FDIC Federal Deposit Insurance Corporation

MEMORANDUM

TO: FDIC Board of Directors

FROM: Doreen R. Eberley
Director, Division of Risk Management Supervision

DATE: February 28, 2025

RE: Statement of Policy on Bank Merger Transactions

SUMMARY

Staff presents for adoption by the FDIC Board of Directors (the Board) the attached resolution and *Federal Register* Notice (Notice), which would seek public comment on a proposal to (1) rescind the Statement of Policy on Bank Merger Transactions previously adopted by the Board on September 17, 2024, and published in the *Federal Register* on September 27, 2024; and (2) reinstate, on an interim basis, the FDIC's Statement of Policy on Bank Merger Transactions that was in effect prior to the 2024 Statement, pending a broader reevaluation of the FDIC's bank merger review process.

Concur:

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Matthew P. Reed, Acting General Counsel

Federal Deposit Insurance Corporation

BACKGROUND

Section 18(c) of the Federal Deposit Insurance Act (FDI Act), which codifies the Bank Merger Act (BMA), prohibits an insured depository institution (IDI) from engaging in a bank merger transaction except with the prior approval of the responsible Federal banking agency.[1] The FDIC has jurisdiction to act on merger transactions that solely involve IDIs in which the acquiring, assuming, or resulting institution is an FDIC-supervised institution.[2] The FDIC also has jurisdiction to act on merger transactions that involve an IDI and any non-insured entity, notwithstanding the IDI's charter.[3]

The FDIC published a request for comment on a proposed Statement of Policy on Bank Merger Transactions in the *Federal Register* on April 19, 2024,[4] and subsequently issued it as final on September 27, 2024 (the 2024 Statement).[5] The 2024 Statement superseded the FDIC's prior Statement of Policy on Bank Merger Transactions (Merger Policy Statement), which was initially adopted in 1998 and amended most recently in 2008.[6]

PROPOSAL

The Notice would seek comment on a proposal to rescind the 2024 Statement and reinstate the attached Merger Policy Statement. Staff recommends approval of the Notice in light of concerns that implementation of the 2024 Statement has added considerable uncertainty to the merger application process. As an example, the 2024 Statement has led to a number of questions regarding when merger applications are required.[7] The 2024 Statement also deemphasizes the use of the Herfindahl-Hirschman Index (HHI) thresholds in the competitive effects analysis, which have long served as a predictable proxy for determining whether a proposed transaction is

[1] 12 U.S.C. § 1828(c).

[2] 12 U.S.C. § 1828(c)(2).

[3] 12 U.S.C. § 1828(c)(1).

[4] 89 FR 29222 (April 19, 2024).

[5] 89 FR 79125 (Sep. 27, 2024).

[6] *See* 63 FR 44761 (Aug. 20, 1998), 67 FR 48178 (Jul. 23, 2002), 67 FR 79278 (Dec. 27, 2002), and 73 FR 8870 (Feb. 15, 2008).

[7] *See e.g.*, *supra* n. 5 at 79134 ("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.").

anticompetitive,[8] and replaces it with more subjective criteria. In addition, the 2024 Statement places an affirmative burden on applicants to demonstrate that a merger transaction will enable the resulting institution to better meet the convenience and needs of the community to be served than would otherwise occur in the absence of the merger without offering any objective or quantifiable criteria regarding how the FDIC will evaluate this factor.[9] The combined effect of these and several other provisions of the 2024 Statement is that the FDIC's bank merger application review has become less transparent and less predictable, leaving prospective applicants unclear about their prospects for approval and the resources and time they will need to allocate to the merger application process. Accordingly, in the interim, the FDIC is proposing to return to the historical approach, which is well-understood by the public and market participants, while the agency develops future policy.

The attached Merger Policy Statement is substantively the same as the 2008 document.[10] The Merger Policy Statement does not address the BMA's statutory factor related to the risk to the stability of the United States banking or financial system, which was added to the BMA by the Dodd-Frank Act in 2010.[11] However, the preamble to the Notice describes the approach that the FDIC has taken when evaluating the financial stability factor in the context of merger applications in the FDIC's Application's Procedures Manual.[12]

The Notice solicits public comment to the proposal to rescind the 2024 Statement and reinstate the Merger Policy Statement. Staff plans to seek the Board's approval to issue a future proposal to comprehensively revise its merger policy at a later time, and will solicit further comments at that time.

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[8] *See id.* at 79136.

[9] *See id.* at 79138.

[10] The only changes are technical edits updating a room number and a citation.

[11] 12 U.S.C. 1828(c)(5), as amended by Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 604(f), 124 Stat. 1376, 1602 (2010).

[12] *See* FDIC Applications Procedures Manual, pp. 4-22—4-23, available at: https://www.fdic.gov/sites/default/files/2024-03/pr19111a.pdf. ("In evaluating a merger application, the FDIC must consider the risk to the stability of the United States banking or financial system (Section 18(c)(5) of the FDI Act). [The FDIC] consider[s] both quantitative and qualitative metrics when evaluating a transaction's impact on financial stability. The following is a non-exhaustive list of quantitative metrics [the FDIC] consider[s]: the size of the resulting firm; the availability of substitute providers for any critical products and services offered by the resulting firm; the interconnectedness of the resulting firm with the banking or financial system; the extent to which the resulting firm contributes to the complexity of the financial system; and the extent of cross-border activities of the resulting firm. In addition to these quantitative metrics, qualitative factors should inform the evaluation of the financial stability factor. Such factors include those that are indicative of the relative degree of difficult in resolving the resulting firm, such as the opaqueness and complexity of the resulting institution's operations.")

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CONCLUSION

As discussed above, the attached *Federal Register* Notice would seek public comment on a proposal to rescind the 2024 Statement and reinstate the Merger Policy Statement, with the public comment period open for a period of 30 days after publication in the *Federal Register*.

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