness in combatting

² 12 U.S.C. § 1828(c)(1).

³ 12 U.S.C. § 1828(c)(2).

⁴ [Applications Procedures Manual - Section 4: Mergers.](#)

⁵ [FDIC Statement of Policy on Bank Merger Transactions.](#)

⁶ The primary purpose of the revision was to reflect statutory changes and other developments since the previous revision in 1989. The developments reflected in the revisions included those resulting from statutory changes, such as changes made by the [Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994](#) and the [Financial Institutions Reform, Recovery, and Enforcement Act of 1989](#).

money laundering a statutory factor. In December 2002, the current SOP was amended to reflect changes made pursuant to an internal reorganization within the FDIC. Finally, in February 2008, the current SOP was updated to address changes resulting from the Financial Services Regulatory Relief Act of 2006 (FSRRA)⁷ and remove discussion of “Oakar Transactions” since the Federal Deposit Insurance Reform Act of 2005 consolidated the former Savings Association Insurance Fund and Bank Insurance Fund into the Deposit Insurance Fund.

Since 2008, significant changes have occurred in the banking industry and financial system that necessitate a review of the regulatory framework that applies to bank merger transactions under the BMA.⁸ The Dodd-Frank Act, which was enacted in July of 2010, amended the BMA to include, for the first time, a financial stability factor. The proposed SOP incorporates and builds upon the FDIC’s approach to evaluating this factor since it was added to the BMA. Further, on July 9, 2021, Executive Order 14036, titled “Executive Order on Promoting Competition in the American Economy” addressed the impact that consolidation may have on maintaining a fair, open, and competitive marketplace, and on the welfare of workers, farmers, small businesses, startups, and consumers. In particular, the Executive Order instructs the Attorney General to consult with the federal banking agencies in adopting a plan for the revitalization of merger oversight under the BMA and the Bank Holding Company Act.

On March 31, 2022, the FDIC published in the *Federal Register* a Request for Information and Comment (RFI) to seek public comments regarding the application of the laws, practices, rules, regulations, guidance, and statements of policy that apply to merger transactions subject to FDIC approval.⁹ The RFI requested comments regarding the effectiveness of the existing

⁷ The FSRRA eliminated: (i) the need for the FDIC to obtain a competitive factors report from the other federal banking agencies when processing a merger application, (ii) the post-approval waiting period, and (iii) the requirement to obtain any competitive factors reports when a merger solely involves an IDI and one or more affiliates.

⁸ [Bank Merger Act, Public Law 86-463, 72 Stat. 129 \(1960\)](#); Bank Merger Act Amendments of 1966, [Public Law 89-356, 80 Stat. 7](#) (codified as amended at 12 U.S.C. 1828(c)(2018)).

⁹ [87 FR 18740](#) (March 31, 2022).

framework in meeting the requirements of the BMA. After review of the 33 public comments received in response to the RFI, the FDIC determined that it was appropriate to review and update the current SOP.

The proposed SOP includes new content and organizational structure, is more principles based, and communicates the Board's expectations regarding merger applications filed pursuant to the BMA. A new section titled Jurisdiction and Scope was added to describe the FDIC's role and the types of transactions that are subject to the BMA, and how the FDIC considers the applicability of the BMA with respect to different transaction structures. The proposed SOP reframes the applications procedures section of the current SOP to address, among other matters, the importance of pre-filing meetings, the submission of a comprehensive application, public feedback, the imposition of conditions, and interagency coordination. Within the proposed SOP, each statutory factor¹⁰ is separately addressed in a forward-looking manner. The proposed SOP refines, and in some cases broadens, the description of the analytical considerations for these areas. Technical or procedural content from the current SOP that is addressed in other FDIC publications (as linked in the resources section of the proposed SOP) was removed. A detailed discussion of the revisions to the current SOP follows this section.

The proposed SOP would be published in the *Federal Register* with a 60-day comment period.

¹⁰ The statutory factors include competitive effects, financial and managerial resources, future prospects, convenience and needs of the community to be served, effectiveness in combatting money laundering, and the risk to the stability of the United States banking or financial system.

Overview of Proposed Statement of Policy

The proposed SOP is organized around the following sections:

Introduction. The introductory section of the proposed SOP clarifies the scope of the BMA. The proposed SOP addresses the competitive effects within the statutory factors section.

Jurisdiction and Scope. This new section was added to explain the type of transactions that are subject to the BMA and FDIC review. Specifically, the new section addresses the broad applicability of the BMA to a variety of different transaction structures, including purchase and assumption transactions that constitute mergers in substance, as well as any assumptions of deposits, as broadly defined in the FDI Act.

Overview of the Applications Process. The proposed SOP differs from the current SOP by not discussing application-processing instructions, which are addressed in the APM. The proposed SOP includes commentary regarding the importance of pre-filing meetings and the submission of a substantially complete application that includes all of the information necessary for the FDIC to evaluate the statutory factors. The proposed SOP also discusses public feedback and coordination with the Department of Justice.

Merger Application Adjudication. The proposed SOP addresses the use of conditions, posting the Order and Basis for Approval to the public website, circumstances that may preclude favorable findings on the applicable statutory factors, and the ability of the applicant to withdraw the filing. If an applicant withdraws their filing, the FDIC Board of Directors 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.

Statutory Factors. The SOP contains a declarative statement highlighting the FDIC Board of Directors' expectations with respect to each statutory factor.

The narrative regarding the FDIC's analysis of competitive effects emphasizes the

identification and evaluation of the competitive environment in the relevant markets with consideration given to whether consumers retain meaningful choices. The proposed SOP clarifies that the FDIC's evaluation of competitive effects will consider all relevant financial service providers that compete in the identified geographic and product markets. The proposed SOP addresses divestitures as a potential means to mitigate competitive effects concerns and clarifies the FDIC's policy against non-compete agreements with employees in connection with divestitures.

The proposed SOP contains a separate discussion of the financial and managerial resources of the existing and proposed entities, as well as the future prospects of the resulting institution. The financial resources section notes that non-standard conditions or written agreements may be imposed, as needed, to address capital maintenance requirements, liquidity or funding support, affiliate transactions, and other relevant provisions. The FDIC will also consider the current and projected financial impact of any related entities, including the parent organization and any key affiliates.

The managerial resources commentary details several important considerations including assessing management's capabilities to administer the resultant IDI's affairs in a safe and sound manner, and effectively implement integration plans and strategies for absorbing the acquired entity. The ratings and supervisory assessments made by relevant supervisory authorities are also considered. The proposed SOP affirms that such evaluations will include the nature and extent of organizational relationships. Additionally, the proposed SOP notes that 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 proposed SOP states that the evaluation of future prospects will include 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.

The convenience and needs of the community to be served section addresses assessment area

considerations; expectations for meeting the needs of the entire community, including low- and moderate-income neighborhoods; branch closures and relocations; the review of public comments; and the conduct of public hearings. The FDIC expects to hold a hearing for any application resulting in an institution with greater than \$50 billion in assets or for which a significant number of Community Reinvestment Act (CRA) protests are received.

As part of its evaluation, the FDIC will review the CRA record of the institutions. A less than Satisfactory historical rating or significant deterioration in CRA performance will generally result in unfavorable findings. The FDIC's review is not limited to the CRA record of the institutions 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.

The proposed SOP affirms that the FDIC will consider the record of each institution in complying with consumer protection requirements and maintaining a sound and effective compliance management system. Further, it notes that applicants will be expected to provide forward-looking information to enable the FDIC to evaluate the benefits of the merger on the convenience and needs of the community to be served.

Projected or anticipated branch expansion, closings, or consolidations (including information related to any job losses or lost job opportunities from branching changes) are expected to cover, at a minimum, the first three years following consummation of the merger. The proposed SOP states that information is expected to address any proposed or expected closures, including the timing of each closure, as well as the effect on the availability of products and services, particularly to low- or moderate-income individuals or designated areas.

The proposed SOP clarifies the FDIC's expectation 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. The proposed SOP explains that 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.

The discussion regarding the risk to the stability of the United States banking or financial system incorporates and builds upon the FDIC's approach since the factor was added to the BMA. The considerations with regard to this factor are generally consistent with the analytical approaches taken by the Board of Governors of the Federal Reserve System and Office of the Comptroller of the Currency, and reflect the FDIC's approach in practice.¹¹ The FDIC evaluates this factor with respect to the following:

- The size of the entities involved in the transaction. Transactions that result in a large institution (e.g., in excess of \$100 billion) are more likely to present potential financial stability concerns and will be subject to added scrutiny;
- 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 proposed SOP defines the evaluative considerations used to assess the effectiveness in combatting money laundering and describes potential impediments to favorable findings for this factor. The proposed SOP also introduces terms and abbreviations that are used following the

¹¹ See, e.g., Order and Basis for Corporation approval of BB&T's application for consent to merger with SunTrust Bank. Refer to [FDIC Press Release PR-111-2019](#).

adoption of The Anti-Money Laundering Act of 2020.

Other Matters and Considerations. This section addresses interstate merger transactions and the unique considerations related to applications from non-banks or banks that are not traditional community banks, as well as operating non-insured entities.

Resources. The proposed SOP includes a list of resources for industry reference.

Conclusion

Staff recommends that the Board approve the publication of the attached Statement of Policy titled “Statement of Policy on Bank Merger Transactions” in the *Federal Register* for public comment.

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