SULLIVAN & CROMWELL LLP

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FDIC Issues Request for Information on Bank Merger Transactions

RFI Poses Questions on Long-Standing Regulatory Policies

SUMMARY

On March 25, 2022, the Federal Deposit Insurance Corporation ("FDIC") issued a request for information on its regulatory framework applicable to bank mergers (the "RFI," available here). The RFI poses questions on long-standing regulatory policies on bank mergers, potentially signaling a revised analytical framework at the FDIC for assessing bank mergers.

BACKGROUND

In July 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy (available here). In the Executive Order, the President urged the "Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System, the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, and the Comptroller of the Currency … to review current practices and adopt a plan … for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956." The White House Fact Sheet accompanying the Executive Order (available here) explained that the President had "[e]ncourage[d] DOJ and the agencies responsible for banking … to update guidelines on banking mergers to provide more robust scrutiny of mergers" because "[e]xcessive consolidation raises costs for consumers, restricts credit for small businesses, and harms low-income communities."

In December 2021, the U.S. Department of Justice's Antitrust Division (the "DOJ") announced that, in accord with the Executive Order, it was seeking public comment on "whether and how the division should revise the 1995 Bank Merger Competitive Review Guidelines," which explain the analytical framework that

has guided the competition review of bank mergers for nearly 30 years. The public comment period closed on February 15, 2022.

OVERVIEW OF RFI

The RFI raises questions about all aspects of bank merger review under the Bank Merger Act (the "BMA"), including the competition issues that are the subject of the DOJ's December announcement. The FDIC notes that it is the responsible agency under the BMA with respect to merger transactions (1) solely involving insured depository institutions if the resulting institution is a state nonmember bank or state savings association and (2) involving an insured depository institution and a noninsured institution.

The RFI begins with a background section providing data on the level of bank consolidation that has taken place over the last 30 years—roughly the period since passage of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. The RFI notes the decline in the number of "smaller insured depositary institutions" during that period and questions whether the decline "may limit access to financial services and credit in communities, potentially adversely affecting the welfare of the communities' workers, farmers, small businesses, startups, and consumers."

The background section also focuses on financial stability considerations and provides that, "given the increased number, size, and complexity of non-GSIB large banks, … a reconsideration by the FDIC of the framework for assessing the financial stability prong of the BMA and focused attention on the financial stability risks that could arise from a merger involving a large bank is warranted." That statement echoes an October 2019 speech by the FDIC's current Acting Chairman (and then FDIC Board member) Martin Gruenberg (available here) discussing "the resolution of large, regional banks" with "assets between $50 billion and $500 billion." In that speech, Mr. Gruenberg stated that "very significant resolution challenges" and "potential systemic consequences" would arise in connection with resolution of a large regional bank, citing the 2008 resolutions of Washington Mutual Bank and IndyMac Bank as examples. He further suggested that "an area where additional rulemaking might be prudent to facilitate the orderly failure of a large regional bank would be an unsecured debt requirement to assure a comparable measure of loss absorbing resources in resolution for these institutions." He urged that resolution of large regional banks "should be a top priority for the FDIC, for the other federal and state bank regulatory agencies, and for the banking industry."

When read in conjunction with this 2019 speech, the RFI, although focused on mergers, might presage a general FDIC reconsideration of the resolution planning of large non-GSIB banks or other supervisory requirements. One of the questions in the RFI is whether "there [are] attributes of GSIB resolvability, such as a Total Loss-Absorbing Capacity (TLAC) requirement, that could be put into place that would facilitate the resolution of a large insured depository institution without resorting to a merger … or a purchase and assumption transaction with another large institution[]."

The RFI solicits public comment on "all aspects of the existing regulatory framework that applies to bank merger transactions," and specifically requests comments, including "quantitative as well as qualitative support," on the ten enumerated questions and a number of sub-questions that are summarized below:

1. "Does the existing regulatory framework properly consider all aspects of the Bank Merger Act as currently codified in Section 18(c) of the Federal Deposit Insurance Act?"
2. "What, if any, additional requirements or criteria should be included in the existing regulatory framework to address the financial stability risk factor included by the Dodd-Frank Act?" Echoing statements by elected and appointed officials, the RFI asks whether, in light of these concerns, "any merger transaction that results in a financial institution that exceeds a predetermined asset size threshold, for example $100 billion in total consolidated assets," should be presumed to "pose[] a systemic risk concern."
3. "To what extent should prudential factors (for example, capital levels, management quality, earnings, etc.) be considered in acting on a merger application?"
4. "To what extent should the convenience and needs factor be considered in acting on a merger application?" The RFI's focus on the "convenience and needs" factor indicates a potential expansive interpretation of that factor by the FDIC, questioning whether "the [current] reliance on an insured depository institution's successful Community Reinvestment Act performance evaluation record [is] sufficient."
5. "In addition to the HHI, are there other quantitative measures that the federal banking agencies should consider when reviewing a merger application?"
6. "[I]n determining whether a particular merger transaction creates a monopoly or is otherwise anticompetitive," should additional factors be considered, including the absence of significant competition between the parties, "[r]apid economic change" resulting in an "outdated geographic market definition," and "actual competition" by out-of-market and non-bank institutions. The RFI focuses on competition for "loans for business startup or working capital purposes" and "cash management services."
7. "Does the existing regulatory framework create an implicit presumption of approval?"
8. "Does the existing regulatory framework require an appropriate burden of proof from the merger applicant that the criteria of the Bank Merger Act have been met?"
9. The RFI notes that the "Bank Merger Act provides an exception to its requirements if the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the insured depository institutions involved in the merger transaction" and asks whether that exception has proven "beneficial or detrimental to the bank resolution process and to financial stability."
10. "To what extent would responses to Questions 1-9 differ for the consideration of merger transactions involving a small insured depository institution?"

The comment period on the RFI is open for 60 days once the RFI is published in the Federal Register.

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