be ''adequately capitalized,'' as defined in the capital regulations of its primary federal regulator, which should be augmented by an adequate allowance for loan and lease losses. It is emphasized that this is a minimum standard, and a higher capital level may be required. The initial capital requirements may be based on a realistic projection of the estimated retained deposits. However, the proposed depository institution will be required to provide a written commitment to achieve the minimum capital position shortly after consummation if the volume of deposits is underestimated.

Proponents should contact the appropriate FDIC regional office (DOS) as soon as possible if they intend to bid on a failing institution. Due to the time constraints involved with this type of transaction, information submissions and applications will be abbreviated. Generally, a letter request accompanied by copies of applications filed with other federal or state regulatory authorities will be sufficient. Other information will be requested only as needed by the appropriate FDIC official.

Relationships With Other Federal Regulators

Nothing in these guidelines is intended to relieve the applicant of any requirements imposed by a depository institution's primary federal regulator. Any differences in requirements between the FDIC and the institution's primary federal regulator will be resolved during the investigation process.

By order of the Board of Directors.

Dated at Washington, DC, this 23rd day of September, 1997.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 97–26234 Filed 10–8–97; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Bank Merger Transactions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed statement of policy.

SUMMARY: The FDIC is proposing to revise its Statement of Policy on Bank Merger Transactions by updating it to reflect legislative and other developments that have occurred since the Statement of Policy was last revised in 1989. The proposed revision also gives additional guidance by including new provisions and clarifying some existing provisions. The proposal is a part of the FDIC's systematic review of its regulations and written policies under the Riegle Community and Regulatory Improvement Act of 1994 and is intended to be read in conjunction with the merger provisions of the FDIC's proposed amendments dealing with applications filed with the FDIC, which also appears in this issue of the **Federal Register**.

DATES: Comments must be received by January 7, 1998.

ADDRESSES: Send written comments to Robert E. Feldman, Executive Secretary, Attention: Comments/OES, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. Comments may be hand delivered to the guard station located at the rear of the 17th Street building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m. (FAX number (202) 898–3838; Internet address: comments@FDIC.gov). Comments may be inspected and photocopied at the FDIC Public Information Center, Room 100, 801 17th Street NW, Washington, DC, between 9 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Kevin W. Hodson, Review Examiner, Division of Supervision, (202) 898–6919; Martha Coulter, Counsel, Legal Division, (202) 898–7348, Federal Deposit Insurance Corporation, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: Section 303(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), 12 U.S.C. 4803(a), requires that each of the federal banking agencies (the FDIC, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Office of Thrift Supervision) conduct a review of its regulations and written policies, for two general purposes. These purposes are: (1) To streamline and modify the regulations and policies in order to improve efficiency, reduce unnecessary costs, and eliminate unwarranted constraints on credit availability; and (2) to remove inconsistencies and outmoded and duplicative requirements.

As part of this review, the FDIC has determined that its Statement of Policy on Bank Merger Transactions (Policy Statement or Statement) should be revised. The primary purpose of the revision is to update the Statement to reflect statutory changes and other developments that have taken place since its last revision in 1989. In addition, certain clarifications and refinements are being proposed, as well as new provisions intended to give guidance in areas not previously addressed by the 1989 Statement. The proposed revisions are discussed more fully below.

Recent Developments. Among the proposed revisions to the Statement are those resulting from statutory changes, including the CDRI Act, the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Interstate Act), and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[1] Section 321(b) of the CDRI Act reduced the post-approval, pre-consummation waiting period for certain merger transactions from 30 days to 15 days (see 12 U.S.C. 1828(c)(6)). Section 102 of the Interstate Act, codified at 12 U.S.C. 1831u, provided for interstate bank mergers. FIRREA broadened the coverage of the Bank Merger Act, 12 U.S.C. 1828(c), to include savings associations and eliminate the Federal Savings and Loan Insurance Corporation (FSLIC).[2]

Each of these changes caused related references in the 1989 Statement to become out-dated or incomplete, a situation the proposed new Statement corrects. For example, because the Bank Merger Act now applies to thrift institutions as well as banks, the proposed Statement replaces the term ''bank'' with ''depository institution.'' It also deletes a reference to the FSLIC. In addition, the proposed Statement includes references to interstate mergers and to the CDRI Act's 15-day post-approval waiting period.

In addition to statutory changes, there have been other developments that warrant revision of the 1989 Statement. For example, the 1989 Statement refers to the use of ''IPC'' deposits (deposits of individuals, partnerships, and corporations) in FDIC merger analysis. However, IPC deposit data is no longer collected by the FDIC. Accordingly, the proposed revisions indicate that the FDIC now uses ''total deposits'' in evaluating the competitive effects of a proposed merger.

Another development was the 1995 amendment of the FDIC's regulations implementing the Community Reinvestment Act (CRA) (*see* 60 FR 22156 (May 4, 1995)). Changes the FDIC made to its CRA regulations include elimination of the requirement for CRA statements and revision of the CRA performance standards to be applied by the FDIC. These changes are reflected in the proposed new Statement.

[1] The citations for these statutes are, respectively, Pub. L. 103–325, 108 Stat. 2160; Pub. L. 103–328, 108 Stat. 2338; and Pub. L. 101–73, 103 Stat. 183.

[2] FIRREA sections 201 and 221.

Other developments affecting the Statement include the proposed amendment by the FDIC of its Bank Merger Act regulations in 12 CFR part 303, which appear elsewhere in this issue of the **Federal Register**. Among these proposed amendments (which would comprise new subpart D to part 303) is a new expedited processing procedure for applications meeting certain eligibility criteria. Another amendment to the merger regulations would be replacement of the term ''phantom'' merger with the term ''interim'' merger. These changes have been incorporated into the proposed new Statement. In addition, the Statement's citations to the FDIC's merger regulations would be revised consistent with the new section designations in the proposed new part 303.

Additions, Deletions and Clarifications. In addition to the updates discussed above, the Statement would be expanded to address several elements not previously covered. These include optional conversion transactions (commonly referred to as Oakar transactions) under 12 U.S.C. 1815(d)(3), branch closings in connection with merger transactions, and interstate and interim mergers. Also included is a new section addressing legal fees and other expenses, which has been transferred from the FDIC's recently-rescinded Statement of Policy on Applications, Legal Fees, and Other Expenses (*see* 62 FR 15479 (April 1, 1997)).

The proposed Statement includes a number of clarifications and refinements, as well. For example, a new sentence in the initial paragraph would incorporate the FDIC's existing view that transactions that do not involve a transfer of deposit liabilities typically do not require prior FDIC approval under the Bank Merger Act, unless the transaction involves the acquisition of all or substantially all of an institution's assets. Other such clarifications include pluralization of the term ''relevant geographic market'' (to read ''relevant geographic market(s)'') to make clear that a merger can involve more than one distinct market area.

The proposed Statement further includes a number of minor, non-substantive wording changes intended only to refine or clarify. None of these minor changes reflects any change in the FDIC's merger-analysis practices or policies.

The FDIC has found in its experience that few if any issues regarding the FDIC's obligations under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) or the National Historic Preservation Act (NHPA) (16 U.S.C. 470 *et seq.*) are presented in the context of bank merger transactions. Since the FDIC is in the process of reviewing its policies on NEPA and NHPA, the FDIC believes it is not advisable to include a reference to NEPA and NHPA in the Statement of Policy at this time.

The proposed Statement is set forth below. It is intended to be read in conjunction with the proposed new merger provisions of part 303 (Applications) of the FDIC's regulations, notice of which is published elsewhere in this issue of the **Federal Register**.

For the above reasons, the FDIC proposes the following Statement of Policy:

Proposed FDIC Statement of Policy on Bank Merger Transactions

I. Introduction

Section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), popularly known as the Bank Merger Act, requires the prior written approval of the FDIC before any insured depository institution may:

(1) Merge or consolidate with, purchase or otherwise acquire the assets of, or assume any deposit liabilities of, another insured depository institution if the resulting institution is to be a state nonmember bank, or

(2) Merge or consolidate with, assume liability to pay any deposits or similar liabilities of, or transfer assets and deposits to, a noninsured bank or institution.

Institutions undertaking one of the above described ''mergers'' or ''merger transactions'' must file an application with the FDIC. Transactions that do not involve a transfer of deposit liabilities typically do not require prior FDIC approval under the Bank Merger Act, unless the transaction involves the acquisition of all or substantially all of an institution's assets.

The Bank Merger Act prohibits the FDIC from approving any proposed merger that would result in a monopoly, or which would further a combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States. Similarly, the Bank Merger Act prohibits the FDIC from approving a proposed merger whose effect in any section of the country may be substantially to lessen competition, or which in any other manner would be in restraint of trade. An exception may be made in the case of a merger whose effect would be to substantially lessen competition, tend to create a monopoly, or otherwise restrain trade, if the FDIC finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest. For example, the FDIC may approve a merger to prevent the probable failure of one of the institutions involved.

In every proposed merger transaction, the FDIC must also consider the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

II. Application Procedures

1. Application filing. Application forms and instructions may be obtained from any FDIC Division of Supervision regional office. Completed applications and any other pertinent materials should be filed with the appropriate regional director as specified in § 303.2(g) of the FDIC rules and regulations (12 CFR 303.2(g)). The application and related materials will be reviewed by regional office staff for compliance with applicable laws and FDIC rules and regulations. When all necessary information has been received, the application will be processed and a decision rendered by the regional director pursuant to the delegations of authority set forth in § 303.66 of the FDIC rules and regulations (12 CFR 303.66) or the application will be forwarded to the FDIC's Washington office for processing and decision.

2. Expedited processing. Section 303.64 of the FDIC rules and regulations (12 CFR 303.64) provides for expedited processing, which the FDIC will grant to eligible applicants. In addition to the eligible institution criteria provided for in section 303.2 (12 CFR 303.2), § 303.64 provides expedited processing criteria specifically applicable to proposed merger transactions.

3. Publication of notice. The FDIC will not take final action on a merger application until notice of the proposed merger is published in a newspaper or newspapers of general circulation in accordance with the requirements of section 18(c)(3) of the Federal Deposit Insurance Act. See § 303.65 of the FDIC rules and regulations (12 CFR 303.65). The applicant must furnish evidence of publication of the notice to the regional director following compliance with the publication requirement. (See § 303.7(b) of the FDIC rules and regulations (12 CFR 303.7(b)).)

4. Reports on competitive factors. As required by law, the FDIC will request reports on the competitive factors involved in a proposed merger from the Attorney General, the Comptroller of the

Currency, the Board of Governors of the Federal Reserve System, and the Director of the Office of Thrift Supervision. These reports must ordinarily be furnished within 30 days, and the applicant will, if it so requested, be given an opportunity to submit comments to the FDIC on the contents of the competitive factors reports.

5. Notification of the Attorney General. After the FDIC approves any merger transaction, the FDIC will immediately notify the Attorney General. Generally, unless it involves a probable failure or an emergency exists requiring expeditious action, a merger may not be consummated until 30 calendar days after the date of the FDIC's approval. However, the FDIC may prescribe a 15-day period, provided the Attorney General concurs with the shorter period.

6. Merger decisions available. Applicants for consent to merge may find additional guidance in the reported bases for FDIC approval or denial in prior merger cases compiled in the FDIC's annual ''Merger Decisions'' report. Reports may be obtained from the FDIC Office of Corporate Communications, Room 100, 801 17th Street NW., Washington, DC 20434.

III. Evaluation of Merger Applications

The FDIC's intent and purpose is to foster and maintain a safe, efficient, and competitive banking system that meets the needs of the communities served. With these broad goals in mind, the FDIC will apply the specific standards outlined in this statement of policy when evaluating and deciding proposed merger transactions.

Competitive Factors

In deciding the competitive effects of a proposed merger transaction, the FDIC will consider the extent of existing competition between and among the merging institutions, other depository institutions, and other providers of similar or equivalent services in the product markets within the relevant geographic market(s).

1. Relevant Geographic Market

The relevant geographic market(s) 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. The relevant geographic market also includes the areas where existing and potential customers impacted by the proposed merger may practically turn for alternative sources of banking services. In delineating the relevant geographic market, the FDIC will also consider the location of the acquiring institution's offices in relation to the offices to be acquired.

2. Product Market

The relevant product market(s) includes the banking services currently offered by the merging institutions and to be offered by the resulting institution. In addition, the product market may also include the functional equivalent of such services offered by other types of competitors, including other depository institutions, securities firms, or finance companies. For example, share draft accounts offered by credit unions may be the functional equivalent of demand deposit accounts. Similarly, captive finance companies of automobile manufacturers may compete directly with depository institutions for automobile loans, and mortgage bankers may compete directly with depository institutions for real estate loans.

3. Analysis of Competitive Effects

In its analysis of 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 providers located outside a relevant geographic market where it is shown that such providers individually or collectively influence materially the nature, pricing, or quality of services offered by the providers currently operating within the geographic market.

The FDIC's analysis will focus primarily on those services that constitute the largest part of the businesses of the merging institutions. In its analysis, the FDIC will use whatever analytical proxies are available 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. Initially, the FDIC will focus on the respective shares of total deposits [3] held by the merging institutions and the various other participants with offices in the relevant geographic market(s), unless the other participants' loan, deposit, or other business varies markedly from that of the merging institutions. Where 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.

Where the market shares of merger participants are not clearly insignificant, the FDIC will also consider the degree of concentration within the relevant geographic market(s) using the Herfindahl-Hirschman Index (HHI) [4] as a primary measure of market concentration. For purposes of this test, a reasonable approximation for the relevant geographic market(s) consisting of one or more predefined areas may be used. Examples of such predefined areas include counties, the Bureau of the Census Metropolitan-Statistical Areas (MSAs), or Rand-McNally Ranally Metro Areas (RMAs).

The FDIC normally will not deny a proposed merger transaction on antitrust grounds (absent objection from the Department of Justice) where the post-merger HHI in the relevant geographic market(s) is 1,800 points or less or, if more than 1,800, reflects an increase of less than 200 points from the pre-merger HHI. Where a proposed merger fails this initial concentration test, the FDIC will consider more closely the various competitive dynamics at work in the market, taking into account a variety of factors that may be especially relevant and important in a particular proposal, including:

- 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; and
- Definite entry plans by specifically identified entities.

In addition, the FDIC will consider the likelihood that other prospective 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 where there is evidence that the mere possibility of such entry tends to encourage competitive pricing and to maintain the

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[3] In many cases, total deposits will adequately serve as a proxy for overall share of the banking business in the relevant geographic market(s); however, the FDIC may also consider other analytical proxies.

[4] The HHI is a statistical measure of market concentration and is also used as the principal measure of market concentration in the Department of Justice's Merger Guidelines. The HHI for a given market is calculated by squaring each individual competitor's share of total deposits within the market and then summing the squared market share products. For example, the HHI for a market with a single competitor would be: $100^2 = 10{,}000$; for a market with five competitors with equal market shares, the HHI would be: $20^2+20^2+20^2+20^2+20^2 = 2{,}000$.

quality of services offered by the existing competitors in the market.

The FDIC will also consider the extent to which the proposed merger would likely create a stronger, more efficient institution able to compete more vigorously in the relevant geographic market.

4. Consideration of the Public Interest

The FDIC will deny any proposed merger whose overall effect would be likely to reduce existing competition substantially by limiting the service and price options available to the public in the relevant geographic market(s), unless the anticompetitive effects of the proposed merger are clearly outweighed in the public interest by the convenience and needs of the community to be served. For this purpose, the applicant must show by clear and convincing evidence that any claimed public benefits would be both substantial and incremental and generally available to seekers of banking services in the relevant geographic market. Moreover, the applicant must show that the expected benefits cannot reasonably be achieved through other, less anticompetitive means.

Where a proposed merger is the only reasonable alternative to the probable failure of an insured depository institution, the FDIC may approve an otherwise anticompetitive merger. The FDIC will usually not consider a less anticompetitive alternative that is substantially more costly to the FDIC to be a reasonable alternative unless the potential costs to the public of approving the anticompetitive merger are clearly greater than those likely to be saved by the FDIC.

Prudential Factors

The FDIC does not wish to create larger weak institutions or to debilitate existing institutions whose overall condition, including capital, management, and earnings, is generally satisfactory. Consequently, apart from competitive considerations, the FDIC normally will not approve a proposed merger where the resulting institution would fail to meet existing capital standards, continue with weak or unsatisfactory management, or whose earnings prospects, both in terms of quantity and quality, are weak, suspect, or doubtful. In assessing capital adequacy and earnings prospects, particular attention will be paid to the adequacy of the allowance for loan and lease losses. In evaluating management, the FDIC will rely to a great extent on the supervisory histories of the institutions involved and of the executive officers and directors that are proposed for the resultant institution. In addition, the FDIC may review the adequacy of management's disclosure to shareholders of the material aspects of the merger transaction to ensure that management has properly fulfilled their fiduciary duties.

Convenience and Needs Factor

The FDIC will consider the extent to which the proposed merger is likely to improve the service 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 means. In assessing the convenience and needs of the community served, the FDIC, as required by the Community Reinvestment Act, will also note and consider each institution's Community Reinvestment Act performance evaluation record. An unsatisfactory record may form the basis for denial or conditional approval of an application.

IV. Related Considerations

1. Interstate bank mergers. Where a proposed transaction is an interstate merger between insured banks, the FDIC will consider the additional factors provided for in section 44 of the Federal Deposit Insurance Act, 12 U.S.C. 1831u.

2. Interim merger transactions. An interim institution is a state- or federally-chartered institution that does not operate independently, but exists, normally for a very short period of time, solely as a vehicle to accomplish a merger transaction. In cases where the establishment of a new or interim institution is contemplated in connection with a proposed merger transaction, the applicant should contact the FDIC to discuss any relevant deposit insurance requirements. In general, a merger transaction (other than a purchase and assumption) involving an *insured* depository institution and a federal interim depository institution will not require an application for deposit insurance, even if the *federal* interim depository institution will be the surviving institution.

3. Optional conversion transactions. Section 5(d)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1815(d)(3), provides for ''optional conversions'' (commonly known as Oakar transactions) which, in general, are mergers that involve a member of the Bank Insurance Fund and a member of the Savings Association Insurance Fund. These transactions are subject to specific rules regarding deposit insurance coverage and premiums. Applicants may find additional guidance in § 327.31 of the FDIC rules and regulations (12 CFR 327.31).

4. Branch closings. Where banking offices are to be closed in connection with the proposed merger transaction, the FDIC will review the merging institutions' conformance to any applicable requirements of section 42 of the FDI Act concerning notice of branch closings as reflected in the Interagency Policy Statement Concerning Branch Closing Notices and Policies.

5. Legal fees and other expenses. The commitment to pay or payment of unreasonable or excessive fees and other expenses incident to an application reflects adversely upon the management of the applicant institution. The FDIC will closely review expenses for professional or other services rendered by present or prospective board members, major shareholders, or other insiders for any indication of self-dealing to the detriment of the institution. As a matter of practice, the FDIC expects full disclosure to all directors and shareholders of any arrangement with an insider. In no case will the FDIC approve an application where the payment of a fee, in whole or in part, is contingent upon any act or forbearance by the FDIC or by any other federal or state agency or official.

By order of the Board of Directors.

Dated at Washington, D.C., this 23rd day of September, 1997.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 97–26233 Filed 10–8–97; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

Applications To Establish a Domestic Branch (Includes Remote Service Facilities); Rescission of Statement of Policy

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed rescission of statement of policy.

SUMMARY: As part of the FDIC's systematic review of its regulations and written policies under section 303(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI), the FDIC proposes to rescind its Statement of Policy ''Applications to Establish a Domestic Branch (Includes Remote Service Facilities)'' (Statement of Policy).

The Statement of Policy provides information and guidance to state nonmember banks planning to establish