March 21, 2024

FDIC Proposes Revised Statement of Policy on Bank Mergers

Proposal Would Update Long-Standing Statement of Policy to Reflect Subsequent Legislative Developments and to Address "Continued Growth and Consolidation" in the Banking Industry

SUMMARY

Today, the Federal Deposit Insurance Corporation (the "FDIC") issued a request for comment (the "RFC" available here) on proposed revisions to its Statement of Policy on Bank Merger Transactions (the "Proposed SOP"). The Proposed SOP updates the current SOP[1] and seeks to "strengthen[] and clarif[y] the FDIC's policies related to the evaluation of bank merger applications" under the Bank Merger Act of 1960 (as amended, the "Bank Merger Act") in light of the "significant changes [that] have occurred in the banking industry and financial system" in the last two decades.[2] As a general matter, under the Proposed SOP the FDIC would have broader discretion when reviewing merger applications.

The RFC solicits public comment on "all aspects of the Proposed SOP"[3] and requests comments on 39 enumerated sets of questions on a broad set of topics. Concurrently with the Proposed SOP, the FDIC is seeking comment on proposed revisions to its supplemental section to the Interagency Bank Merger Act Application form.

Comments on the Proposed SOP and other matters raised in the RFC will be due 60 days after publication in the Federal Register.

BACKGROUND

The Proposed SOP comes against the background of a reexamination of bank merger policy by the Biden Administration and bank regulatory agencies over the past two years. In July 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy (available here) urging, among other things, a “revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956.” In accordance with that directive, (i) in December 2021, the U.S. Department of Justice’s Antitrust Division (the “DOJ”) announced that it was seeking public comment on “whether and how the [DOJ] should revise the 1995 Bank Merger Competitive Review Guidelines,” which explain the analytical framework that guides the competition review of bank mergers[4] and (ii) in January 2024, the Office of the Comptroller of the Currency (the “OCC”) requested comment on a proposed rulemaking regarding bank mergers, which would eliminate the existing expedited review and streamlined application provisions for business combinations and would add a new policy statement summarizing the principles the OCC uses when reviewing bank merger applications.[5]

Since 2022, the FDIC has signaled that it would be revisiting its approach to review of bank merger transactions, and that it is working with the OCC, the Federal Reserve, and the DOJ on updates to the analytical framework related to those transactions. The current SOP was last published for comment in 1997, and was revised in 2002 and 2008 without being issued for public comment to reflect, among other things, the anti-money-laundering statutory factor and amendments to the Bank Merger Act resulting from the Financial Services Regulatory Relief Act of 2006. In March 2022, the FDIC issued a request for information on a wide range of issues relating to bank merger transactions (the “2022 RFI”).[6] In November 2023, FDIC Chairman Martin J. Gruenberg, in his testimony to the Senate Committee on Banking, Housing, and Urban Affairs (available here), noted that “[a]lthough there has been a significant amount of consolidation in the banking sector over the last thirty years, facilitated in part by mergers and acquisitions, there has not been a significant review of the implementation of the [Bank Merger Act] by the banking agencies in that time” and that “[t]he FDIC is evaluating and considering the comments received [as part of the 2022 RFI] as it considers changes to the merger review framework, as appropriate.”

OVERVIEW OF THE PROPOSED SOP

Today, the FDIC took a further step toward updating its bank merger-related regulatory review framework by issuing the RFC. According to the FDIC, the Proposed SOP is intended to: (i) update and clarify the FDIC’s policies and expectations related to the evaluation of bank merger transactions, (ii) reflect regulatory, legislative and industry changes since 2008, including the financial stability factor added to the Bank Merger Act by the Dodd-Frank Wall Street Reform and Consumer Protection Act, (iii) incorporate the FDIC’s consideration of the comments it received as part of the 2022 RFI and (iv) address evaluative considerations for each statutory factor under the Bank Merger Act.[7]

The Proposed SOP differs from the current SOP in both structural and substantive respects. For example, the Proposed SOP includes a separate discussion of each statutory factor, which the FDIC considers to be “more principles based”[8] than the current SOP. Each section includes a declarative statement aimed at making the FDIC Board’s expectations with respect to a specific statutory factor more transparent as well as an accompanying narrative that describes the FDIC’s analytical considerations for such factor. Certain of the stated expectations appear to represent a departure from the current SOP guidance and past practice at the FDIC and DOJ, including most notably:

- With respect to the competitive effects statutory factor, in cases where divestitures may be necessary, that the FDIC expects such divestitures to occur before completion of the merger transaction;[9]
- Regarding the convenience and needs statutory factor, an expectation that (i) applicants must demonstrate that a resulting institution will "better meet" the convenience and needs of the community to be served "than would occur absent the merger" and (ii) public hearings will be held for transactions with a resulting institution exceeding $50 billion in total assets or for which a "significant" number of CRA protests are received;[10] and
- In respect of the financial stability factor, that a resulting institution with $100 billion or more in total assets will be subject to heightened scrutiny as it is "more likely" to present potential financial stability concerns, although the FDIC recognizes that "size is only one of several important considerations that needs to be evaluated in the context of other criteria."[11]

Other noteworthy differences from the current SOP include: (i) a new section titled "Jurisdiction and Scope," which discusses the types of transactions the FDIC views as requiring an FDIC approval, highlighting that its jurisdiction includes asset acquisitions by banks from non-insured entities (including a bank's own non-bank subsidiaries) that could be the substantive equivalent of a merger (such as the acquisition of all or substantially all of a non-insured entity's assets or a purchase and assumption transaction) and the assumption by an insured depository institution ("IDI") of liability to pay *any* deposit or similar liabilities of any non-insured bank or entity, noting in particular that the FDIC broadly interprets what it means to assume liability to pay deposits and that a formal written agreement between an IDI and another entity to transfer deposit liabilities (such as a circumstance where customers are solicited to transfer deposits to an IDI in connection with an arrangement to which that IDI is a party) is not required to trigger jurisdiction;[12] and (ii) a discussion of how the FDIC considers applications from non-banks (*i.e.*, banks the parent companies of which are not regulated as bank holding companies), banks that are not traditional community banks (*e.g.*, monolines) and operating non-insured entities, noting that, although they are subject to the same statutory factors as transactions between IDIs, the FDIC may need to consider a broader range of information in the case of non-insured entities, such as three years of audited financial statements and potentially independent appraisals or valuations of assets to be transferred to an IDI.[13]

The FDIC also indicated that the Proposed SOP seeks to reframe the "Applications Procedures" section of the current SOP to underscore the importance of, among other things, pre-filing meetings and public feedback, and not using conditions as a means of favorably resolving any statutory factors that otherwise present material concerns.[14] In addition, the Proposed SOP removes certain technical or procedural content included in the current SOP that is addressed in other FDIC publications, such as the Applications Procedures Manual, and instead lists references to such information in a separate "Resources" section at the end of the Proposed SOP.[15]

FDIC LEADERSHIP STATEMENTS

Of particular note, during today's public meeting regarding the RFC were the starkly different statements delivered by members of the FDIC Board. On the one hand, FDIC Chairman Martin Gruenberg stated that he "strongly support[s]" the Proposed SOP and its publication for public comment.[16] Similarly, Consumer Financial Protection Bureau ("CFPB") Director and FDIC Director Rohit Chopra remarked that "[t]he FDIC's proposed Bank Merger Act Policy Statement would bring analytical rigor to merger review and better align the agency's framework with the statute."[17] On the other hand, Vice Chairman Travis Hill remarked that he believes the Proposed SOP "moves in the wrong direction, potentially making the [FDIC's regulatory review] process [for merger transactions] longer, more difficult, and less predictable."[18] Similarly, FDIC Director Jonathan McKernan stated that he is "unable to support today's proposal because it reflects and would implement a bias against bank mergers that is bad policy and contrary to law."[19]

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ENDNOTES

1 FDIC, *Statement of Policy on Bank Merger Transactions* (Jul. 7, 1998) (as amended) (available here).

2 RFC at 5; Staff Memorandum to Board of Directors of FDIC on Proposed Statement of Policy on Bank Merger Transactions (available here) (the "Staff Memo") at 1, 4.

3 RFC at 13.

4 Although the DOJ has not yet issued any proposed revisions to the Bank Merger Competitive Review Guidelines, in July 2023 the DOJ and the Federal Trade Commission (the "FTC") issued draft merger guidelines (available here) for public comment that articulated a policy more skeptical of mergers than the 2010 Horizontal Merger Guidelines. In December 2023, the DOJ and the FTC adopted final merger guidelines that largely tracked the draft merger guidelines despite many commenters having criticized the draft merger guidelines. *See* our prior memorandum to clients regarding the final merger guidelines here.

5 *See* our prior memorandum to clients regarding the OCC's notice of proposed rulemaking on business combination transactions here.

6 *See* our prior memorandum to clients regarding the FDIC's 2022 RFI on bank merger transactions here.

7 *See* 12 U.S.C. § 1828(c). The statutory factors include competitive effects, financial and managerial resources, future prospects, convenience and needs of the community to be served, effectiveness in combatting money laundering, and the risk to the stability of the United States banking or financial system.

8 RFC at 12.

9 *Id.* at 77.

10 *Id.* at 82, 85.

11 *Id.* at 47.

12 *Id.* at 68–74.

13 *Id.* at 91–92.

14 *Id.* at 70–72; *see also* Statement by Acting Comptroller of the Currency and FDIC Director, Michael Hsu, on the FDIC's Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024) (available here) (stating, on the issue of conditions, that "[T]he proposed Statement of Policy provides that the FDIC will not use conditions as a means for favorably resolving any statutory factors that otherwise present material concerns. I concur with this approach. At the same time, in some instances targeted conditions can mitigate specific risks from a proposed merger transaction. These should be considered when they will be effective and where appropriate.").

15 *See* RFC at 93; *see also* Staff Memo at 5.

16 Statement by Martin J. Gruenberg, Chairman, FDIC, on Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024) (available here).

17 Prepared Remarks of CFPB Director Rohit Chopra at the Peterson Institute for International Economics Event on Revitalizing Bank Merger Review (Mar. 21, 2024) (available here).

18 Statement by Vice Chairman Travis Hill on the FDIC's Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024) (available here).

19 Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024) (available here).

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