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FDIC Releases Proposed Updates to Statement of Policy on Bank Merger Transactions

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The Federal Deposit Insurance Corporation ("**FDIC**") recently published a Federal Register notice seeking public comment on proposed revisions to the FDIC's Statement of Policy on Bank Merger Transactions (the "**SOP**"). Relevant to all insured depository institutions, the revised SOP puts forward a "principles-based outline" detailing the FDIC's management of its duties in reviewing merger transactions under the Bank Merger Act (the "**BMA**") and, at a high level, grants the FDIC more discretion when reviewing bank merger applications. A brief summary of the SOP's highlights is provided below.

- ***The FDIC's General Expectations for Bank Merger Application Processing.*** The SOP stresses the strategic importance of the pre-filing process and the filing of complete applications – highlighting the FDIC's expectation that financial projections and related analyses not only be included with all applications, but also be well supported and adequately detailed. The SOP further emphasizes that the rationales for proposed transactions must be underpinned "by studies, surveys, analyses and reports, including those prepared by or for officers, directors or deal team leads," which also need to be included with any filing.
- ***Bank Merger Application Adjudication Guidance.*** The SOP provides that the FDIC will not use or rely on written conditions in approval orders as a means for positively resolving any statutory factors that otherwise present significant issues. Furthermore, the SOP articulates the following elements, among others, that would likely lead to a merger application receiving unfavorable findings:
  - Non-compliance with applicable statutes, rules or regulations (e.g., transactions that would exceed the 10% nationwide deposit limit, issued and/or pending enforcement actions, etc.);
  - Unsafe or unsound condition(s) relating to the existing insured depository institutions or the resulting insured depository institution;
  - Less than satisfactory examination ratings (e.g., information technology or trust examinations);
  - Material concerns about financial performance or condition, risk profile or future prospects;
  - Substandard management (e.g., significant turnover, weak corporate governance, complacent oversight and administration, etc.);
  - Partial, unreasonable or unsupported projections, analyses and/or assumptions; or
  - A lack of sustained performance under corrective programs, particularly when the proposed transaction concerns the areas that are the subject of the corrective program.
- ***Potential Monopolistic or Anticompetitive Effects of Bank Merger Applications.*** The SOP provides that the FDIC will assess the potential monopolistic or anticompetitive effects of a given merger application on an individualized level by tailoring evaluations to consider the following:
  - The size and competitive implications of the resulting insured depository institutions;
  - All relevant market participants (e.g., any other financial service providers considered to be competitive with merging entities – potentially even those that are located outside the geographic market if such providers may materially influence the market in question); and
  - Any additional data sources or analytical approaches necessary to fully assess the competitive effects of proposed mergers involving insured depository institutions with specialty lines of business or non-traditional products, services or delivery methods.

Importantly, the SOP indicates that, as a means to alleviate any potential monopolistic or anticompetitive concerns, the FDIC may require divestitures prior to the consummation of a proposed merger. In such cases, the SOP states that the FDIC would typically require selling institutions to refrain from entering into or enforcing existing non-competes with personnel of divested entities.

- ***Capital Requirements Conditions on Bank Merger Applications.*** The SOP provides that the FDIC may impose a number of conditions on merger applications in order to best ensure resultant insured depository institutions have the ability to satisfy applicable capital standards. For example, the FDIC may require capital levels that are higher than applicable capital standards and can also require a resulting insured depository institution to enter into written agreements addressing capital maintenance requirements, liquidity or funding support, affiliate transactions, etc.
- ***The FDIC's Expectations Regarding the Needs of the Community to Be Served by Resulting Insured Depository Institutions.*** The SOP provides that the FDIC expects mergers to enable resulting insured depository institutions to better meet the convenience and needs of communities to be served and wants bank merger applicants to be able to demonstrate such betterment. For example, the FDIC will want bank merger applicants to do the following:
    - Demonstrate how the transaction will benefit the public (e.g., by providing higher lending limits, greater access to existing products and services, new or expanded products or services, reduced prices and fees, etc.);
    - Provide specific, forward-looking information meant to allow the FDIC to assess the expected benefits of the merger on the convenience and needs of the community to be served; and
    - Provide for each institution a record of compliance with consumer protection requirements and maintaining a sound and effective compliance management system.
- ***Minimizing Risks to the Stability of the U.S. Banking or Financial System.*** The SOP provides that the FDIC considers the risk presented by a proposed merger to the stability of the U.S. banking or financial system by assessing the following factors:
    - Size of the entities involved;
    - Availability of substitute providers for critical products or services to be offered by a resulting insured depository institution;
    - Degree of interconnectedness a resulting insured depository institution would have with the U.S. banking or financial system;
    - Extent to which a resulting insured depository institution adds to the complexity of the U.S. banking or financial system; and
    - Extent of a resulting insured depository institution's cross-border activities.

  While the size of entities involved in a merger would not be the FDIC's sole focus for determining system-wide risk in any case, the SOP does notably provide that proposed mergers resulting in insured depository institutions in excess of $100 billion would automatically be subject to greater scrutiny by the FDIC.

Comments related to all aspects of the SOP (available here) are encouraged and must be submitted to the FDIC on or before May 20, 2024. However, the FDIC is specifically seeking comment on a number of questions, including the following:

1. Does the SOP's structure effectively present the FDIC's expectations with regard to the agency's review and evaluation of merger applications? How could the SOP's structure be improved?
2. How might the FDIC provide more clarity regarding the contexts in which a transaction would be subject to FDIC approval under the BMA?
3. To what extent is the FDIC's approach to analyzing the competitive effects of a proposed merger transaction appropriate? What changes to the current approach should the FDIC consider to better reflect present-day competitive conditions?
4. Is the geographic market definition outdated? Would it be appropriate to define relevant geographic markets by reference to markets in which the merging institutions have delineated CRA assessment areas?
5. How should the SOP address analytics for rural, minority, or low- to moderate-income communities? What type of analytical standards or criteria would be appropriate?
6. To what extent are the FDIC's evaluations of (i) financial resources, (ii) managerial resources and/or (iii) future prospects appropriate, and what additional items, if any, should be considered?

7. How could the SOP more effectively describe the FDIC's expectations with regard to its review of the convenience and needs factor, and what considerations, if any, are overlooked?

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