

## I. INTRODUCTION

Section 18(c) of the Federal Deposit Insurance (FDI) Act, also referred to as the Bank Merger Act (BMA), requires the prior written approval of the FDIC before any insured depository institution (IDI) may merge or consolidate with, purchase or otherwise acquire the assets of, or assume any deposit liabilities of, another IDI if the resulting institution is to be a state nonmember bank. Section 18(c) also requires prior written approval of the FDIC before any IDI may merge or consolidate with, assume the liability to pay deposits or similar liabilities of, or transfer assets to, a noninsured bank or institution (credit unions are noninsured institutions for purposes of Section 18(c)). Subpart D of Section 303 of the FDIC Rules and Regulation sets forth the requirements and procedures for applications submitted pursuant to Section 18(c). Additional policies are set forth in the *FDIC Statement of Policy on Bank Merger Transactions*. Requirements on interstate bank mergers are found in Section 44 of the FDI Act and in Subpart D, and are addressed in the *Statement of Policy on Bank Merger Transactions*.

## II. MERGER TYPES

The FDIC categorizes each merger transaction as one of the following: regular merger, consolidation, purchase and assumption, corporate reorganization, or interim merger.<sup>1</sup> These terms are discussed in more detail below. This Section also discusses deposit insurance considerations.

### Regular Merger

A regular merger is a combination of the assets and liabilities of two or more nonaffiliated institutions under one institution's charter and the extinguishment or cancellation of the charter(s) of the other institution(s).<sup>2</sup> Pursuant to Section 18(c), a merger application must be filed with the FDIC, and prior FDIC approval must be obtained before:

- (1) two or more IDIs may merge if the acquiring, assuming, or resulting institution will be a state nonmember insured bank or a state savings association; or
- (2) any IDI of any charter type (i.e., national bank, federal savings association, or state bank) may merge or consolidate with a noninsured bank or institution (including a holding company, credit union, trust or other company).

The FDIC has long held that the term “noninsured institution” means any entity that a bank may legally merge with, not just depository institutions. Thus, a bank merger application is required anytime a noninsured entity merges or consolidates, whether by statutory or substantive merger or consolidation, with an IDI of any charter type. A regular merger between commonly controlled institutions is treated as a corporate reorganization (discussed below).

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<sup>1</sup> The FDIC categorizes merger transactions under these descriptive headings for internal reporting purposes. The Interagency Bank Merger Act Application Form directs the applicant to identify both the type and form of filing, and therefore provides a broader set of categories for describing merger transactions.

<sup>2</sup> Regular mergers are typically structured as mergers that are authorized by relevant statute. A regular merger may also be found to occur in cases where a transaction is not undertaken pursuant to such a statute, but where the transaction is structured as an asset acquisition or purchase and assumption transaction. Such transactions may constitute a substantive merger subject to FDIC approval if it is substantively similar to a statutory merger, such as where an entity absorbs all or substantially all of a target entity's assets, and the target entity dissolves or otherwise ceases its main business operations.

### Consolidation

A consolidation generally is a combination of the assets and liabilities of two or more IDIs into a newly chartered IDI, and the extinguishment or cancellation of the charters of the other institutions. This type of combination is rare. A separate deposit insurance application is not necessary because the resulting depository institution will be insured pursuant to Section 4(d) of the FDI Act. For BMA purposes, a consolidation is treated in the same manner as a regular merger. A consolidation of commonly controlled institutions would be treated as a corporate reorganization (discussed below).

### Purchase and Assumption

A purchase and assumption transaction is characterized by the transfer of assets and deposit<sup>3</sup> liabilities (or similar liabilities) from one institution to another without the two institutions legally combining into a single entity. A purchase and assumption transaction is distinct from a (regular) merger under state statute in that the target (selling) institution may continue to exist as a going concern following the consummation of the purchase and assumption transaction. Pursuant to Section 18(c), a merger application must be filed with the FDIC, and prior FDIC approval must be obtained before:

- (1) a state nonmember bank may purchase the assets of, or assume any deposit liabilities of, an IDI of any charter type (for example, the assumption of deposits in connection with the purchase of a branch);
- (2) any IDI may assume the liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution; or
- (3) any IDI may transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such IDI (for example, the sale of a branch by an IDI to a credit union when the credit union also assumes the deposits of that branch).

A common example of a purchase and assumption is a transaction whereby the applicant purchases one or more branches and assumes the deposits in those branches from the target institution, which will continue to operate otherwise. Transactions that do not involve a transfer of deposits or similar liabilities typically do not require prior FDIC approval under the BMA, unless the transaction involves the acquisition of all or substantially all of an institution's assets.

A purchase and assumption transaction between commonly controlled institutions may be treated as a corporate reorganization (discussed below).

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<sup>3</sup> The term "deposits" (as defined in the FDI Act) applies to this discussion. The definition is quite broad; see 12 USC 1813(l). For example, the definition expressly includes trust funds and escrow funds. Therefore, the BMA is often implicated when an IDI acquires trust accounts from another institution, or in cases where an IDI acquires a portfolio from an escrow company.

### Corporate Reorganization

A corporate reorganization is a merger transaction that involves solely an IDI and one or more of its affiliates.<sup>4</sup> For example, a corporate reorganization occurs when a holding company merges its subsidiary banks or merges with its subsidiary bank, or when a bank absorbs a subsidiary. For purposes of this paragraph, an institution is an affiliate of another institution if one institution controls, is controlled by, or is under common control with the other institution. “Control” generally means the power to (i) vote 25 percent or more of any class of the voting securities, (ii) select a majority of the directors, or (iii) exercise a controlling influence. Generally, there is a presumption against control in cases in which an entity owns, controls or has power to vote less than five percent of another entity’s voting securities. If a merger transaction involves entities in which control is unclear (e.g., if ownership or common ownership levels are between five and 25 percent), Division of Risk Management Supervision (RMS) staff should consult with Legal to determine if a control relationship exists. Control can be direct or indirect, and the controlling party may be acting alone or in concert with others.

As discussed in Part V of this Section, certain procedural requirements, such as requesting a competitive factors report, may be waived in the case of a merger of affiliated institutions.

#### *Merger Transaction Involving a National Bank, Member Bank, or Federal Savings Association and its Noninsured Affiliate(s)*

An application for a merger involving a National Bank, Member Bank, or Federal Savings Association with one or more of its nonbank subsidiaries or affiliates will be processed by the FDIC in accordance with the instructions for a corporate reorganization. In addition, upon receipt of the merger application, the Case Manager should contact the Office of the Comptroller of the Currency (OCC) District Office or Federal Reserve District Bank responsible for processing the related application. The Case Manager should keep the other agency counterparts informed of any issues or concerns that are raised throughout the application review process and of the estimated time of completion. Any comments received by the FDIC as a result of the public notice should be shared with the other agencies, including the state authority in the case of a member bank.

### Interim Merger

An interim merger is a merger (other than a purchase and assumption transaction) between an operating IDI and a newly-formed institution (or corporation) that will not open for business and that exists solely for the purpose of facilitating a combination. The IDI resulting from the merger can be under the charter of either institution. There are two types of interim mergers:

- (1) Forward interim merger - after which the resultant IDI will operate under the charter of the interim institution and the certificate number of the existing institution.
- (2) Reverse interim merger - after which the resultant IDI operates under the charter and certificate number of the existing institution.

Because federal interim institutions may be insured upon issuance of their charter under section 5(a)(2) of the FDI Act, the FDIC does not act on interim mergers (other than purchase and

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<sup>4</sup> The term “affiliate” for purposes of this Section has the meaning given to it in Section 2(k) of the Bank Holding Company Act of 1956.

assumption transactions) in which the interim institution is a federally chartered interim depository institution that will not open for business and the resulting IDI is regulated by the OCC or Federal Reserve.

State interim institutions are not insured by operation of law. Therefore, the FDIC may consider a merger application between a noninsured interim institution and an insured depository institution under section 18(c)(1) of the BMA, or require an application for deposit insurance in connection with a merger transaction between a state-chartered interim institution and an insured depository institution if the related merger application is being acted upon by a federal banking agency other than the FDIC under section 18(c)(2) of the BMA. If the FDIC is the federal banking agency responsible for acting on the related merger application, a separate application for deposit insurance is not necessary. Procedures for applying for deposit insurance for interim institutions are set forth at section 303.24 of the FDIC's regulations.

Interim mergers are most often used as a step in the formation of a holding company (including in connection with a mutual-to-stock transaction) to facilitate a holding company's acquisition of an unaffiliated target institution.

An institution can form a holding company in one of two ways: (1) a swap of the institution's stock for the stock in a newly formed company; or (2) the formation of a holding company and merger of the existing institution into an interim institution that is a wholly owned subsidiary of the holding company. The former requires no bank merger application to the FDIC; the latter requires an interim bank merger application to the FDIC when either the interim institution is not insured, or the resulting institution is a state nonmember bank or state savings association.

An existing institution can be acquired by an existing holding company in one of two ways: (1) the direct sale of its stock to the holding company; or (2) a merger into an interim institution that is a wholly owned subsidiary of the holding company. The former requires no bank merger application to the FDIC; the latter requires a merger application to the FDIC when either the interim institution is not insured, or the resulting institution will be a state nonmember bank or a state savings association.

If a full merger application is filed with the Federal Reserve by the holding company and the Federal Reserve has requested a competitive factors report, then the FDIC is excused from seeking a competitive factors report in connection with the related interim bank merger transaction. In such circumstances, the FDIC must nevertheless conduct sufficient review and analysis, giving consideration of information provided by the Federal Reserve and Department of Justice, to resolve the statutory factors in Section 18(c)(5) of the FDI Act regarding the effect on competition.

If the Federal Reserve waives the full application for the holding company, then the bank merger transaction will be processed by the FDIC as a regular merger, since the Federal Reserve may not have assessed the competitive factor. In this case, the FDIC must request a competitive factors report.

An interim institution may also be used to facilitate a mutual-to-stock (MTS) conversion. Refer to *Mutual-to-Stock Conversions*, Section 10 of these Procedures, for additional information. Interim mergers used to facilitate a MTS conversion will require a longer processing time because MTS conversions require Washington Office (WO) approval. In such cases, the application should be removed from expedited processing and the applicant should be notified in writing that additional review is necessary.

### Deposit Insurance Considerations

State-chartered interim institutions are not automatically insured under Section 5 of the FDI Act. A merger involving a state-chartered interim institution will be acted on by the appropriate Primary Federal Regulator (PFR) for the resulting depository institution, if the interim institution has applied for, and obtained approval for, deposit insurance. A merger involving a state-chartered interim institution that has not applied for deposit insurance must be acted on by the FDIC, because the FDIC is the only PFR that can act on the merger of any IDI with a noninsured entity. If the FDIC is the PFR responsible for acting on the merger application pursuant to Section 18(c)(1) of the FDI Act, a separate deposit insurance application is not necessary because the resulting depository institution will be insured pursuant to Section 4(d) of the FDI Act.

A deposit insurance application is not necessary for a regular merger (as opposed to a purchase and assumption transaction) between an IDI and a federally chartered interim institution, even if the resulting institution will operate under the federal interim charter. Refer to the *Deposit Insurance Applications Procedures Manual* for further instruction.

A depository institution resulting from the regular merger of an IDI with either another IDI or a noninsured entity will be an IDI pursuant to the provisions related to continuation of deposit insurance under Section 4(d) of the FDI Act. In addition, pursuant to Section 8(q) of the FDI Act, the surviving institution is required to certify the assumption of the deposits.

For regular merger transactions in which a noninsured entity, such as a credit union, acquires an IDI and is the surviving institution, the FDIC-insured institution is required to provide notice to the FDIC requesting termination of insurance pursuant to Section 8(p) or 8(q) of the FDI Act, as appropriate.

Mergers involving an insured branch of a foreign bank are addressed in *U.S. Activities of Insured Branches of Foreign Banks*, Section 46 of these Procedures.

### Branch Applications

Whenever a state nonmember bank acquires a branch in a merger, the state nonmember bank is establishing a domestic branch, which is separately subject to the FDIC's approval under section 18(d) of the FDI Act. The FDIC will not require a separate application to establish a domestic branch since the related merger application should typically include all of the information needed to evaluate the statutory factors applicable to the establishment of domestic branches. Nonetheless, each of the statutory factors applicable to domestic branch establishments must be evaluated, and the FDIC must expressly exercise its authority to approve such domestic branch establishments in the order approving the related merger application.

## **III. SPECIAL CONSIDERATIONS FOR MERGERS WITH CERTAIN CHARACTERISTICS**

### Interstate Bank Mergers

Pursuant to Section 44 of the FDI Act (12 U.S.C.1831u), the FDIC may approve a merger transaction between insured banks with different home states when the resulting bank will be a state nonmember bank, without regard to whether the transaction is prohibited under state law. Generally, if a merger transaction results in a state nonmember bank establishing a branch in a state in which the bank did not previously operate a branch, the requirements of Section 44

mandatorily apply. The FDIC may not approve an application that would permit an out-of-state bank to acquire a bank in a host state that has not been in existence for the minimum period of time, if any, specified in the statutory law of the host state, provided such statutory minimum is no longer than five years. A bank that has been chartered solely for the purpose of, and does not open for business prior to, acquiring all or substantially all of the assets of an existing bank or branch shall be deemed to have been in existence for the same period of time as the bank or branch to be acquired.

An interstate merger transaction may involve the acquisition of a branch of an insured bank without the acquisition of the entire bank, only if the law of the state in which the branch is located permits out-of-state banks to acquire a branch of a bank in such state without acquiring the bank. For purposes of Section 44, in the case of a merger that consists of the acquisition of a branch without the acquisition of the bank, the branch is treated as a bank whose home state is the state in which the branch is located.

Section 44 contains the following requirements and limitations (also see the exception at end of discussion):

- The FDIC may approve an application for an interstate merger transaction pursuant to Section 44 only if each bank involved in the transaction is Adequately Capitalized as of the date the application is filed, and the FDIC determines that the resulting bank will be Well Capitalized and well managed<sup>5</sup> upon the consummation of the transaction.
- Any bank that files an application for an interstate merger must comply with the filing requirements of any host state of the resulting bank, provided that the requirement does not have the effect of discriminating against out-of-state banks or out-of-state holding companies or their subsidiaries and is similar in effect to any requirement imposed by the host state on an out-of-state nonbanking corporation.
- The applicant must submit a copy of the FDIC application to the state bank supervisor of the host state.
- Nationwide Concentration Limit: The FDIC may not approve an application for an interstate merger transaction involving IDIs if the resulting depository institution (including all IDIs that are affiliates of the resulting institution), upon consummation of the transaction, would control more than ten percent of the total amount of deposits of IDIs in the United States.
- Statewide Concentration Limit: The FDIC may not approve an application for an interstate merger transaction between nonaffiliates if any bank involved in the transaction (including all IDIs that are affiliates of the resulting institution) has a branch in any state in which any other bank involved in the transaction has a branch; **and**, the resulting bank (including all IDIs that are affiliates of the resulting institution), upon consummation of the transaction, would control 30 percent or more of the total amount of deposits of IDIs in any such state. Furthermore, states retain the authority to impose stricter limits on the percentage of deposits that may be held or controlled by any bank or bank holding company (including all IDIs that are affiliates of the resulting institution). The FDIC may approve an interstate merger transaction without regard to the 30 percent concentration limit **only if:**

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<sup>5</sup> A finding that an institution is “well managed” may generally be supported by the supervisory record and facts underlying an assigned Management or Composite rating of 1 or 2, as well as other relevant supervisory findings.

- A state allows a greater percentage of total deposits to be controlled by a resulting bank;  
**or**
- If the transaction is approved by the state bank supervisor and the standard on which the approval is based does not have the effect of discriminating against out-of-state banks, out-of-state holding companies, or subsidiaries of such banks or holding companies.
- In determining whether to approve an interstate merger transaction in which the resulting bank would have a branch or bank affiliate in any state in which the bank submitting the application (as the acquiring bank) had no branch or bank affiliate before the transaction, the FDIC must:
  - Comply with the responsibilities of the FDIC regarding the Community Reinvestment Act (CRA);
  - Take into account the most recent written CRA evaluation of any bank which would be an affiliate of the resulting bank; and
  - Take into account the record of compliance of any applicant bank with applicable state community reinvestment laws.

Approval documents, including the Order and SOI, should address that the merger was approved under the authority of and in compliance with Section 44 of the FDI Act.

As noted in the subpart below entitled Mergers Involving Emergency Transactions, if an application involves one or more banks in default or in danger of default, or with respect to which the FDIC provides assistance under Section 13(c) of the FDI Act, pursuant to Section 44 of the FDI Act, the FDIC may approve an application without regard to any of the interstate bank merger requirements and limitations discussed above. Approvals for transactions involving banks in default or in danger of default have not been delegated.

#### Mergers Involving Troubled Institutions

The Case Manager should consult with the WO if a proposed merger transaction involves one or more troubled institutions and/or the resultant institution would likely be identified as a troubled institution. In such cases, the anticipated condition and viability of the resultant institution should be closely analyzed to ensure it will have satisfactory management, acceptable capital, and an appropriate business plan. For such transactions, new management and additional capital may be necessary to favorably resolve one or more statutory factors, or to support a recommendation for approval in cases where one or more statutory factors are unfavorably resolved. In any case where one or more applicable statutory factors are not favorably resolved, RMS lacks delegated authority to act on the application and FDIC Board action is required.

#### Mergers Involving State Savings Associations

The Case Manager must consult with the WO on any merger application related to a state savings association to ensure that the appropriate procedures and timelines are followed. Refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding applications or notices involving state savings associations. Statutory timeframes specific to mergers involving state savings associations are as follows:

Mergers involving state savings associations are subject to the BMA, but section 10(s) of the Home Owners Loan Act also provides the authority for savings associations to engage in mergers, consolidations, and other acquisitions. HOLA authority allows for the expedited approval of acquisitions involving savings associations. Any application involving a savings

association to acquire or be acquired by an IDI is required to be approved or disapproved in writing by the PFR for the savings association before the end of the 60-day period beginning on the date such application is filed with the PFR. The FDIC considers an application to have been “filed” on the date the agency would deem the application to be substantially complete. The period for approval or disapproval referred to above may be extended for an additional 30-day period if the PFR for the savings association determines that:

- (1) an applicant has not furnished all of the information required to be submitted; or
- (2) in the judgment of the PFR for the savings association, any material information submitted is substantially inaccurate or incomplete.

Mergers involving state savings associations merit special attention during the application process, given the statutory timeframes for approval. Applications received by the FDIC involving state savings associations should be acknowledged by the RO indicating that the application will not be acted upon until the FDIC has determined that the application is substantially complete.

#### Mergers Involving Credit Unions

A credit union is a noninsured institution for purposes of the FDI Act and the BMA. Therefore, pursuant to section 18(c)(1) of the FDI Act, any merger transaction involving a credit union must be acted on by the FDIC, since the FDIC is the only PFR that can act on the merger of an IDI with a noninsured entity. This includes merger transactions in which the IDI is either the target bank (Section 18(c)(1)(c)), or the acquiring, assuming, or resulting institution. The Case Manager should consult with the WO upon receipt of any merger application involving a credit union to ensure that the appropriate procedures and timelines are followed.

Upon receipt of an application involving a credit union, the Case Manager should coordinate with the applicable regulatory authorities of both the target and the acquiring institution to determine if it will be necessary to execute an interagency Memorandum of Understanding regarding information sharing prior to discussing any confidential, nonpublic supervisory information. Discussions should be held with appropriate WO and RO Legal prior to contacting the other regulatory authorities.

Special considerations required in these types of transactions include appropriate disclosures to depositors regarding the change in deposit insurance, which is typically addressed through one or more non-standard conditions. The Case Manager should obtain and review such disclosures prior to distribution. The Case Manager should communicate with the WO and with the applicable regulatory authorities to ensure that depositor disclosures are adequate and include sufficient information regarding membership eligibility requirements, opt-in agreements regarding credit union membership if the credit union is the acquirer, timeframes for ineligible account transfers, the account transfer process, and depositor insurability.

As previously stated under the subpart of Part II, Deposit Insurance Considerations, the Case Manager needs to ensure that the termination of insurance process pursuant to 8(p) is completed.

#### Mergers Involving Foreign Ownership



Certain merger transactions may result in foreign ownership<sup>6</sup> or control of the resultant institution. For example, this could occur in a merger where an acquiring depository institution that is predominantly owned by domestic investors provides shares of its stock to a target entity's investors in exchange for the shares of the target entity, whose ownership is significantly composed of foreign investors.

If the transaction will result in aggregate foreign ownership that equals 25 percent or more, or if foreign owners will in the aggregate own less than 25 percent but control the institution, the RO should consult with the WO (RMAS<sup>7</sup> and Legal) to confirm that the correct filings were made, discuss processing requirements, determine appropriate conditions and agreements applicable to the foreign ownership or control, and if necessary, resolve any matters regarding delegations of authority. The Case Manager should be aware that pursuant to Section 303.84 of the FDIC Rules and Regulations, which implements the change in control provisions of the FDI Act, certain transactions<sup>8</sup> do not require notice to the FDIC. As such, the FDIC will not require or process a separate change in control notice for proposed transactions that will be reviewed under a merger application under the Bank Merger Act.

#### *Parallel-owned banking organizations (PBO)<sup>9</sup>*

Generally, a PBO is created when at least one U.S. depository institution and one foreign bank are controlled either directly or indirectly by the same person or group of persons (foreign or domestic), who are closely associated in their business dealings or otherwise acting in concert. PBOs do not include structures in which one depository institution is a subsidiary of another, or the organization is controlled by a company subject to the BHC Act and Home Ownership Loan Act.

The RO should contact the WO regarding any merger application that will be part of a PBO, subject to foreign ownership (25 percent or more in the aggregate) or control, and will not be part of a foreign banking organization subject to comprehensive consolidated supervision.

Further, the RO should consult with appropriate staff from the Anti-Money Laundering (AML) Section when assessing the AML statutory factor for any merger or consolidation transactions involving foreign ownership or control. The AML Section will advise the RO of any specific information needs, and will assist in determining if any country in question is identified as non-cooperative in deterring money laundering or if it is under investigation for potential money laundering activities.

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<sup>6</sup> Foreign ownership includes ownership by a foreign non-banking entity, a foreign bank, or a person who is not a citizen of the United States.

<sup>7</sup> Or equivalent LBS or CFI staff, as applicable.

<sup>8</sup> Among the transactions that do not require notice are acquisitions of voting securities subject to approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842(a)), section 18(c) of the FDI Act (12 U.S.C. 1828(c)), or section 10 of the Home Owners' Loan Act (12 U.S.C. 1467a).

<sup>9</sup> A PBO is created when at least one U.S. depository institution and one foreign bank are controlled either directly or indirectly by the same person or group of persons who are closely associated in their business dealings or otherwise acting in concert. It does not include structures in which one depository institution is a subsidiary of the other, or the organization is controlled by a company subject to the Bank Holding Company Act or the Savings and Loan Holding Company Act.

### Mergers Involving New Control Groups

Section 4(d) of the FDI Act provides that any state or federal depository institution that results from the merger of insured depository institutions or from the merger a noninsured depository institution with an insured depository institution shall continue as an insured depository institution. Therefore, if an organizing group forms a noninsured interim depository institution and causes that interim depository institution to be the resulting institution in a merger with an existing insured depository institution, the resulting institution would be insured by operation of law. Such a transaction would be subject to the FDIC's approval under the BMA as a merger transaction between an insured depository institution and a noninsured institution, and such structures present supervisory concerns that are more commonly found in de novo deposit insurance applications or Change in Bank Control Act applications. Notably, the BMA requires the FDIC to evaluate "financial and managerial resources and future prospects" for a resulting institution for which there may not be a supervisory record of the resulting management or ownership. In such cases, in order to favorably resolve the statutory factors, Case Managers may need to obtain information that is traditionally gathered in a deposit insurance application or Change in Bank Control Act applications.

### Mergers Involving Emergency Transactions or Immediate Action to Prevent Probable Failure

Case Managers should immediately contact the WO upon receipt of a merger application in cases where an emergency exists requiring expeditious action, or the FDIC may need to act immediately on a merger in order to prevent the probable failure of an institution.

### Qualifications for Mergers Involving the Acquisition of Failed Banks

The Case Manager should immediately contact the WO upon receipt of any merger application where an institution will pursue the acquisition of one or more failed banks. Similar to deposit insurance applications involving failed bank acquisitions, the FDIC will consider (in addition to applicable statutory factors under the BMA and Section 44 as applicable) whether the proposed merger includes, among other items, an acceptable business plan, resulting capital, and a satisfactory management team. The FDIC will also consider the information provided in the *Final Statement of Policy on Qualifications for Failed Bank Acquisitions* issued August 26, 2009. Investors interested in pursuing a merger transaction as a vehicle for ultimately acquiring failed institutions must obtain the requisite approvals or clearances from other applicable regulatory agencies and must meet the bid criteria established by the FDIC.

### Acquisition of a Company Engaged in Insurance Activities

As required under Section 307(c) of the Gramm-Leach-Bliley Act of 1999, if an applicant seeks to acquire a state-supervised insurance company, the Case Manager should consult with the applicable state insurance regulator and take the views of such insurance regulator into account in making a determination on the application.

## **IV. FORM OF APPLICATION**

The Interagency Bank Merger Act Application Form (Application Form) is used for any merger, consolidation, corporate reorganization, purchase and assumption, or other merger transaction. The Application Form contains an FDIC supplement that requires all FDIC applicants to provide certain information on the delineation of, and competition in, the relevant geographic market(s). Merger applications can be filed electronically through *FDICconnect*. Refer to *Applications*

*Overview*, Section 1.1 of these Procedures, for more information regarding applications filed through FDICconnect. The Application Form is available on the external FDIC website at: <https://www.fdic.gov/regulations/laws/forms/applications.html>.

## V. ACCEPTING AND PROCESSING THE APPLICATION

The Case Manager should process merger applications using the steps below and should refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.<sup>10</sup> A pre-filing meeting between the applicant and the appropriate regulatory agencies is strongly recommended to discuss filing requirements and other relevant matters.

Frequently a merger transaction is one part of a sequence of transactions that includes several steps that are consummated at a moment in time, more than one of which may require FDIC approval. Drawing a picture or flow chart of the transactions often helps in determining the structure of a merger, whether an additional application is required, the scope of a review and analysis that should be undertaken, and the appropriate conditions to be imposed. RO Legal should be consulted in complex or multi-step transactions to ensure that all necessary applications are filed appropriately. Given the complex and varying accounting requirements that may apply to these types of transactions, consider consulting the Regional Accountant regarding the review of financial projections and regulatory capital calculations.

If more than one merger is involved in a multi-step transaction, the FDIC may accept one application package so long as the FDIC separately exercises its authority to act on the proposed merger transactions and the public notice adequately describes the entire proposal. In such cases, a single record may be established in the FDIC's internal systems so long as the transaction description includes a detailed comment regarding the steps involved in the transaction and the specific authorities (regulation citations) under which FDIC approval has been requested.

1. Merger applications should be reviewed upon receipt, or as close to receipt as possible, to determine whether expedited processing applies and/or if there are conditions or issues that would justify removing the application from expedited processing pursuant to Section 303.11(c)(2) of the FDIC Rules and Regulations.
2. An application filed under this Section by an eligible depository institution as defined in Section 303.2(r) of the FDIC Rules and Regulations will be acknowledged in writing by the FDIC and will receive expedited processing, unless the applicant is notified in writing to the contrary and provided with the basis for that decision. Merger applications qualify for expedited processing if all parties to the merger transaction are eligible depository institutions and the resultant institution will be Well Capitalized; or the acquiring party is an eligible depository institution and the amount of the total assets to be transferred does not exceed an amount equal to ten percent of the acquiring institution's total assets as reported in its Call Report for the quarter immediately preceding the filing of the merger application.

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<sup>10</sup> The Case Manager should follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, Division of Depositor and Consumer Protection (DCP) notifications, WO action or input, delegations, etc., in *Applications Overview*, Section 1.1 of these Procedures.

3. Establish the record. All applications should be entered into at the appropriate internal database within three business days of receipt. In all cases, dates and comments in the record should be updated regularly to reflect the current status of the application.
4. Specific to merger applications, the Case Manager should:
  - Ensure that the application clearly identifies all parties to the transaction.
  - Ensure that the proposal, as described in the merger agreement and other narrative discussion, is consistent with the type of application filed. Any inconsistencies should be promptly brought to the applicant's attention and resolved prior to acceptance.
  - Ensure that the application addresses items 1 through 14 of the Application Form and all required supplemental agency information, as applicable. Responses should be complete and informative, with attachments if necessary.
  - Ensure that the defined relevant geographic market(s) are reasonable based on the discussion in the *Relevant Geographic Market* subpart of Part VI below. The applicant should be asked for any further support and/or explanation deemed necessary prior to acceptance.
  - For interstate mergers, refer to the Interstate Bank Mergers subpart of Part III above. If the application is deemed substantially complete, prepare and send an acceptance letter, unless authority for accepting the filing is not delegated to the RO.
5. Since this is a CRA "Covered Application," follow RO procedures for notifying DCP counterparts of receipt of a merger application. RMS RO staff will complete a DCP input form and email it to the appropriate DCP RO staff for review and comment. Refer to *Processing Applications Using CRA and Compliance Information*, Section 1.10 of these Procedures, for details.
6. Prepare and send a request to the Attorney General for a competitive factors report and include a copy of the application. The Department of Justice (DOJ) electronically submits biweekly reports to each RO, and these reports should be provided to the FDIC within 30 days (or 10 days if the FDIC advises the Attorney General of the United States (Attorney General) that an emergency exists requiring expeditious action). In the event the competitive factors report contains adverse findings, the applicant will be given an opportunity to submit comments to the FDIC on the contents of the competitive factors report. The FDIC Board has reserved the authority to act in cases in which the DOJ has provided an adverse competitive factors report.

A competitive factors report from the Attorney General is not required if the proposed merger transaction is solely between an IDI and one or more of its affiliates at the time the application is submitted. A competitive factors report from the Attorney General may also not be required if the FDIC finds that it must act immediately to prevent the probable failure of one of the IDIs involved in the merger transaction. However, in some cases where the FRB is acting on a related holding company application and has requested a competitive factors report, it may nonetheless be warranted for the FDIC to separately request a competitive factors report on the related bank merger from the Attorney General. The Case Manager should consult with WO in an instance such as this.

Section 18(c)(4)(A)(ii) of the FDI Act requires the other banking agencies to provide the FDIC a copy of their request to the Attorney General for competitive factors reports when the FDIC is not the responsible agency.

7. For merger transactions that are subject to FDIC approval under section 18(c)(1) of the Bank Merger Act and that involve a noninsured institution and an insured depository institution for which the FDIC is not the primary federal regulator, upon receipt of the application, the Case Manager should contact the OCC District Office or Federal Reserve District Bank responsible for supervising the insured depository institution, solicit the views of these other agency counterparts, and keep them informed of any issues or concerns that are raised throughout the application review process.
8. For interstate bank mergers, prepare and send a letter to the state bank supervisor of the host state requesting confirmation that the applicant has complied with the filing requirements of the host state and that a copy of the FDIC merger application was submitted to the state bank supervisor of the host state, as required by Section 44 of the FDI Act.
9. Thoroughly analyze the application and any supporting exhibits and materials (e.g., agreements or contracts related to the proposal, business plan, management, financial projections, supporting assumptions, organizational structure, affiliate information, etc.). As necessary, communicate any follow-up questions, issues, and/or information needs to the applicant and the other applicable regulators.
10. Complete the appropriate Summary of Investigation form.<sup>11</sup> Designate the subject and proposal by putting an X in either the "Merger" or "Purchase and Assumption" box ("Consolidation" and "Other" are rarely used). Check the appropriate type box - "Regular Merger," "Interim Merger," or "Corporate Reorganization." If the proposal is a Purchase and Assumption, check the "Regular Merger" or "Corporate Reorganization" type box. Refer to *Merger Types*, Part II of this Section, for a discussion of merger types. Section IV - Delegated Authority Approval Requisites of the SOI form cannot be completed until the effect on competition is analyzed. Recall that a competitive factors report may not be required from DOJ for most corporate reorganizations. However, the statutory factors in Section 18(c)(5) of the FDI Act must still be considered and resolved.
11. The SOI narrative should appropriately address the statutory factors set forth in Section 18(c)(5) and 18(c)(11) of the FDI Act. Refer to *Statutory Factors*, Part VI of this Section below. Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI.
12. Verify that the aggregate of the main office plus the number of branches reported by each bank agrees with the number of offices reported by the FDIC.<sup>12</sup> In the event of a discrepancy, obtain a branch listing from the FDIC database, determine the source of the difference(s), and ensure that any necessary structure changes are processed. The number of offices data fields in the SOI and in the system of record refer to the number of deposit-taking offices. The number reported by the target institution should equal the target's number of deposit-taking offices being acquired post consummation. List the

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<sup>11</sup> The Case Manager should follow the general instructions and requirements found in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instructions in this Section.

<sup>12</sup> Information relative to each bank's number of offices and Summary of Deposits (SOD) can be retrieved at [www2.fdic.gov/sod](http://www2.fdic.gov/sod). SOD data is only updated as of June 30<sup>th</sup> each year. Current information is available through the Information Workstation module of the appropriate internal database.

locations of any branches to be established in the comment section of the SOI or as an addendum.

13. If any branches are to be closed in connection with the merger, obtain written verification that provisions have been made by either the applicant or the other institution to comply with Section 42 of the FDI Act. Refer to the *Policy Statement of Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of Thrift Supervision Concerning Branch Closing Notices and Policies* for interpretations of Section 42. The acquiring or resulting institution is ultimately responsible for ensuring that the required notices are provided to its customers if the branches will be closed post consummation. The publication notice must identify any branches that will not be operated following consummation of the transaction. Refer to *Branch Closings*, Section 9 of these Procedures, for further information.

If the acquiring or resulting institution is an interstate bank **and** is closing a branch, the Case Manager must refer to the Interstate Bank Branch Closings discussion included in *Branch Closings*, Section 9 of these Procedures.

14. If an acquired bank or branch is to be operated under a different trade name than the acquiring bank, review the adequacy of steps taken to minimize the potential for customer confusion about federal deposit insurance coverage. Refer to the *Interagency Statement on Branch Names*, FIL 46-098, for additional information.
15. If approval is being recommended, prepare an approval letter, an Order and Basis, and a letter to the Attorney General advising of the approval. The approval letter shall include a statement that the transaction may not be consummated for the appropriate amount of days from the date of FDIC approval, as described in *Post Approval Waiting Period*, Part VIII of this Section. The Attorney General must be notified of all merger approvals, including corporate reorganizations. The Order and Basis should include the standard conditions imposed in Section 303.2(dd) of the FDIC Rules and Regulations, as well as any non-standard conditions deemed necessary. The Case Manager must obtain the applicant's written agreement to any non-standard conditions prior to submitting the approval documents for signature. Refer to *Standard and Non-standard Conditions*, Section 1.11 of these Procedures for further information. The number of offices reported on the SOI should match the number of offices reflected in the Order and Basis. If the Region has delegated authority, distribute the aforementioned documents upon approval, with copies to the appropriate regulatory agencies.
16. If approval of the merger appears warranted but the Region does not have delegated authority to act, forward a copy of the SOI, the draft approval letter, the draft Order and Basis, the draft letter to the Attorney General, and the applicant's written consent to any non-standard conditions to the WO for final action. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.
17. For any merger application that presents significant concerns or deficiencies that may result in a denial action, the RO shall advise the applicant of the concerns and deficiencies and provide an opportunity to submit additional information. If appropriate, such communication may be delayed until the WO concurs. If denial of the merger application appears warranted, Legal should be consulted as soon as possible for an assessment of the basis for issuing a denial. If recommending denial, the RO should send the SOI and

a draft disapproval letter to the WO for final action. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for further instruction.

18. Ensure that the common dollar amounts tie between the appropriate system of record, the SOI, and the Order and Basis, as these documents are the sources for information used to prepare the annual report to Congress on merger decisions. Figures for total assets and total deposits in the SOI (Section II – General Data) and within the Order should be rounded to the thousands. For corporate reorganizations in which the target institution is a wholly-owned subsidiary of the acquiring institution and, therefore, the institutions' financial information is already consolidated for Call Report purposes, total assets and offices acquired should generally be reflected as "0." If "0" is used, the SOI should provide an explanation in the comment section.
19. Update the appropriate system of record to reflect the date forwarded to the WO, if applicable, the final action, the date of the action, expiration date, hours devoted to the application, and any other required information.

#### Processing Procedures for Applications for Which a Competitive Factors Report is Not Required

A competitive factors report may not be required in connection with the acquisition by a bank holding company of another bank holding company, and the simultaneous merger of the subsidiary bank of the acquired holding company into the subsidiary bank of the acquiring holding company. If a full application is filed with and processed by the Federal Reserve, the FDIC is not required to obtain a competitive factors report. However, if the Federal Reserve waives the full application or delays acceptance until after the FDIC acts on the subsidiary bank merger transaction, a competitive factors report must be obtained in connection with the bank merger transaction. The Case Manager should confirm with their Federal Reserve counterpart whether a competitive factors report has been requested and if the competitive factor has been or will be assessed in the Federal Reserve's review process. The date of such contact, along with the counterpart's name and response, should be documented in the Summary of Investigation (SOI).

A substantially complete BMA application filing for mergers solely involving affiliates and for which a competitive factors report from the Attorney General is not required may be processed in accordance with the following procedures:

- (1) On the SOI form<sup>13</sup>:
  - In Section II – General Data, enter "NA" in all blocks of the Competitive Factors section; and
  - Provide an explanation of why the transaction qualifies for this processing procedure in the SOI comments.
  - Complete the SOI in accordance with the instructions above.
- (2) If the proposed merger transaction is solely between an IDI and one or more of its affiliates (with the affiliation existing at the time of filing), a competitive factor report from the Attorney General is not required. If such report was not obtained, the timeframe set forth

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<sup>13</sup> The Case Manager should follow the general instructions and a detailed discussion of SOI requirements for all types of applications found in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instructions in this Section.

in Section 303.64(a)(iii) of the FDIC Rules and Regulations is not applicable; however, all other timeframes set forth in Section 303.64 and described in *Time Frame for Processing*, Part VII of this Section, remain applicable.

- (3) If approval is warranted, prepare and send the applicant an approval letter and an Order and Basis. If the proposed merger transaction is solely between an IDI and one or more of its affiliates, the approval letter shall state that the transaction may be consummated immediately. Also, send the DOJ a copy of the approval letter and Order and Basis.

### Emergency and Probable Failure Processing Procedures

The Regional Director may request approval to process a merger application under the probable failure or emergency provisions of the BMA by notifying the Risk Management Examinations Branch (RMEB) Associate Director (or LBS or CFI Associate Director, as applicable) by email. The request should include a brief summary of the proposal, a statement on the competitive aspects, and the reason(s) why approval should be granted. However, a final determination to approve an application subject to the probable failure or emergency provisions is reserved to the FDIC Board.

**Probable Failure** – In merger transactions involving the probable failure of one of the institutions, there is no publication requirement, comment period, or requirement for a competitive factors report, and the transaction may be consummated immediately upon approval.<sup>14</sup>

**Emergency** - In merger transactions involving an emergency requiring expeditious action, the publication requirements and comment period are reduced, as described in *Publication Requirement*, Part IX of this Section. The period for receiving competitive factors reports is shortened to 10 days and the post approval waiting period is reduced to 5 days.

## VI. STATUTORY FACTORS

The following statutory factors must be evaluated when processing a merger application. They must also be favorably resolved to retain delegated authority. The *FDIC Statement of Policy on Bank Merger Transactions* also provides information on the analysis of the statutory factors. The consideration and finding on each factor must be documented in the SOI. Each of the following factors is discussed in further depth below:

- Whether the proposed merger transaction would result in a monopoly;
- Whether the effect of the proposed merger in any section of the country would substantially lessen competition or tend to create a monopoly, or in any other manner restrain trade, unless the responsible agency finds that the anti-competitive 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;
- Financial and Managerial Resources of the Existing and Proposed Institutions;
- Future Prospects of the Existing and Proposed Institutions;
- Convenience and Needs of the Community to be Served;
- The Risk to the Stability of the United States Banking or Financial System;
- Effectiveness of Involved Insured Depository Institutions in Combatting Anti-Money Laundering Activities; and

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<sup>14</sup> Pursuant to Section 18(c) of the FDI Act and Section 303.65 of the FDIC Rules and Regulations.



- Whether, upon consummation of an interstate merger transaction, the resulting insured depository institution would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States.

The BMA requires the FDIC to consider the financial and managerial resources and future prospects of the existing and proposed/resulting institutions. Consultation with WO is required in cases in which the selling institution is expected to be weakened by virtue of the transaction (e.g., if the selling institution is planning to sell performing assets and retain a significant portion of its problem assets). In a case such as this example, it may not be possible to favorably resolve all of the statutory factors, thereby removing delegated authority to act on the transaction from the Regional Office (RO).

At a minimum, the narrative portion of the SOI should include the following:

- A synopsis of the proposed transaction. For transactions in which total assets (TA) acquired differ from TA of the target, such as with branch purchase and assumption transactions, the narrative should describe the composition of assets acquired;
- Comments concerning the structure, background, and condition of each party to the transaction (and parent companies or other key affiliates, as applicable);
- A discussion of each statutory factor. Comments should be sufficiently detailed to support the determination made for each respective factor;
- A summary of the views and recommendations of other regulators, along with approval dates, if applicable;
- A summary of any recommended standard and non-standard conditions; and
- The recommended action.

### Effect on Competition

Section 18(c)(5) of the FDI Act prohibits the FDIC from approving (1) any merger that would result in a monopoly, or be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or (2) any merger whose effect in any section of the country may be to substantially lessen competition, or tend to create a monopoly, or in any manner restrain trade, unless the FDIC finds that 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. For example, preventing the probable failure of one of the institutions involved in a transaction may be of sufficient public interest to outweigh the anticompetitive effects of a transaction. For transactions exclusively involving affiliates, the “effect on competition” analysis and SOI comment will state that the merger will not have an effect on competition because there is no change in the competitive dynamics in any relevant market.

### *Relevant Market*

The Merger SOP states that the relevant geographic market(s) (RGM) includes the areas in which the offices to be acquired are located and the areas from which those offices derive the predominant portion of their loans, deposits, or other business. In delineating the RGM, the FDIC will also consider the location of the acquiring institution's offices in relation to the offices to be acquired. The RGM also includes the areas where existing and potential customers impacted by the proposed merger transaction may practically turn for alternative sources of banking services. The Federal Reserve Bank of St. Louis maintains a website called CASSIDI™

(<http://cassidi.stlouisfed.org/>) that includes up-to-date information about banking markets defined by the Federal Reserve District Banks, CASSIDI™, and Case Managers should consider that these defined markets are presumptively reasonable for the purposes of determining the RGMs for a merger transaction. The Merger SOP states that the relevant product market(s) include(s) the banking services currently offered by the merging institutions and to be offered by the resulting institution. The relevant product market(s) may also include the functional equivalent of such services offered by other types of competitors, including other depository institutions, securities firms, or finance companies.

The merger application form and related FDIC supplement to the form require applicants to delineate the RGM and provide supporting data and commentary for such delineation. The supplement also requires specific information regarding competition within each RGM. For all merger transactions involving nonaffiliated entities, the applicant must provide a discussion of the effects of the proposed transaction on existing competition in each RGM where the applicant and target institution operate.

In presenting the delineated RGM, applicants may delineate the RGM through data, statistical, or other information, including information regarding commuting patterns of the general population and/or customer data indicating where customers work and could reasonably be expected to find alternative sources of banking services. Such information is available from the FDIC external website, the U.S. Census Bureau, and county and state chambers of commerce. These considerations inform the Federal Reserve's geographic market definitions (available through CASSIDI™), and, as noted above, these defined markets should presumptively be considered reasonable. In all cases, the reasonableness of the applicant's delineation should be fully supported.

Because the delineation of the RGM is the foundation for determining the effect on competition, the Case Manager must review the delineation for reasonableness. In determining reasonableness, the Case Manager should first consider the use of defined markets using the Federal Reserve's geographic market definitions. If a Federal Reserve geographic market definition is not used, the Case Manager should consider the degree to which the communities encompassed in the delineated RGM are integrated through migration patterns, including for work, commerce, and recreation; the ease and ability for customers to substitute products, services, and providers; and expansionary or contractionary developments within the market. Further, to the extent that related applications are submitted to other regulatory agencies, the Case Manager should consider the views, if any, of those agencies, including the chartering authority and Federal Reserve. Differences among the agencies should be identified and reviewed.

The findings of this RGM analysis may require the Case Manager to reconsider the appropriateness of the applicant's RGM delineation. However, because of the importance of the RGM delineation, the basis for differences between the revised RGM and the applicant's described RGM should be well documented, and the use of a modified RGM well supported. The Case Manager is encouraged to consult with the WO (RMS and Legal) if analysis leads to a significant difference between the FDIC-determined RGM and the RGM described by the applicant.

In any case in which the FDIC will review the application based on a revised RGM, the Case Manager, following management concurrence, should inform the applicant of the revised RGM, and provide the applicant an opportunity to submit additional information in support of the described RGM.

### *Analysis of Competitive Effects*

In analyzing the competitive effects of a proposed merger transaction, the FDIC will focus particularly on the type and extent of competition that exists and that will be eliminated, reduced, or enhanced by the proposed merger. The FDIC will also consider the competitive impact of financial service providers located outside a RGM where such providers, individually or collectively, materially influence the nature, pricing, or quality of products and services offered by the providers currently operating within the RGM.

Generally, total deposits adequately serves as a rough proxy for overall share of the banking business in the RGM. As such, the FDIC will initially focus on the respective shares of total deposits held by the merging institutions and the other financial service providers with offices in the RGM, unless the other providers' loan, deposit, or other business varies markedly from that of the merging institutions. The FDIC will also consider other analytical methods that reasonably reflect the dynamics of the market, including deposit and loan totals, the number and volume of transactions, contributions to net income, or other measures.

In cases in which it is clear based on market share considerations alone that the proposed merger would not significantly increase concentration in an unconcentrated market, a favorable finding will be made on the competitive factor.

### *Herfindahl-Hirschman Index*

Among the techniques to assess the competitive effects of a proposed merger, the FDIC will also consider the degree of concentration within the RGM using the Herfindahl-Hirschman Index (HHI) as a primary measure of market concentration. The HHI is a statistical measure of market concentration.

The HHI for a given market is calculated by squaring each individual competitor's percentage share of total deposits within the RGM and then summing the squared market share products. The HHI for the market is the sum of the squares of the market shares of all competitors in the RGM. For example, the HHI for a market with a single competitor would be  $100^2$  or 10,000; for a market with five competitors with equal market shares, the HHI would be 2,000, calculated as  $20^2+20^2+20^2+20^2+20^2$ . For purposes of this test, a reasonable approximation for the RGM consisting of one or more predefined areas may be used. Examples of such predefined areas include counties, the U.S. Census Bureau's MSAs, or the RGMs defined by the Federal Reserve Banks.

For all cases, the HHI in each RGM should be documented in the SOI. The FDIC normally will not deny a proposed merger transaction on competitive grounds (absent objection from the DOJ) when the post-merger HHI in each RGM is 1,800 or less or, if more than 1,800, reflects an increase of less than 200 points from the pre-merger HHI. When a proposed merger fails this initial screen, the FDIC will consider more closely the various competitive dynamics at work in the market, taking into account the variety of factors that may be relevant in a particular proposal. These might include:

- The number, size, financial strength, quality of management, and aggressiveness of the various participants in the market;
- The likelihood of new participants entering the market based on its attractiveness in terms of population, income levels, economic growth, and other features;

- Any legal impediments to entry or expansion;
- Definitive entry plans by specifically identified entities;
- The likelihood that new entrants might enter the market by less direct means - for example, electronic banking with local advertisement of the availability of such services (this consideration will be particularly important if there is evidence that the possibility of such entry tends to encourage competitive pricing and to maintain the quality of services offered by the existing competitors in the market); and
- The extent to which the proposed merger would likely create a stronger, more efficient institution able to compete more vigorously in the RGM.

In most cases, pro forma HHI calculations are available through the Summary of Deposits website at <http://www2.fdic.gov/sod>. In addition, banking market information, institution specific data and pro forma HHI calculations are available through the Federal Reserve Bank of St. Louis website at <https://cassidi.stlouisfed.org/index>.

### *Competitive Factors Report*

The FDIC is required to request a competitive factors report from the Attorney General for all merger transactions, except for those involving solely an IDI and one or more of its affiliates (with the affiliation existing at the time of filing). However, such a request may not be required if the FDIC finds that it must act immediately to prevent the probable failure of one of the IDIs involved in the merger transaction. In addition, the other agencies are required to provide the FDIC a copy of the request to the Attorney General when the FDIC is not the agency responsible for acting on the merger application. The results of the report, if applicable, should be documented in the SOI.

The following terms are used in competitive factors reports to describe competitive effects:

**Monopoly** - The proposed transaction must be disapproved in accordance with Section 18(c)(5)(A) of the FDI Act;

**Substantially Adverse** - The proposed transaction would have anticompetitive effects which preclude approval, unless the anticompetitive effects are clearly outweighed in the public interest by the probable benefit of the transaction in meeting the convenience and needs of the community to be served;

**Adverse** - The proposed transaction would have anticompetitive effects which would be material to the decision, but which would not preclude approval; and

**No Significant Effect** - The anticompetitive effects of the proposed transaction, if any, would not be material to the decision.

The RO does not have delegated authority to approve a merger application if the resulting institution will hold more than 35 percent of the deposits in an RGM, or if the DOJ does not issue a “No Significant Effect” opinion on a competitive factors report.

### Financial and Managerial Resources of the Existing and Proposed Institutions

The SOI comments should describe and include an assessment of the overall condition of each institution, as well as the combined financial resources. Available holding company support should also be considered. When questions are raised regarding the source or availability of

proposed funding for the acquisition, the FDIC will verify the source of funding and validate the availability of funds.

The SOI comments should describe and include an assessment of managerial resources. Comments should address ownership and active management of each institution as well as the combined institution. Comments should include an analysis of each institution's corporate governance practices as well as a review of managements' past responsiveness to regulatory recommendations. Any significant management changes should be addressed, especially if the target institution is, or recently was, a problem institution and the applicant intends to retain certain senior or key management personnel of the target institution. Any insider transactions should be reviewed closely and discussed in the SOI.

Applications involving interim mergers should be reviewed closely regarding proposed board and management changes. The application should designate clearly the management of the resulting institution and the organization with which they are associated (the applicant bank or the existing holding company organization).

#### Future Prospects of the Existing and Proposed Institutions

The SOI comments should describe and include an assessment of future prospects for the resultant institution, including earnings and capital projections, and other relevant financial and operational aspects for the first year of operation following consummation. Pro forma capital and earnings ratios for the resultant institution for the end of the most recent quarter and for the first year of operation should be included in the SOI. In the event of a purchase and assumption, the projected effect of the transaction on the target's capital, earnings, and other relevant financial and operational aspects should also be included in the SOI comments. An assessment of the applicant's strategic plan and how the proposed merger supports that plan should be included in the SOI comments. Any changes to current products and services offered by either the applicant or the target institution should also be described here.

In situations in which the target institution will continue to operate, such as a branch acquisition, it is also important to assess the future prospects of the target institution. Situations in which the target institution is projected to be weaker after the merger could result in an unsatisfactory finding for this factor, and the Case Manager should consult with the WO.

#### Convenience and Needs of the Community to be Served

The FDIC will consider the extent to which the proposed merger is likely to impact the services to the general public through such capabilities as higher lending limits, new or expanded services, reduced prices, increased convenience in utilizing the services and facilities of the resulting institution, or other benefits. Since this is a "Covered Application," RMS shall notify DCP counterparts of receipt of a merger application. In assessing the convenience and needs of the community to be served, the FDIC must consider each institution's CRA performance evaluation record. Items to consider include:

- An unsatisfactory record for the acquirer may form the basis for a denial recommendation or conditional approval of an application.
- An unsatisfactory record for the target may be resolved with the acquisition.
- An unsatisfactory record for the target may not be resolved with the acquisition and may form the basis for a denial recommendation or conditional approval of an application.

Further discussion of the DCP notification process can be found in Section 1.10 Processing Applications Using CRA and Compliance Information.

#### Effectiveness in Combating Money Laundering Activities

The FDIC must take into consideration the effectiveness of each IDI involved in a proposed merger transaction in combating money laundering activities, including in any overseas branches. The evaluation of this factor should include an analysis of each IDI's record of BSA/AML compliance. In general, the most recent safety and soundness examination (or onsite BSA/AML review, if conducted separately) of each IDI should indicate that a satisfactory BSA/AML program has been implemented to favorably resolve this factor. Further, the application materials should provide clear support that the resultant institution will operate under a satisfactory BSA/AML compliance program commensurate with its risk profile and business plan. If an IDI involved in a merger transaction is not directly supervised by the FDIC, the FDIC will generally rely on the primary federal regulator's supervisory information when evaluating the institution's effectiveness in combating money laundering activities.

Significant unresolved BSA/AML deficiencies, or an outstanding or proposed formal or informal enforcement action that includes provisions related to BSA/AML, will generally preclude the favorable resolution of this factor. In such circumstances, the Case Manager should consult with the RO Special Activities Case Manager and RO Legal, and, as appropriate, the WO BSA/AML Section, RMAS, other RMS branches as appropriate, and Legal, to consider whether any mitigating factors are sufficient to support a favorable finding based on the overall facts and circumstances. Sufficient mitigating factors may include, for instance, material, demonstrated progress toward implementing a satisfactory BSA/AML program that addresses the underlying issues or concerns (including with respect to any required "look back" reviews), or validation that the acquiring institution's satisfactory BSA/AML program will address the less than satisfactory record of the target institution. Absent such mitigating factors, RMS may not be able to find favorably on this factor, and a denial recommendation may be appropriate. In limited instances, a targeted BSA/AML visitation may be appropriate to assess management's progress in addressing the BSA/AML program weaknesses.

The SOI comments should document the BSA/AML records of each institution involved in the transaction, including whether the overall BSA/AML programs have been, and are expected to remain, satisfactory. Comments should also address the nature and extent of any BSA/AML violations or other deficiencies/weaknesses, the primary provisions of any formal or informal enforcement actions, and the demonstrated progress with respect to any corrective measures taken by management.

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

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). Case Managers should consider both quantitative and qualitative metrics when evaluating a transaction's impact on financial stability. The following is a non-exhaustive list of quantitative metrics for Case Managers to consider: 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 difficulty in resolving the resulting firm, such as the opacity and complexity of the resulting institution's operations.

The RO should consult with the WO on any proposed merger transaction involving a systemically important institution or if it appears that an unfavorable resolution of this factor is possible.

## VII. TIME FRAME FOR PROCESSING

### Expedited Processing for Eligible Institutions:

To qualify for expedited processing, all entities must be "eligible" institutions as defined in Section 303.2(r) of the FDIC Rules and Regulations, and the resulting institution must be Well Capitalized immediately following the merger; or the acquiring party is an eligible depository institution, and the amount of the total assets to be transferred does not exceed ten percent of the acquiring institution's total assets, as reported in its Call Report for the quarter immediately preceding the filing of the merger application. Pursuant to Section 303.64 of the FDIC Rules and Regulations, the FDIC will take action on an expedited application by the date that is the **latest** of:

- 45 days after the date of the FDIC's receipt of a substantially complete merger application;
- 10 days after the date of the last publication;
- 5 days after receipt of the Attorney General's report on the competitive factors (not applicable to corporate reorganizations); or
- For an interstate bank merger subject to the provisions of Section 44 of the FDI Act, 5 days after the FDIC confirms that the applicant has satisfactorily complied with the filing requirements of the resulting institution's host state and submitted a copy of the FDIC merger application to the host state's bank supervisor.

Failure to act within the expedited processing timeframes does NOT constitute an automatic or default approval.

### Standard Processing:

Statutory: None

RO Processing Guideline: 60 days from receipt of a substantially complete application.

### Earliest Date of Approval

Assuming all other requirements for approval have been met, the earliest date of approval for applications requiring public notice is the day after the comment period ends.

Mergers involving state savings associations are subject to different statutory processing timeframes, as described above in *Special Considerations for Mergers with Certain Characteristics*, Part III of this Section.

## VIII. POST APPROVAL WAITING PERIOD

Section 18(c)(6) of the FDI Act provides that if the agency has not received any adverse comments from the Attorney General relating to the competitive factors, the 30-day post approval waiting period may be reduced with concurrence of the Attorney General, to a period of not less than 15 days. In transmittal letters accompanying favorable competitive reports to the agencies, the DOJ typically states that it concurs in authorizing the consummation of BMA transactions 15 days after the date of approval by the agency. The waiting period must be stated in the Order and Basis.

**Emergency** - For merger transactions involving an emergency requiring expeditious action, the post approval waiting period is shortened to five days.

**Probable Failure** - For merger transactions involving the probable failure of one of the institutions, there is no post-approval waiting period and the merger may be consummated immediately upon approval.

**Corporate Reorganizations** - If the proposed merger transaction is solely between an IDI and one or more of its affiliates and the FDIC has not requested a competitive factors report from the Attorney General, there is no post-approval waiting period and the merger may be consummated immediately upon approval.

## IX. PUBLICATION REQUIREMENT

The applicant must publish notice of the proposed transaction at least three times, at approximately equal intervals, in a newspaper of general circulation in the community or communities in which the main offices of the entities involved are located, or, if there is no such newspaper in the community, in the geographically closest newspaper of general circulation. The first publication of the notice should be as close as practicable to the date on which the application is filed with the FDIC, but no more than five days prior to the filing date. Public comments must be received by the Regional Director within 30 days after the first publication of the notice. Section 303.9 of the FDIC Rules and Regulations provides for comment period extensions in certain situations. If it is contemplated that the resulting institution will operate offices of the other institution(s) as branches, the following statement shall be included in the notice:

“It is contemplated that all offices of the above named institutions will continue to be operated (with the exception of [insert identity and location of each office that will not be operated]).”

The last publication of the notice shall appear on the 25th day after the first publication of the notice or the newspaper's publication date closest to 25 days after the first publication. The applicant must furnish evidence of publication of the notice to the Regional Director following compliance with the publication requirement.

**Emergency** – The publication requirements for merger transactions involving an emergency are twice during a 10-day period: first, as soon as possible after the FDIC notifies the applicant that the merger will be processed as an emergency requiring expeditious action; and, second, on the 7th day or the newspaper's publication date closest to 7 days after the date of first publication. This timeframe will allow the public 10 days after the first publication to comment.

**Probable Failure** - For merger transactions involving the probable failure of one of the institutions, there is no publication requirement or comment period.



## X. DELEGATED AUTHORITY

Below are examples of transactions for which the RO generally does not have delegated authority to act on merger applications:

- a) Combined deposits in an RGM exceed 35 percent;
- b) The FDIC has received an unfavorable competitive factors report from the Attorney General;
- c) One or more of the statutory factors in sections 18(c)(5) and 18(c)(11) are unfavorably resolved;
- d) Compliance with the CRA and any applicable related regulations, including 12 CFR Part 345, is unfavorably resolved;
- f) The merger involves the acquisition of failed banks;
- g) The resultant institution will be an ILC;
- h) The FDIC determines that the application should be denied; or
- i) There are no matters that would establish or change existing FDIC policy, attract unusual attention or publicity, or involve a matter of first impression.

In such instances, RO and WO staff should coordinate the review of the application. Refer to *Applications Overview*, Section 1.1 of these Procedures, for a discussion of FDIC, RMS and RO delegations of authority regarding applications, notices and other filings, and expectations for applications requiring WO action or input.

### Applications Involving ILCs

On September 11, 2007, the FDIC Board of Directors restored, reinstated, and re-delegated authority to the RMS Director to act on certain filings by, or with respect to, ILCs. The restoration and reinstatement of previously suspended delegations did not include merger applications in which the acquiring, assuming, or resulting institution would be an industrial bank. Thus, the FDIC Board of Directors retains authority to accept and act on all merger applications in which the acquiring, assuming, or resulting institution would be an industrial bank.

The RO should neither accept the application nor communicate to the applicant that the application is substantially complete unless authorized by the FDIC Board. ROs should forward any merger application involving an ILC to the WO for final action in accordance with the following procedures:

- Upon receipt, the RMS Deputy Regional Director shall provide email notice of the application to the appropriate RMEB Associate Director and RMAS Section Chief.
- The RO should also provide a copy of the application to the appropriate RMAS Section Chief.
- Upon completing its review of the application, the Regional Director should forward all application materials to the Associate Director.

## XI. REFERENCES

*Risk Management Manual of Examination Policies – Application Section*

*FDIC Rules and Regulations Parts 303, 345, 390, and 391*

*Federal Deposit Insurance Act Sections 18(c), 18(d), 42, and 44*

*FDIC Statement of Policy on Bank Merger Transactions*

*Final Statement of Policy on Qualifications for Failed Bank Acquisitions*

*Interagency Policy Statement on Branch Closing Notices and Policies*

*Interagency Statement on Branch Names / Guidance on the Use of Trade Names, FIL-46-98, dated May 1, 1998*

*Merger Applications, Consideration of a New Factor in Bank Merger Act Transactions – “Anti-Money Laundering Record,” FIL-109-2001, dated December 28, 2001*

*Competitive Analysis and Structure Source Instrument for Depository Institutions*  
(<https://cassidi.stlouisfed.org/index>)

*Deposit Market Share Reports - Summary of Deposits* (<http://www2.fdic.gov/sod>)