Applications Procedures Manual

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FEDERAL DEPOSIT INSURANCE CORPORATION

I. INTRODUCTION

Part 303 of the FDIC Rules and Regulations (12 CFR 303) provides a framework for filing requirements for various applications, notices, and requests (collectively, "filings" as defined in Section 303.2(s)) (12 CFR § 303(s)). The Applications Procedures Manual (Procedures) provide direction for professional staff assigned to review and process most applications, notices, and other requests (collectively, filings) submitted to the FDIC.[1] These Procedures apply to Case Managers, Section Chiefs, and other referenced positions including equivalent staff, when applicable. The content addressed in this overview section generally applies to all filing types unless otherwise noted in subsequent sections of these Procedures.

The Case Manager is responsible for reviewing, evaluating, and processing all filings submitted by institutions within their assigned caseloads. The Case Manager must assess whether the proposal could change an institution's business plan, strategy, operations, and risk profile. The Case Manager is expected to use sound judgment in analyzing all filings to determine the impact of the proposal on overall safety and soundness of the institution and ultimately, the impact, if any, on the Deposit Insurance Fund (DIF).

In addition, the Case Manager will serve as the main point of contact for each assigned filing, will communicate with other FDIC staff and external parties, as appropriate, and is to ensure that all tracking and documentation systems are current. For all filings, the Case Manager shall provide notice of and access to the filing to Division of Depositor and Consumer Protection (DCP) and Legal Division (Legal) counterparts in accordance with the process provided in these Procedures. The Case Manager should also consult with the Washington Office (WO) as necessary. The WO includes, but is not limited to, the Risk Management Applications Section (RMAS), the Large Bank Supervision Branch (LBS), and the Division of Complex Institution Supervision and Resolution (CISR).

In order to ensure the timely review, consideration, and processing of filings, the Case Manager is expected to be familiar with the content of this *Applications Overview* Section, the sections of these Procedures addressing each filing type, Part 303 of the FDIC Rules and Regulations, FDIC and Division of Risk Management Supervision (RMS) delegations of authority, and pertinent laws, regulations, statements of policy, and other guidance.[2]

Pre-Filing Meetings

Pre-filing meetings are encouraged in situations involving complex or novel filings, situations that present major matters, and other similar circumstances. The pre-filing process helps provide clarity for the applicant or notificant regarding regulatory expectations and the filing process, including general timelines for regulatory review and processing. In addition, the pre-filing process provides an opportunity for the applicant to obtain preliminary feedback regarding areas of a proposal that may raise supervisory questions or concerns. The goals of the pre-filing process are to facilitate a comprehensive filing that addresses the applicable statutory factors and regulatory requirements, and to minimize avoidable delays in the filing process.

Pre-filing meetings typically serve as the first line of communication between an applicant or notificant and the FDIC. The Case Manager should invite all relevant parties, including the chartering authority and, as appropriate, the Federal Reserve, as well as representatives from other divisions and the WO. Further, the applicant or notificant should be encouraged to provide appropriate materials in advance of the pre-filing meeting. The Case Manager should provide preliminary feedback regarding the anticipated filing, if any, respond to questions, and discuss the FDIC's expectations with regard to a formal application or notice. Any matters that potentially raise questions or present concerns should be highlighted. The pre-filing

[1] Refer to the *Deposit Insurance Applications Procedures Manual* for procedures specific to deposit insurance applications.
[2] Appendix A of these Procedures summarizes requirements provided in Part 303 of the FDIC Rules and Regulations.

meeting should be documented with a brief memorandum to the file that identifies the attendees, addresses the substance of the discussion, and describes any anticipated next steps.

Filings Involving State Savings Associations

Title III of the Dodd-Frank Act transferred to the FDIC the functions, powers, and duties of the Office of Thrift Supervision (OTS) relating to state savings associations. The Dodd-Frank Act also amended Section 3 of the Federal Deposit Insurance (FDI) Act to designate the FDIC as the Primary Federal Regulator (PFR) for state savings associations. Consistent with this authority, the FDIC Board of Directors (FDIC Board) approved the transfer and re-designation of certain regulations of the former OTS to the FDIC. The transferred and re-designated OTS regulations were initially adopted as Parts 390 and 391 of the FDIC Rules and Regulations (12 CFR 390 and 391). Since that time, most of the provisions of Part 390, except for Subparts Q and W, and all of Part 391 have been eliminated or transferred to Part 303.

There are some differences between the filing regulations pertaining to state savings associations and those pertaining to banks. As such, the Case Manager must review the Delegations of Authority – Filings (Filings Matrix) and processing timeframes with respect to any filing related to a state savings association. Regional Office (RO) Legal and, as appropriate, the Washington Office (WO) should be consulted if questions arise regarding filings from state savings associations.

Charter Conversions

Financial institutions choose to operate under the state or federal charter that best accommodates their business and strategic needs. Generally, institutions can change charters by providing a filing to the new chartering authority. The 2009 Federal Financial Institutions Examination Council (FFIEC) Statement on Regulatory Conversions re-affirms that charter conversions or changes in primary federal regulator are typically only conducted for legitimate business and strategic reasons. The statement also indicates that the prospective chartering authority will consult with the FDIC (NCUA when appropriate), in its role as deposit insurer and receiver, and the Federal Reserve as the consolidated holding company supervisor, on any application involving an institution for which its current supervisor has either rated or proposes to rate that institution a 3, 4, or 5 (or "Needs to Improve" or "Substantial Noncompliance" with respect to Community Reinvestment Act (CRA) performance), or has instituted or plans to institute a serious or material corrective program with respect to that institution.[3]

Section 612 of the Dodd-Frank Act (12 U.S.C. 214d; 12 U.S.C. 35) may impact charter conversions. Section 612 generally prohibits charter conversions by a national bank or federal savings association to a state bank or state savings association, or by a state bank or state savings association to a national bank or federal savings association, while the institution is subject to a cease and desist order (or other formal enforcement order) issued by, or a memorandum of understanding entered into with, its current PFR or state bank supervisor with respect to a significant supervisory matter. The statute includes a limited exception when the PFR that issued the cease and desist order (or other formal enforcement order) or memorandum of understanding does not object to the conversion. Following consultation with RO management and RO Legal, Case Managers should consult with the WO in the event a conversion under Section 612 is proposed. If there is a charter conversion that may result in a change in the business plan, the Case Manager should also refer to Section 22 on Change in General Character of Business.

For additional information, refer to the Interagency Statement on Section 612 of the Dodd-Frank Act Restrictions on Conversions of Troubled Banks, FIL 50-2012, dated November 26, 2012.

[3] FFIEC Statement on Regulatory Conversions.

II. TIME LIMITS FOR PROCESSING COMPLETED FILINGS

Processing Timeframes

The FDIC's goal is to act on filings as promptly as practical, while allowing appropriate time for review and evaluation. To assist management in realizing this goal, RMS, DCP, and Legal have jointly established timeframes for processing each type of filing.[4] The desired timeframe for processing each type of filing reflects the timeframe from receipt of a substantially complete filing to disposition (approval/non-objection, return, withdrawal, or denial/objection). Counting begins on the day after a substantially complete filing is received in accordance with Section 303.4 of the FDIC Rules and Regulations.

While most filings are acted on at the RO pursuant to delegated authority, additional time may be needed for situations requiring WO involvement. Reviews by Legal, DCP, or any specialty areas within RMS are to be completed promptly so that such reviews do not delay action.

The timeframes generally establish the outer limits of what is considered reasonable to review and process substantially complete filings. It is recognized that filings that present or involve legal or policy issues, unusual circumstances, or CRA protests may be delayed in processing beyond these timeframes. Further, filings not delegated to the RO may require additional time. It is the FDIC's policy to process filings within the timeframe guidelines, recognizing that there will, of necessity, be exceptions for reasons such as those listed above. Any exceptions must comply with all relevant statutes and regulations. Authority to extend processing timeframes, to the extent allowed by statute or regulation, is delegated to the higher of: (a) the RMS official with authority to act on the filing, or (b) the Assistant Regional Director.[5]

Case Managers should monitor the status of each pending filing relative to the recommended timeframes. Filings taking longer than these guidelines require a written explanation in the Summary of Investigation (SOI) and in the appropriate internal database. In addition, the bank or person submitting the filing (the applicant) should be notified in writing that processing will extend beyond the timeframe guidelines. The applicant should also be advised by the RO in writing if a filing will not be resolved under delegated authority at the RO level so that the applicant will be aware that the publicly announced timeframes for RO processing are not applicable. However, these notifications should not disclose FDIC staff's preliminary findings or likely recommendations regarding any statutory factors.

As described in application-specific chapters of these Procedures, for certain filings (including notices of change in bank control and notices of change in director or senior executive officer), failure to comply with processing time limits set by statute or regulation may result in the FDIC being deemed to have approved or not objected to the filing. Therefore, Case Managers should ensure such filings are acted on within the appropriate timeframes.

One-Year Limitation

Section 343(a) (12 U.S.C. 4807) of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act) requires federal banking agencies to take final action on applications before the end of the one-year period beginning the day after a complete filing is received. Section 343(b) of the Riegle Act provides that the person submitting the application may, at any time, grant a waiver of the time limit. It is expected that processing timeframes approaching the one-year period for which a waiver may be appropriate will only occur in rare and unusual instances. The RO should consult with the WO prior to extending the processing time of a filing based on a waiver request. The SOI comments should discuss any

[4] FDIC Re-Issues its Processing Timeframe Guidelines for Applications, Notices, and Other Requests, FIL 81-2018 (December 6, 2018).
[5] Authority to extend certain processing timeframes is reserved to the Board. Refer to the Filings Matrix.

contact made with the applicant regarding a waiver of the time limit and indicate whether such a waiver request has been received. Any waiver of the one-year time period by the applicant should be in writing and noted in the RO comments section in the appropriate system of record.

III. FILING RECEIPT AND ACKNOWLEDGMENT, AND ESTABLISHMENT OF THE FILING RECORD

Filings may be submitted by applicants through various means including, for certain filing types, through FDIC*connect*, a secure, internet-based communication channel through which insured institutions can conduct business and exchange information with the FDIC. When the FDIC receives a filing, a record of that filing must be established in the appropriate internal database within three business days. The filing record must be established whether the filing is complete or not in order to maintain an accurate record of all filings received.

Filings Submitted Through FDIC*connect*

Currently, the types of filings listed below can be submitted through FDIC*connect*.

- Establish or Relocate Domestic Branch or Office*
- Extension of Time*
- Applications Pursuant to Prompt Corrective Action*
- Brokered Deposit Waiver*
- Consent to Exercise Trust Powers*
- Golden Parachute and Severance Payments*
- Reduce or Retire Capital Stock or Capital Debt*
- Interagency Notice of Change in Control
- Change in Director or Senior Executive Officer
- Interagency Bank Merger Act Application

**Automatically interfaces with internal database*.

When a filing is submitted through FDIC*connect,* the appropriate Case Manager will receive an email from FDICconnect with the filing attached. A system record will be automatically established for any filing submitted through FDICconnect that interfaces with the appropriate internal database that memorializes the filing. All information provided by the applicant will be available in the record, including attachments.

For any filing not submitted through FDIC*connect* or submitted through FDIC*connect* and not interfaced with the system of record, the Case Manager[6] must establish a system record of the receipt of the filing within three business days. Section 303.4 of the FDIC Rules and Regulations addresses computation of time requirements with regard to filings. The FDIC begins computing the relevant period on the day after an event occurs (*e.g.*, the day after a substantially complete filing is received by the FDIC or the day after publication begins) through the last day of the relevant period. When the last day is a Saturday, Sunday, or federal holiday, the period runs until the end of the next business day.

The internal database will automatically designate whether the filing is eligible for expedited processing; however, the Case Manager must confirm the designation by reviewing the record and selecting "Yes" or "No" in the "Expedited Processing Requisites" boxes. Disagreement with the Recommended Expedited Processing flag will prompt the Case Manager to enter a reason under the Expedited Processing Comment field.

[6] Some regions have established procedures whereby Applications Assistants establish records for Case Managers.

The Case Manager must ensure all filing materials submitted through FDIC*connect* or other means are scanned into the appropriate documentation and imaging system and retained in RO files in accordance with existing documentation guidelines.

Internal Distribution

In all cases, the Case Manager is to provide the initial filing materials from the documentation and imaging system folder to regional DCP and Legal designees,[7] who will distribute the filing to an appropriate party for review. Any materials submitted subsequent to the initial filing should also be forwarded to facilitate a complete review of the filing. At the time the initial materials are forwarded, the Case Manager should email the designated DCP and Legal contacts to notify them of the date that the RO anticipates acting on the filing, or in the case of filings for which WO action is anticipated, the date the filing is expected to be forwarded to the WO. If a specific action or forwarding date cannot be reasonably anticipated, the Case Manager should use the delay date. The email should also request that the designated DCP and Legal contacts provide any feedback by a specified date (prior to the anticipated action or forwarding date).

Use of Shared Mailboxes

A shared applications mailbox has been established for each RO and Area Office (AO) to receive the same email that a Case Manager receives when an electronic filing is submitted through FDIC*connect*. The email includes the contents of the filing. Individuals granted access to the shared mailbox should be assigned daily monitoring responsibility to ensure filing-related emails are routed in a timely manner. Each RO should establish back-up monitoring procedures and assignments. The following procedure is recommended, but may be tailored to accommodate regional differences:

Shared mailbox access should be given to RMS Applications Assistants and application subject matter experts (SMEs). The Applications Assistant (or a SME in his/her absence) should review the shared mailbox twice daily and create a record for filings received without any other direct interface within the appropriate internal database. The Case Manager will be apprised that a filing was received (and the corresponding record created) through the documentation and imaging system, active tasks in the system of record, or by an email from the Applications Assistant (or SME).

State Banking Department Access

State banking departments that have opted to accept electronic filings have access to these filings through a secure web-based portal through which states may access the system of record. Participating states have designated a primary point of contact who will be notified by email when an institution submits a filing through FDIC*connect*. A copy of the entire filing is provided, including any attachments.

Acknowledgment of Filings

All filings should be acknowledged in writing within three business days of receipt. The written acknowledgment generally should not convey a determination regarding acceptance of the filing or request additional information as these matters should be communicated separately, as appropriate. The written acknowledgment can be in the form of a letter or email communication with the applicant. Refer to Subpart A of the Filings Matrix for delegations regarding routine correspondence related to filings.[8] A copy of the written acknowledgment should be maintained in the documentation and imaging system, and the comments recorded in the appropriate internal database should be updated to reflect the date the

[7] Each RO's DCP and Legal management will identify designees to RMS management.
[8] Correspondence may address both receipt and acceptance if both occur within the three business days of receipt.

acknowledgment was provided. For filings submitted via FDIC*connect*, the system will provide acknowledgement of receipt; therefore, a separate written acknowledgement is not necessary.

V. ACCEPTANCE OF FILINGS

The Case Manager must review each filing as soon as possible after receipt. The review should determine the purpose of the filing and ensure that the applicable filing procedures (per Part 303 of the FDIC Rules and Regulations) are met. The Case Manager should also determine whether the filing qualifies for expedited processing, whether the RO has delegated authority to act on the filing, and whether the filing is substantially complete and should be accepted for processing. If authority to act on the filing is reserved to the WO, authority to determine whether the filing is substantially complete is also reserved to the WO. In such cases, the RO should consult with the WO prior to issuing a letter conveying the FDIC's determination that the filing is substantially substantially complete or requesting additional information. Refer to the Miscellaneous Filings and Other Matters portion of the Filings Matrix.

A filing is considered substantially complete when the FDIC has the necessary information, as determined by RMS with input from DCP and Legal to fully consider each of the applicable statutory factors and any other regulatory requirements.[9] Generally, if the applicant has submitted the information required under Part 303 or other applicable regulation, and there are no significant follow-on questions or matters presented, the filing should be considered substantially complete as of the date of receipt of the filing.

Substantially Complete Upon Receipt

If the filing is substantially complete when received, the Case Manager should enter the date of receipt as the acceptance date in the appropriate internal database. In addition, the Case Manager should ensure that a letter is issued to inform the applicant that the filing is substantially complete and provide the acceptance date. The letter may also request missing information; however, such requests should be limited to clarifying information, information required by rule that is expected to be provided in the near term and that does not directly impact the consideration of applicable statutory factors, or technical items or documents necessary to complete a specific component of the filing (*e.g.*, final or executed documents previously submitted in draft form). The letter should provide a short timeframe for submitting any requested materials, typically not more than 30 days. The RO should not delay the processing of a substantially complete filing while awaiting receipt of the requested information or documentation.

Not Substantially Complete Upon Receipt

A filing that is not substantially complete lacks the substance necessary for the FDIC to evaluate the statutory factors. If the filing is not substantially complete when received, the Case Manager should consult with the ARD and Legal on whether to return the filing or issue a letter to request additional information. A request letter should only be issued for a filing that is not substantially complete when the additional information relates to a limited number of specific matters, would enable a complete analysis of the matters and the related statutory factors, and can reasonably be expected to be submitted within a short period of time.

If a decision is made to return the filing, the Case Manager should call the applicant to advise that the filing will be returned with a letter describing the deficiencies. In such circumstances, the Case Manager should update the appropriate internal database to reflect that the action taken on the filing was returned.

If a decision is made to issue a request letter, the letter should be sent to the applicant no later than within

[9] "Regulatory requirements" refers to the requirements included in Part 303 of the FDIC Rules and Regulations and any other federal or state regulations, statutes, or laws applicable to the filing.

30-45 days from receipt of the filing. The letter should indicate that the filing is incomplete and has not been accepted for processing; identify the missing materials; clearly state the date by which the applicant's response must be received (within 30 days from the date of the letter); and indicate that if the FDIC determines that the filing remains incomplete after review of the applicant's response, the FDIC will return the filing and consider the file closed. Issuance of the letter should generally occur within 30 days for non-complex filings, but may be extended up to 45 days for filings that are novel, complex, or present other unusual matters.

If circumstances warrant, the ARD or the person with appropriate delegated authority, may determine to provide the applicant an extension of time to respond to the letter. The extension should only be provided if the applicant submits written justification to support the need for the extension (*e.g.,* the complexity of the requested information may require substantial compilation, processing, research, or analysis). If an extension of time is granted, the FDIC should notify the applicant in writing of the new response due date, which should generally not exceed 30 days beyond the originally provided response date.

The filing, as supplemented, should generally be considered substantially complete if the response fully addresses each matter included in the FDIC's request letter. In such circumstances, an acceptance letter should be sent to the applicant, and the filing should be reflected as accepted in the appropriate internal database as of the date the last response was received by the FDIC. As noted above, a filing is substantially complete when sufficient information has been provided to permit the FDIC to fully consider the applicable statutory factors.

If the filing remains incomplete following receipt of any responses, the FDIC will, in most cases and absent extenuating circumstances, return the filing and consider the file closed. Extenuating circumstances are those beyond the applicant's control and could include, for instance, obtaining documents from an independent third party (such as from a court in the case of a filing under Section 19 of the FDI Act), the effects of business disruptions due to inclement weather or emergency situations, or other similar challenges. Multiple requests by the FDIC for additional, clarifying, or supporting information should generally be avoided.

Comments in the Filing Record

The Case Manager should ensure that the filing record is complete and updated on a regular basis to reflect noteworthy developments during processing. Comments included in the record should be concise, focused on substantive issues, and, as a whole, provide the reader with an adequate understanding of the proposed transaction, processing status, any significant issues encountered, and the resolution of such issues. Because comments should address significant processing activity, the Case Manager may clarify, edit, or delete prior comments that have become irrelevant or that may cause confusion given subsequent activity.

VI. REVIEWING AND EVALUATING THE CONTENT OF THE FILING

An effective review process relies on the Case Manager's sound judgment to develop an independent assessment of the proposal and its potential impact on the institution's risk profile. This process should lead to appropriate and well-supported findings and recommendations for each filing that are consistent with the applicable statutory factors and laws and regulations.

A Case Manager's review of a filing should focus primarily on consideration of the applicable statutory factors, but the Case Manager should also determine that the underlying proposal makes clear business sense; is reasonable and feasible given the applicant's business model, risk profile, financial condition, rating under the Uniform Financial Institutions Rating System (UFIRS), and operating environment; and is consistent with the applicant's strategic, operational, and financial goals. This review should also identify whether unusual features or issues are presented.

The Case Manager should maintain an open and ongoing dialogue with the applicant to facilitate the timely receipt and analysis of information. As the main point of contact throughout the review process, the Case Manager is responsible for effectively communicating all requirements, expectations, and potential issues that could impact the findings and recommendations, including any conditions to be imposed if approval or non-objection is warranted.

An important element of the review process is documenting the analysis and rationale supporting the findings and recommendations, which is done in the SOI. Refer to *Summary of Investigation*, Section 1.2 of these Procedures, for instruction on completing an SOI.

Requests for Comments on Filings Pending with Other Regulatory Agencies

The FDIC may receive requests for comments on filings submitted to other regulatory agencies, including the Federal Reserve, Office of the Comptroller of the Currency, and other state or Federal authorities. Such requests commonly relate to deposit insurance applications, merger applications, change in control notices, applications related to golden parachute agreements or payments, and applications filed pursuant to Section 19 of the FDI Act, but may be received in connection with other types of filings submitted to another agency. All such requests should be obtained in writing, whether through a formal letter or email. Any requests received at the field level should be immediately forwarded to the appropriate Case Manager. Any questions regarding the filing or requests for information necessary to develop the FDIC's response should be provided timely to the requesting agency. Such communication may be made by email.

In all instances, the Case Manager should prepare a recommended response. As necessary, the Case Manager should prepare a brief summary with relevant supporting information, and provide the recommended response and any supporting documentation to RO management for review. To the extent the filing raises no concerns, the FDIC's response will generally be limited to a statement that the FDIC has no comment regarding the filing, which may be conveyed to the requesting agency either by email or formal letter. Conversely, if the filing raises concerns or an objection, the FDIC's comments should be communicated through a formal and appropriately detailed letter that specifically identifies the concerns or objection. In each case, the communication should be provided or signed by an official with the authority to act if the filing required action by the FDIC (considering the applicant, the type of filing, and the proposed action).

If the FDIC does not receive the type of filing underlying the request, the recommended response should be routed to the Regional Director or Deputy Regional Director for review and disposition. The WO should be consulted prior to disposition if the filing appears to present significant supervisory concerns, policy questions, major matters, or matters of public interest. The FDIC will strive to provide timely responses to all requests, considering any processing timeframes relevant to the filing.

All correspondence and documentation, including the request, the response, and any relevant supporting information, should be maintained in the documentation and imaging system.

Filings Requiring Consideration of CRA and Compliance Performance

Per Parts 303 and 345 of the FDIC Rules and Regulations, DCP review is required for certain "covered" applications. Refer to Section 1.9, *Protests/Comments*, and Section 1.10, *Processing Applications Using CRA and Compliance Information*, for a discussion of the processing procedures for such filings. When a protest or adverse comment letter is received, the Case Manager must coordinate closely with DCP staff that will evaluate and process the protest. Such coordination should include collaborating on the response letter, SOI preparation, possible conditions, and development of the approval letter and Order, if applicable.

VII. PREPARING FILING RELATED DOCUMENTS

To finalize the review process and enable the FDIC to take action, staff must condense the investigation and review process to a set of recommendation documents. Recommendation documents include the Report of Investigation (ROI), if applicable, the SOI, and all decisional documents (statements, orders, and transmittal letters) communicating the FDIC's final determination.[10] Refer to *Summary of Investigation*, Section 1.2 of these Procedures, for information regarding the SOI.

VIII. DELEGATIONS OF AUTHORITY

Authority to act on any filing is vested in the FDIC Board. However, the Board, through the FDIC's amended bylaws and various resolutions, has delegated certain authority to the RMS Director and DCP Director. Under certain circumstances, the RMS Director may delegate authority to others to act on their behalf. Specific authority is re-delegated by the RMS Director to certain WO staff, the Regional Directors, Deputy Regional Directors, and other RO staff. As discussed below, certain delegated authorities are subject to Legal and/or DCP concurrence. The Filings Matrix summarizes the Board's reservations and communicates sub-delegations of authority by the RMS Director to professional staff, subject to confirmation in writing. If any provisions regarding the exercise of delegated authority at the RO level are not met, authority to act is reserved to the WO.

Among other items, the FDIC Board reserves to itself consideration of any matter that would establish or change existing FDIC policy, could attract unusual attention or publicity, or would involve a matter of first impression. This retention of authority is sometimes referred to as the Major Matters Resolution.

Evaluating Statutory Factors

It is FDIC policy to fully consider and favorably resolve all statutory factors associated with any filing in order to act favorably under delegated authority. In order for the Case Manager to favorably resolve a statutory factor, the analysis should lead to a clear and well-supported conclusion that no material concerns exist with regard to the factor.

For statutory factors that correspond to risk management or compliance examination ratings (including those associated with any other relevant specialty area), satisfactory regulatory ratings generally support favorable resolution of the factor. Overall, the filing should support that the institution (post-consummation) will be in satisfactory financial condition with sufficient financial and managerial resources, and will operate with appropriate practices and processes, including with respect to the proposed transaction or activity.

The following items warrant close attention during the Case Manager's review of a filing:

- UFIRS component ratings of 3 or worse;
- Adverse information or less than satisfactory ratings related to compliance, CRA, Information Technology (IT), Anti-Money Laundering/Countering the Financing of Terrorist Activities (AML/CTF), or other specialty areas since the last safety and soundness examination;
- Noncompliance with any outstanding enforcement actions, other actions or agreements, or conditions imposed through a prior approval or non-objection;
- Proposed or final interim rating downgrades to 3 or worse (or equivalent) for any risk management or specialty examination;

[10] Procedural guidance has been issued with respect to the preparation and development of the ROI through the Risk Management Manual of Examination Policies, and for the SOI through these Procedures.

- Material concerns identified through a pending examination, visitation, offsite review, investigation, or other similar supervisory or administrative activity, such that the institution's risk profile may be adversely impacted;
- Parent organization financial or managerial concerns; and
- Other material financial, managerial, or operational concerns, whether or not related to the filing.

Any such concerns should be thoroughly evaluated in the context of the applicable statutory factor(s) and regulatory requirements, and must be appropriately mitigated or addressed to support a favorable resolution of the applicable factor(s) and requirements. Other divisions should be consulted, as appropriate, to fully evaluate these concerns.

In determining whether a concern is appropriately mitigated or addressed, the Case Manager should consider the following items:

- The source, nature, and severity of the concern;
- Whether material progress has been made in addressing the concern, efforts yet to be completed, and the timeframe by which the concern is expected to be resolved; and
- Whether the concern is expected to adversely impact the institution's financial condition, operations, or overall risk profile.

Filings from Institutions with Composite Ratings of 3

Filings from institutions assigned a composite rating of 3 present supervisory issues given the institution's financial, managerial, and/or other shortcomings. To facilitate resolving statutory factors, the Case Manager must conclude that either: (1) the proposed transaction or activity would improve the institution's overall condition, result in improvement in the specific areas of concern (such as earnings, capital, or management), or satisfy provisions of an outstanding enforcement action; or (2) the review indicates substantial and sustained progress in resolving the institution's deficiencies, such that the institution's overall risk profile is improving and an upgrade can be reasonably expected in the near term even though not yet effected.

Filings from Institutions with Composite Ratings of 4 or 5

Given the severity of the institution's condition and underlying deficiencies, as well as concerns regarding the institution's practices, it is unlikely that all applicable statutory factors will be favorably resolved for filings from an institution assigned a composite rating of 4 or 5. In rare circumstances in which the RO believes that favorable findings on the statutory factors is warranted for an institution with a composite rating of 4 or 5, or equivalent rating for any relevant specialty areas, the recommendation must be forwarded to the WO for final action.[11]

Filings Submitted Due to an Institution's Troubled Status

Filings submitted due to an institution's troubled status, such as those related to management changes, golden parachutes, and brokered deposit waivers, should be reviewed and processed in accordance with the guidance included in the relevant sections of these Procedures. The Case Manager should also refer to the appropriate portion of the Filings Matrix for the filing under review.

[11] This does not include filings submitted due to an institution's problem or troubled status, including actions under Sections 29, 32, or 38 of the FDI Act, or Part 359 of the FDIC Rules and Regulations for which delegated authority is otherwise provided.

Unfavorable Findings

Unfavorable findings with respect to one or more statutory factors will usually present circumstances that warrant a denial recommendation. At the FDIC's discretion applicants may be offered the opportunity to withdraw the filing. In rare circumstances, notwithstanding unfavorable findings relative to one or more statutory factors, there may be a business case for considering an approval recommendation. For example, a non-expansionary filing to address a circumstance outside the institution's control, such as loss of a significant retail banking office due to lease termination or environmental issues, may warrant an approval recommendation. Any approval recommendation should describe the institution's action plans to address its deficiencies in a timely manner. If a business case exists, the recommendation should be forwarded to the WO for final action in accordance with delegations of authority as specified in the Filings Matrix. The Board of Directors reserves authority to act on any deposit insurance or merger application where one or more of the statutory factors is not favorably resolved.

Favorable Subject to Conditions

The Case Manager should not use conditions as a means to favorably resolve any statutory factors that otherwise present material concerns. For example, "favorable subject to conditions" would not be an appropriate conclusion if the situation involves weak or questionable earnings projections; an unacceptable or opaque control structure; insufficient capital levels; weak or marginal management or director candidates; apparent violations of a statute or regulation; or a higher-risk business model without compensating factors, such as a strong risk management program. In such situations, the finding would be "unfavorable."

"Favorable subject to conditions" may be used in situations where the institution can be reasonably expected to address a pending issue in a timely manner in the normal course of business. In such situations, the matter in question would generally not be a material component of the proposal and would not adversely impact the institution's overall risk profile. As an example, "favorable subject to conditions" may be appropriate with respect to the management factor on a change in control notice if the institution proposes to expand its operations to include trust services within a short time period after the change in control, but has not yet selected a senior trust officer. In this case, assuming the management factor is otherwise viewed favorably, it may be appropriate to impose a condition that the institution must appoint an acceptable senior trust officer prior to initiating trust services.

Case-Specific Concurrence from DCP and/or Legal

Certain filings require case-specific concurrence from DCP and/or Legal as indicated within the Filings Matrix. The Case Manager should determine, as timely as possible, whether case-specific concurrence will be required, and should notify the appropriate DCP and Legal counterparts. The Case Manager should ensure that any such concurrence is obtained and reflected within the final case documents prepared at the RO level. Case-specific concurrence should be documented by including a signature line on the routing notice (or similar form) for staff and each management official to review and concur with the recommended action. Legal has confirmed that concurrence may be provided through electronic mail, given a business necessity or exigency (such as absence when a time-sensitive matter must be resolved). Such circumstances are expected to be infrequent.

DCP signatures should be included first on the routing notice, followed by Legal, then RMS. Concurrence for certain CRA-related filings (deposit insurance, merger, and office-related filings) may be provided through the appropriate internal tracking form provided that all DCP delegation requirements are met. While concurrence may not be required, the facts and circumstances of a case may warrant consultation with Legal and/or DCP staff. Unless otherwise indicated, concurrence to act on a matter related directly to a prior action (such as a request emanating from a condition imposed in the prior action) requires concurrence from DCP and/or Legal to the same extent the prior action required concurrence.

General Concurrence from Legal

The General Counsel grants general concurrence for the following types of supervisory filings:

- Continuation of insurance upon withdrawal from Federal Reserve System.
- Establishment and relocation of a domestic office and branch.
- Relocation of a foreign branch.
- Consent to exercise trust powers.
- Retire capital or subordinated debt.
- HOLA 10(l) election and revocation.
- Extension of time unless the decision on the underlying filing requires Legal concurrence.
- Determination of whether a filing is substantially complete unless the decision on the underlying filing requires Legal concurrence.
- Merger – Reorganization if each insured depository institution involved in the reorganization qualifies as a "small bank" or "intermediate small bank" under the Community Reinvestment Act (CRA) evaluation thresholds at the time of application and FDIC action.

For general concurrence to apply to a filing, each of the following must be satisfied: (1) each institution is satisfactorily rated (composite 1- or 2-rated, or equivalent, and not troubled or otherwise of concern); (2) the statutory factors and regulatory requirements have been fully considered and favorably resolved (except for a substantially complete determination made prior to the point those factors and requirements have been assessed); (3) the action is consistent with FDIC policies, procedures, and practices; and (4) staff review (including, as appropriate, DCP) has not raised significant concerns or impediments. If general concurrence from Legal applies, the Case Manager should ensure that its applicability is noted in the final case documents.

Filings Requiring Washington Office Action

If RO management determines that a filing may not satisfy the prerequisites for action under delegated authority, the Case Manager should notify the appropriate WO section of this determination and enter a comment in the system of record. RO staff should consult with WO staff on any case in which delegated authority is uncertain.

If a determination is made that a specific filing requires action by the WO, the RO should ensure the WO is apprised of the status, any related developments, and material findings or recommendations. Ongoing communication throughout the RO review will minimize processing time in the WO and ensure final disposition within published timeframe goals.

Case Managers should review the Filings Matrix to identify filings that require WO action.

Review and Processing – Filings Requiring Washington Office Action

The process below should be followed for all filings requiring WO action. Note that specific procedures apply to FDI applications (refer to the *Deposit Insurance Applications Procedures Manual*).

- As soon as practical, but no later than 10 business days following receipt, the RO will email a brief summary of the proposal to the appropriate Associate Director and a copy the appropriate Section Chief. The purpose of the summary is to notify the WO of the filing and the determination that WO action will be required.
- While leading the RO's application review, Case Managers should be alert to situations that should be communicated timely to RO and WO RMS management. Communication is warranted when preliminary review indicates substantial concerns that may be challenged or result in unfavorable

findings relative to the applicable statutory factors; substantial, atypical investigation processes may be required; significant legal issues exist; or review and processing are expected to be materially outside prescribed timeframes.

The communication should be provided as soon as practical after a situation has been identified, even if the circumstances remain fluid and details are limited. The communication should be supplemented as more current or detailed information becomes available.

Case Managers will continue to serve as the primary point of contact during the processing of the filing, and are responsible for maintaining open and continuous communication with the applicant, state agency, and any other relevant regulator regarding the status of processing.

- In accordance with processing timeframes, the RO will forward the signed SOI and accompanying narrative, decision documents as applicable (including a draft order and transmittal letter, along with any other necessary documents), and other pertinent documentation to the WO for final review, processing, and action. Processing timeframes may be extended for good cause, depending on the status of a field investigation or extenuating circumstances that may exist for a particular case. Any delays in processing should be documented in the appropriate internal database with specific reasons for the delay.
- SOIs forwarded to the WO for action should be signed by the Regional Director; under a specific delegation of authority, SOIs may be signed by the Deputy Regional Director.
- The WO will coordinate with the RO during the final review and processing, will inform the RO of the filing's disposition, will issue any final approval documents, and will provide copies of all final documents for inclusion in the appropriate documentation and imaging system.

Approving or Non-Objecting to a Filing Under Delegated Authority

Authority delegated to the RO, as detailed in the Filings Matrix and in Appendix A to the Filings Matrix, requires certain criteria to be met in order to approve or non-object to a filing. The Case Manager should verify that each criteria is satisfied for any filing where action at the RO level is contemplated.

Expectations Regarding Elevation of Filing Matters

RMS RO and WO staff must maintain open and timely communication with RMS RO and WO management regarding filing matters or developments that are expected to have a negative impact on the filing review process, timeline, or the ultimate conclusions and recommendations related to a filing. Negative impacts may include, but are not limited to, a review period that will extend beyond the timeframe goals or unfavorable findings with respect to any statutory factor. The need for such communication is heightened when, among other examples, substantial concerns regarding a proposal may result in a request for informal review by the RMS Director or may be challenged by an applicant; atypical review and investigation processes may be required; or the circumstances may result in formal complaints or objections with respect to the FDIC's review and processing.

When circumstances similar to those described above occur, RO staff should alert appropriate RO management who will inform the RMS WO management, as well as WO Legal and DCP, as appropriate, at the earliest opportunity and ensure ongoing communication as circumstances warrant. RO staff should prepare an informational summary as soon as practical following identification of the significant matter, and forward the summary through the Regional Director to the RMS Director, Senior Deputy Director (SDD), and appropriate Associate Director.

The summary should include, as appropriate:

- Known facts and circumstances, as well as possible outcomes and potential consequences;

- The application status;
- Open questions, requests, and concerns;
- Actions taken or initiated, and anticipated consequences;
- Coordination within the FDIC;
- Coordination with other agencies;
- Anticipated timing of the next update; and
- Proposed next steps.

WO management and staff will coordinate with appropriate RO management and staff in preparing briefings for FDIC officials, coordinating next steps, and other efforts as dictated by the circumstances.

Use of Written Agreements

Depending on the nature and complexity of the filing, the FDIC may impose non-standard conditions that require the institution and/or other applicable parties (such as certain affiliates or investors) to enter into a written agreement. Written agreements, which are intended to address specific risks or supervisory matters, may include parent company agreements, capital and liquidity maintenance agreements, operating agreements, and passivity agreements. If a written agreement is contemplated, the RO should discuss the matter with the Risk Management and Applications Section (RMAS) and WO Legal. Refer to *Standard and Non-standard Conditions*, Section 1.11 of these Procedures, for additional details.

After-the-Fact Filings and Related Matters

The FDIC may receive an after-the-fact filing from an insured institution or other party (collectively, party) that has initiated, directly or indirectly, a strategy, transaction, activity, or relationship (collectively, activity), but failed to submit to the FDIC a filing required by statute or regulation and obtain the FDIC's prior approval or non-objection. An after-the-fact filing may be submitted by the party upon self-identifying the failure to submit a filing (*e.g.*, through an internal audit or compliance review) or upon being directed by the FDIC of the need to file. In all instances, the FDIC must consider the circumstances leading to the after-the-fact filing, the review and processing considerations discussed below, and the appropriate supervisory action to address the failure to file. In situations in which the FDIC is not the party's PFR, the Case Manager should coordinate with the relevant agencies in considering or processing the after-the-fact filing, and determining the appropriate supervisory action.

This discussion does not apply to after-the-fact filings permitted by statute or regulation, such as certain situations involving changes in bank control.

Review and Processing Considerations

If the failure to file was discovered by the FDIC, the party should be informed in writing of the apparent violation of the applicable statute or regulation for failing to file, and the need to submit a filing to the RO by a specified date (generally, within 30 days from the written communication). Following submission, the filing should be reviewed and processed according to the established processes and procedures for the relevant filing type.

However, the FDIC should not direct a party to make an after-the-fact filing if, following consultation with RO management and RO Legal (and as necessary, WO RMS and Legal), it appears likely that RMS would not approve or issue a non-objection to the filing due to concerns with regard to one or more statutory factors. If approval or non-objection appears unlikely, the FDIC should advise the applicant and require conditions directing the party to develop a plan for termination, reversal, or divestiture of the activity (as discussed further below).

Similar considerations apply if the failure to file was self-identified by the party, and the party submits an after-the-fact filing without the FDIC's prior knowledge. If, following consultation with RO management and RO Legal (and as necessary, WO RMS and Legal), approval or non-objection is likely, the filing should be reviewed and processed according to the established processes and procedures for the relevant filing type. If denial or objection is warranted, the Case Manager should develop an appropriate recommendation that includes a condition to be imposed requiring termination, reversal, or divestiture of the activity.

Plan for Termination, Reversal, or Divestiture

The FDIC should instruct a party to file a plan for termination, reversal, or divestiture if approval or non-objection cannot be granted. This instruction should be communicated in writing with a specified due date for the plan to be submitted (generally, within 30 days from the written communication). The plan should include a reasonable timeframe for execution and appropriate milestones to achieve full implementation. If any areas of the submitted plan are deficient, the Case Manager should promptly request additional supporting information or modifications to the plan. Upon receiving an acceptable plan, the FDIC should instruct the party in writing to fully implement the plan within the prescribed timeframe. Depending on the nature of the activity and the extent of any related supervisory concerns, the party may be required to immediately terminate, reverse, or divest the activity.

Supervisory Actions

The FDIC must also consider the appropriate supervisory action in any circumstance in which a party failed to submit to the FDIC a filing required by statute or regulation, or if a party failed to implement a plan of termination, reversal, or divestiture within the prescribed time frame. Generally, the options for supervisory actions include: 1) issuance of a supervisory letter, 2) assessment of civil money penalties, or 3) formal or informal enforcement action. The Case Manager should consult with RO management and RO Legal (and, as necessary, WO RMS and Legal) to develop the appropriate supervisory response.

Impact on Determinations related to Statutory Factors, Regulatory Requirements, or Supervisory Ratings

RMS may determine that the failure to submit a required filing reflects negatively on management. If so, the failure to file should be considered when evaluating the statutory factors and regulatory requirements relevant to the filing. Further, because the failure to submit a required filing may be an apparent violation of Part 303 or other parts of the FDIC Rules and Regulations, such circumstances should be considered when assigning ratings to the institution, particularly when considering the ratings assigned to the management component.

IX. REFERENCES

Part 303 of the FDIC Rules and Regulations

Resolution and Delegations of Authority for Supervisory Filings, Enforcement Matters, Capital Determinations, and Information Sharing Agreements, Board Resolution Seal No. 086825

Major Matters Resolution, Board Resolution, Seal No. 074956

Statement of FDIC Corporate Governance for Supervisory Matters

Interagency Statement on Section 612 of the Dodd-Frank Act Restrictions on Conversions of Troubled Banks, FIL-50-2012

FDIC Statement of Policy on Applications for Deposit Insurance

FDIC Statement of Policy on Bank Merger Transactions

Policy Statement Regarding Minority Depository Institutions

Minority Depository Institution Designations, FIL 24-2022

Legal Concurrence Requirements Pursuant to the FDIC Board's Revised Delegations of authority to Act on DCP and RMS, February 18, 2021

FDIC Re-Issues its Processing Timeframe Guidelines for Applications, Notices, and Other Requests FIL 81-2018

Appendix A

PART 303, SUBPART A - RULES OF GENERAL APPLICABILITY

Part 303, Subpart A of the FDIC Rules and Regulations, Rules of General Applicability (12 CFR 303), sets forth general procedures for submitting various notices, applications, and requests (collectively, filings) to the FDIC. These are summarized below. The subparts of Part 303 provide specific filing and processing guidance for individual filing types, which are incorporated into the sections of these Procedures, as applicable.

Standard Conditions

The term *standard conditions* refers to the conditions that the FDIC may impose as a routine matter when approving a filing, whether or not the applicant has agreed to their inclusion. The following conditions, or variations thereof, are standard conditions:

(1) That the applicant has obtained all necessary and final approvals from the primary federal or state authority or other appropriate authority;
(2) That if the transaction does not take effect within a specified time period, or unless, in the meantime, a request for an extension of time has been approved, the consent granted shall expire at the end of the specified time period;
(3) That until the conditional commitment of the FDIC becomes effective, the FDIC retains the right to alter, suspend or withdraw its commitment should any interim development be deemed to warrant such action; and
(4) In the case of a merger transaction (as defined in § 303.61(a) of this part), including a corporate reorganization, that the proposed transaction not be consummated before the 30th calendar day (or shorter time period as may be prescribed by the FDIC with the concurrence of the Attorney General) after the date of the order approving the merger transaction.

Minor variations may be made with concurrence of RO Legal. Refer to *Standard and Non-standard Conditions*, Section 1.11 of these Procedures, for additional details.

General Filing Procedures

Unless stated otherwise, filings should be submitted to the appropriate FDIC RO.[12] Forms and instructions for submitting filings may be obtained from any FDIC RO or AO and the external FDIC website. The FDIC encourages filings to be submitted through FDIC*connect*. However, if FDIC*connect* is not an option and no specific filing form is prescribed, then the filing should be submitted in writing, be signed by the applicant or a duly authorized agent, and include a concise statement of the action requested. Filing and content requirements are set forth in the specific subparts of Part 303. The FDIC may require the applicant to submit additional information.

Public Notice Requirements

General public notice requirements are set forth in Section 303.7 of the FDIC Rules and Regulations. Specific publication requirements are set forth in Part 303, Subparts B (deposit insurance), C (branches and relocations), D (mergers), E (change in bank control), and J (foreign bank activities), and in the applicable sections of these Procedures.

[12] Although Part 303 provides for submission to the RO, some applications will not fall under regional jurisdiction and should instead be submitted to the WO.

Multiple transactions - For purposes of the publication requirements, Section 303.7(d) of the FDIC Rules and Regulations permits the FDIC to consider more than one transaction, or a series of transactions, to be a single filing. When publishing a single public notice for multiple transactions, the applicant must explain in the public notice how the transactions are related and state that the closing date of the longest public comment period will apply to all of the related transactions.

Joint public notices - For a transaction subject to public notice requirements by the FDIC and another federal or state banking authority, Section 303.7(e) of the FDIC Rules and Regulations indicates that the FDIC will accept publication of a single joint notice that includes all the information required by the FDIC and the other federal or state banking authority provided that the notice states that comments must be submitted to the FDIC and, as applicable, the other federal or state banking authority.

Public Access and Freedom of Information Act Requests

Any person may inspect or request a copy of the non-confidential portions (the public file) of a filing subject to a public notice requirement until 180 days following the final disposition of the filing, in accordance with Sections 303.7 and 303.8 of the FDIC Rules and Regulations. The FDIC will provide the requested public file, regardless of whether the filing has been accepted as substantially complete.

Requests for copies of the public file following closure of the file 180 days after final disposition require a request under the Freedom of Information Act (FOIA). Further, any request for confidential portions of a filing, regardless of when the request is made, must be submitted in writing under the FOIA and Part 309 of the FDIC Rules and Regulations.

Regardless of the nature of the request, the filing should be closely reviewed to ensure that the content of the filing is appropriately categorized as either "public" or "confidential." The Case Manager must ensure that the public portion includes only information and documents reasonably considered public, and the confidential section includes only information and documents reasonably determined to be confidential. As appropriate, redactions of confidential information embedded in documents otherwise considered public or publication of information that the applicant has requested to be treated as confidential should be discussed with RMS' FOIA contacts, RO Legal, and WO RMS and Legal. Refer to *Public Information*, Section 1.4 of these Procedures, for additional information.

Submission of Comments

For filings subject to a public notice requirement, any person may submit comments to the appropriate Regional Director during the comment period. Comment periods applicable to a particular filing can be found in the appropriate subparts of Part 303 and the individual sections of these Procedures.

Comment period extension - Section 303.9(b)(2) of the FDIC Rules and Regulations permits the FDIC to extend or reopen the comment period if:

- The applicant fails to submit all required information on a timely basis to permit review by the public or requests confidential treatment not granted by the FDIC that delays the public availability of the information;
- Any person requesting an extension of time satisfactorily demonstrates to the FDIC that additional time is necessary to develop factual information that the FDIC determines may materially affect the filing; or
- The FDIC determines that other good cause exists. Note, it is RMS policy that in the case of deposit insurance applications, good cause will automatically be determined to exist when the public portion of the filing is not immediately available. In such cases, the 30-day public comment period will begin on the date that the public portion of the filing is first made available.

The Case Manager should review the Filings Matrix and consult with Legal to determine the appropriate delegations for extending the comment period. The WO (RMS and Legal) should be consulted in the event specific delegations are in question.

Solicitation of comments - Whenever appropriate, the Regional Director may solicit comments from any person or entity that might have an interest in or be affected by the pending filing.

Applicant response - The FDIC will provide to the applicant copies of all comments received and may offer the applicant an opportunity to respond.

Hearings and other meetings - Section 303.10 of the FDIC Rules and Regulations addresses hearings and other proceedings in connection with filings involving:

- A deposit insurance application for a proposed new depository institution or an operating non-insured institution;
- An insured state nonmember bank application seeking to establish a domestic branch or to relocate a main office or domestic branch;
- A relocation application of an insured branch of a foreign bank;
- A merger or consolidation application that requires the FDIC's prior approval under the Bank Merger Act, except in cases of mergers that the FDIC Board determines must be acted on immediately to prevent the probable default of one of the institutions involved, or that must be acted on expeditiously due to an emergency condition;
- Nullification of a decision or filing; and
- Any other purpose or matter which the FDIC Board in its sole discretion deems appropriate.

Expedited Processing

Processing timeframes for a filing may be shortened when an eligible depository institution qualifies for expedited processing. Additionally, Part 303 of the FDIC Rules and Regulations provides that certain filings submitted by eligible institutions will be deemed approved after a defined number of days following receipt or publication if no action is taken by the FDIC. Therefore, the Case Manager should review filings as soon after receipt as possible to determine whether expedited processing is applicable and whether there are any matters that may result in a filing being removed from expedited processing. Legal should be consulted prior to removing a filing from expedited processing. The specific expedited processing timeframes vary by type of filing and appear in each of the relevant Subparts.

An eligible depository institution is not required to request expedited treatment; rather, expedited treatment follows from Section 303.2(r) of the FDIC Rules and Regulations, which defines an eligible depository institution as one that meets the following criteria:

- Has an FDIC-assigned composite rating of 1 or 2 under the UFIRS;
- Has a Compliance rating of 1 or 2;
- Has a Satisfactory or better CRA rating;
- Is "well capitalized" as defined by the appropriate capital regulations of the institution's PFR; and
- Is not subject to a cease and desist order, consent order, prompt corrective action directive, written agreement, memorandum of understanding, or other administrative agreement with its PFR or chartering authority.

The FDIC-assigned UFIRS composite rating is the rating assigned by the FDIC after reviewing the most recent Report of Examination. For FDIC-supervised institutions, this can be an intervening state rating if the rating has been accepted by the FDIC. The assigned rating could also be a rating assigned as the result of an interim rating change.

The Case Manager should note that expedited processing is only available when authority has been delegated to the Regional Director (Section 303.11(c) of the FDIC Rules and Regulations), except for filings made pursuant to Part 303 Subpart J (International Banking). Therefore, a review of the Filings Matrix is also required in determining whether expedited processing is available.

Section 303.11(c)(2) of the FDIC Rules and Regulations states that the FDIC may remove a filing from expedited processing for any of the following reasons prior to final disposition:

- An "adverse comment" (Section 303.2(c)) or "CRA Protest" (Section 303.2(l)) is received that warrants additional investigation or review (for filings subject to public notice).
- The Regional Director determines that the filing presents significant supervisory, compliance, or CRA concerns, or raises significant legal or policy issues.[13]
- Other "good cause" exists, as determined by the Regional Director. Good cause may be based on, for example, adverse information concerning the applicant's financial condition, compliance posture, or CRA assessment, or may result from concerns with respect to management, IT, AML/CFT compliance, or other supervisory matters. Further, removal from expedited processing is necessary if the nature of the intended activity or transaction presents a matter of controversy or first impression, establishes or changes existing FDIC policy, or could attract unusual attention or publicity. This authority should not be employed merely to lengthen processing time.

Further, Section 303.11(c)(2), authorizes the FDIC to remove certain filings from expedited processing at any time prior to final disposition if the filing is subject to (i) public notice and the FDIC receives an adverse comment that warrants additional investigation or (ii) evaluation of CRA performance and the FDIC receives a CRA protest that warrants additional investigation or review or the Regional Director determines the filing presents significant CRA or compliance concerns. In such circumstances, the filing should be removed from expedited processing unless the issue is fully and immediately resolved. However, there is no provision for removing a filing from expedited processing if a CRA protest is received for a filing not subject to evaluation of CRA performance or if an adverse comment is received for a filing not subject to public comment.

While the power to remove a filing from expedited processing allows for very broad discretion, this authority should be carefully exercised to ensure filings for sound, well-operated institutions are considered in a timely manner. If significant supervisory or other issues are evident, the filing should be removed from expedited processing to allow the time necessary to fully analyze and consider all relevant issues. If a filing is removed from expedited processing, the applicant must be informed promptly in writing of the determination and the reason(s) for removal. In addition, the Case Manager should document support within the appropriate system of record.

Computation of Time

Section 303.4 of the FDIC Rules and Regulations states that computation of time begins on the day after an event occurs (for example, the day after a substantially complete filing is received or the day after publication begins), and continues through the last day of the relevant period. The computation of time is based on calendar days. However, if the last day of the relevant period is a Saturday, Sunday, or federal holiday, the relevant period is extended to the end of the next business day. Section 308.12 addresses the calculation of time limits.

[13] Significant CRA concerns may include a determination by the Regional Director that although the applicant has an institution-wide CRA rating of satisfactory or better, its CRA rating is less than satisfactory in a state, certain metropolitan statistical area (MSA), or non-MSA portion of the state in which it seeks to expand (Section 303.11(c)(3)).

Abandonment of Filings

Section 303.11(e) of the FDIC Rules and Regulations specifically provides that applicants must provide the FDIC with all specified information and such additional information as is necessary for the FDIC to fully evaluate the filing. When required information is not submitted, the FDIC may consider the filing abandoned, provide written notice of the abandonment to the applicant and any interested parties that submitted comments to the FDIC, and close its files on the matter.

Decisions on and Disposition of Filings

In general, with respect to filings, the FDIC may approve (or not object), conditionally approve (or conditionally not object), or deny (or object to) a filing after appropriate review and consideration of the record. The applicant may also withdraw a filing or, as noted above, the FDIC may deem a filing abandoned. Section 303.11(a) of the FDIC Rules and Regulations requires the FDIC to promptly notify the applicant and any other person who makes a written request of the final disposition of a filing. If a filing is denied, the FDIC will immediately notify the applicant in writing of the reasons for the denial.

Unless provided otherwise by statutes, consistent with longstanding RMS practice, the FDIC will act on filings that may be deemed approved after a defined number of days (as previously discussed under Expedited Processing), and not simply allow the filing to be automatically approved.

Availability of Informal Review Process

If an applicant develops concerns regarding the FDIC's review of its filing, including concerns with respect to processing timeframes or other pre-decisional matters, the applicant may request a review by the RMS Division Director similar to the informal review process discussed in FIL-51-2016, *Reminder on FDIC Examination Findings* (July 29, 2016). The informal review process is available solely for pre-decisional processing matters, as processes regarding decisional matters are captured by Parts 303 and 308 of the FDIC Rules and Regulations. As such, applicants may not use the informal review process to request a review of the FDIC's analyses or preliminary findings with regard to any statutory factor or the overall filing, or situations in which the FDIC has offered the applicant an opportunity to withdraw the filing. Case Managers, after consulting with regional management, should consult with the appropriate WO Section Chief regarding these matters.

Nullification of Decisions

Except as provided by law or regulations, Section 303.11(g) of the FDIC Rules and Regulations permits the FDIC to nullify, withdraw, revoke, amend, or suspend a decision on a filing if the FDIC becomes aware at any time:

- Of any material misrepresentation or omission related to a filing or any material change in circumstances that occurred prior to the consummation of the transaction or commencement of the activity authorized by the decision on the filing; after the agency has rendered a final determination, the FDIC may nullify, withdraw, revoke, amend, or suspend its decision by providing written notification to the applicant of the determination and the reason(s) for the nullification, or
- That the decision on the filing is contrary to law or regulation or was granted due to clerical or administrative error.

Any person responsible for a material misrepresentation or omission in a filing or supporting information may be subject to an enforcement action and other penalties, including criminal penalties provided in Title 18 of the United States Code.

This authority permits the FDIC, under the identified circumstances, to nullify, withdraw, revoke, amend, or suspend a decision related to a filing, whether or not the filing was evaluated using expedited processing. RO Legal should be contacted as soon as possible to discuss any consideration to nullify, withdraw, revoke, amend, or suspend any decision on a filing. Before taking any of the actions described above, the FDIC must issue and serve on an applicant written notice of its intent to take such action. The applicant is permitted to file a written response to the FDIC within 15 days of the date of service.

Under certain circumstances, the FDIC may issue a temporary order on a decision without providing the applicant with a prior notice of its intent to nullify, withdraw, revoke, amend, or suspend a decision on a filing. For example, such action is permitted if the activity may pose a threat to depositors or impair public confidence, or when it is necessary to reevaluate the impact of a change of circumstances prior to consummation or commencement of the transaction or activity. With temporary orders, as with notices of intent to nullify, withdraw, revoke, amend, or suspend a decision on a filing, the applicant must be provided an opportunity to respond. The applicant's failure to file a written response to a notice of intent or to a temporary order constitutes the applicant's waiver of the opportunity to respond and its consent to the action taken by the FDIC (303.11(g)(3) of the FDIC Rules and Regulations).

Appeals and Petitions for Reconsideration

Section 303.11(f) of the FDIC Rules and Regulations provides information regarding appeals and requests for reconsideration. This paragraph does not apply to filings for change in control, change in senior executive officers or directors, or Section 19 denials, which are covered by relevant subparts of Part 308 of the FDIC Rules and Regulations (Subparts D, L, and M, respectively). However, for all other filings, Section 303.11(f) applies and requires the applicant to file a petition within 15 days of receipt of a notice of denial.

Investigations and Examinations

Section 303.6 of the FDIC Rules and Regulations states "The FDIC may examine or investigate and evaluate facts related to any filing under this chapter to the extent necessary to reach an informed decision and take any action necessary or appropriate under the circumstances." It is expected that the FDIC will fully analyze all relevant information with respect to a filing. It is further expected that investigations and examinations generally will be necessary in limited circumstances, such as deposit insurance applications (whether submitted on behalf of a *de novo* institution or an operating non-insured entity), and change in control notices if the filing involves parties not familiar to the FDIC or a higher-risk proposal. With the approval of the Regional Director or Deputy Regional Director, investigations may be conducted in other situations, such as merger applications involving a non-insured entity. The field investigation for a *de novo* institution will be documented in the ROI. Other investigations or examinations should be documented in a detailed memorandum or Report of Visitation.

Appendix B

List of Acronyms and Abbreviations

The following is a list of acronyms and abbreviations that are used throughout these Procedures.

Abbreviation	Definition
ALLL	Allowance for Loan and Lease Losses
ACL	Allowance for Credit Losses
AML	Anti-Money Laundering
ARD	Assistant Regional Director
BHCA	Bank Holding Company Act
BSA	Bank Secrecy Act
C Corp	C Corporation
CALMAs	Capital and Liquidity Maintenance Agreements
CBC Act	Change in Bank Control Act of 1978
CCS	Comprehensive Consolidated Supervision
CDFI	Community Development Financial Institution
CEBA	Competitive Equality Banking Act
CEO	Chief Executive Officer
CFT	Countering the Financing of Terrorist Activities
CISR	Division of Complex Institution Supervision and Resolution
CRA	Community Reinvestment Act
CRE	Commercial Real Estate
CSBS	Conference of State Bank Supervisors
DCP	Division of Depositor and Consumer Protection
DRR	Division of Resolutions and Receiverships
DIF	Deposit Insurance Fund
DIR	Division of Insurance and Research
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act
DEA	Drug Enforcement Agency
ESS	Executive Secretary Section
FBI	Federal Bureau of Investigation
FDI	Federal Deposit Insurance
FDI Act	Federal Deposit Insurance Act
FDIC	Federal Deposit Insurance Corporation
FDICIA	Federal Deposit Insurance Corporation Improvement Act
FFIEC	Federal Financial Institutions Examination Council
FIL	Financial Institution Letter
FIRREA	Financial Institution Reform, Recovery, and Enforcement Act of 1989
FO	Field Office
FRB	Federal Reserve Board
FRS	Federal Reserve System
FSA	Federal Savings Association

Abbreviation	Definition
FSOC	Financial Stability Oversight Council
FOIA	Freedom of Information Act
HOLA	Home Owners' Loan Act
ICE	Immigration & Customs Enforcement
IDI	Insured Depository Institution
IAB	International Affairs Branch
IAP	Institution-Affiliated Party
IBFR	Interagency Biographical and Financial Report
ILC	Industrial Loan Company
IT	Information Technology
LBS	Large Bank Supervision Branch
LLC	Limited Liability Company
LPO	Loan Production Office
MDI	Minority Depository Institution
MDIP	Minority Depository Institution Program
MSA	Metropolitan Statistical Area
Mutual	Mutually Owned Institution
NCUA	National Credit Union Administration
OCC	Office of the Comptroller of the Currency
OTS	Office of Thrift Supervision
PBO	Parallel-Owned Banking Organization
PFR	Primary Federal Regulator
RMSA	Relevant Metropolitan Statistical Area
RMAS	Risk Management and Applications Section
RMS	Division of Risk Management Supervision
RO	Regional Office
ROI	Report of Investigation
S Corp	S Corporation
SDD	Senior Deputy Director
SME	Subject Matter Expert
SOI	Summary of Investigation
SOP-ADI	FDIC Statement of Policy on Applications for Deposit Insurance
SOP-QFBA	FDIC Statement of Policy on Qualifications for Failed Bank Acquisitions
UFIRS	Uniform Financial Institutions Rating System
WO	Washington Office

I. INTRODUCTION

The primary method for presenting the facts, circumstances, and analysis regarding applications, notices, and other requests (collectively, filings) is the Summary of Investigation (SOI). The SOI should fully discuss the underlying proposal, the analysis and conclusions regarding the statutory factors and other relevant risk factors, and the recommended course of action.

The SOI should provide a wide range of readers - including Regional Office (RO) and Washington Office (WO) management, the Legal Division (Legal), the Division of Deposit and Consumer Protection (DCP) and internal review staff - with sufficient information to understand the proposal, the institution's current circumstances and risk profile, the Case Manager's analysis of all applicable statutory and regulatory requirements, any mitigating information, other matters that may impact or be impacted by the determination, and the basis for the recommended course of action. The depth and breadth of the SOI analysis and the discussion required to support a recommended action will vary from case to case, given the specific proposal and the characteristics of the underlying institution.

II. FORMAT OF THE SUMMARY OF INVESTIGATION

The SOI, at a minimum, must include the following sections: Description of Proposal; Analysis of Statutory Factors; Other Significant Matters; and Conclusion and Recommendation. The required content of each section is discussed below.

Description of Proposal

The Description of Proposal section should describe the proposed transaction or activity that resulted in the filing. This section should also include appropriate background information and context. At a minimum, the background information should briefly describe the institution's business model, including its primary products and services, funding sources, and operational focus. The background information should also note whether the proposal involves a material change to the business model, such as expansion into new geographic markets or new business lines. If so, a comprehensive analysis of the change should be included in the Analysis of Statutory Factors section.

Concerns that the proposal presents "major matters," such as significant policy or legal issues, the potential to attract unusual attention or publicity, or is a matter of first impression (that is, a situation that might set future direction, precedent, or policy) should be noted in this section and further detailed, as appropriate, in the Other Significant Matters section.

If there are related filings that have been, or are anticipated to be, submitted to the FDIC and/or other agencies, those filings should be summarized in this section to provide context for the entirety of the proposal.

Analysis of Statutory Factors

FDIC policy is that staff must fully consider and favorably resolve all statutory factors associated with any filing to act favorably under delegated authority. Accordingly, the Analysis of Statutory Factors section of the SOI must address each statutory factor separately and include a specific statement as to whether the statutory factor has been favorably resolved, favorably resolved subject to conditions, or unfavorably resolved.*

*Note: For filings subject to expedited processing, although each statutory factor must be considered, resolution of the factors may be addressed by reference to the relevant ratings assigned to the institution, so

long as the filing does not present a distinctly different business plan than historically pursued and the institution is not experiencing or likely to experience deterioration. In most cases, the review of the statutory factors for filings evaluated under expedited processing may be documented mainly with statistical and rating information (including the SOI data fields and the Application Summary Statement). Case Managers should, however, provide expanded analysis and commentary as circumstances warrant. Such commentary would be appropriate for cases in which potential concerns could impact the analysis of one or more statutory factors (*e.g.*, less than satisfactory component ratings, weaknesses in a specialty area, departure from the current business model/plan, or other emerging supervisory concerns). If the filing is removed from expedited processing, the Case Manager should summarize the reason within the SOI.

Case Managers should review the appropriate sections of these Procedures to identify the statutory factors applicable to each type of filing, as well as other regulatory requirements and processing or interpretive guidance pertinent to the filing.

Within the SOI, the Case Manager should provide a written evaluation of each statutory factor. The level of analysis and written commentary required for each statutory factor will vary depending on the facts and circumstances of the filing. SOIs related to filings presenting unique facts or circumstances, higher risk activities, or deficiencies regarding the underlying business plan should include more detailed assessments of each statutory factor.

For example, the SOI for a new branch filing that is part of a newly implemented expansion strategy should address the statutory factors contained in Section 6 of the Federal Deposit Insurance (FDI) Act[1] and assess, among other items, whether the institution has a history of satisfactory performance and condition, satisfactory earning prospects given the expansion plans, capital levels that will support the anticipated growth, and the necessary policies and controls to effectively manage the expansion. In contrast, less extensive SOI comments may be appropriate in analyzing a filing to establish a new, in-market branch by a well-rated, well-managed institution with an existing branch network.

Comments Regarding Specialty Examination Areas

An institution's demonstrated commitment toward maintaining effective programs with respect to each of the specialty examination areas is generally reflected in the Management component rating per the Statement of Policy on Uniform Financial Institutions Rating System;[2] as a result, the effectiveness of specialty programs is taken into account in the analysis of management. If any issues or concerns are noted regarding a specialty area, the matter should be discussed in an appropriate level of detail within the management assessment in the Analysis of Statutory Factors section. Depending on the nature of the matter, such issues or concerns may also affect the analysis of other applicable statutory factors. If an institution is subject to an enforcement action related to a specialty area, the SOI should outline the primary provisions of the enforcement action and note the nature and status of corrective measures taken by management, and whether substantial progress in meeting the provisions of the enforcement action is noted.

[1] Section 6 of the FDI Act requires the FDIC to consider the following factors: financial history and condition of the depository institution, the adequacy of its capital structure, its future earnings prospects, the general character and fitness of its management, the risk presented by the institution to the Deposit Insurance Fund, the convenience and needs of the community to be served, and the consistency of the institution's corporate powers with the FDI Act.

[2] The UFIRS takes into consideration certain factors that are common to all institutions. Under this system, all financial institutions are evaluated in a comprehensive and uniform manner, and supervisory attention is appropriately focused on the financial institutions exhibiting financial and operational weaknesses or adverse trends. Specialty examination findings and the ratings assigned to those areas are taken into consideration, as appropriate, when assigning component and composite ratings under UFIRS. Published in the Federal Register on January 6, 1997: link: Federal Register: Uniform Financial Institution Rating System.

Other Significant Matters

The Other Significant Matters section should address any other matters that could have an impact on the analysis of the statutory factors, other regulatory requirements, or the overall recommendation. Examples may include (this should not be considered an exhaustive list):

- Noteworthy regulatory, policy, or legal issues. For example, any significant concerns identified by Legal or DCP. The Case Manager should confirm, prior to finalizing the SOI, that all DCP and Legal feedback has been received and considered.

- Other regulatory or policy issues that must be addressed per outstanding policy, such as:

    - The presence of a dominant management influence, including the adequacy of any mitigating factors;
    - The effectiveness of any related recent or pending supervisory actions; and
    - Any proposed non-standard conditions related to the dominant official presence.[3]

- For requests to make a golden parachute payment, the certifications required by Part 359 of the FDIC Rules and Regulations.

- Internal and external consultations, such as:

    - Consultations completed during the processing of a filing, including discussions with subject matter experts, WO RMS staff, WO and RO Legal, DCP, and any other divisions of the FDIC. The SOI should specifically note whether case-specific concurrence from Legal and DCP was required and obtained (or, if applicable, whether the case was subject to general concurrence from Legal).
    - The attitude of other regulators, along with dates of any correspondence reflecting other regulatory actions on the filing and related filings.
    - Whether other regulatory actions are subject to conditions; if so, summarize the conditions.
    - Unless addressed elsewhere in the SOI, the Other Significant Matters section should briefly summarize any feedback received from Legal and DCP, based on their review of the filing.

- Outstanding corrective program or supervisory strategy changes, such as:

    - The status of outstanding written agreements (*e.g.*, capital and liquidity maintenance agreements, parent company agreements, and/or operating agreements) or corrective programs (*e.g.*, formal or informal enforcement actions).
    - A summary of the RO's strategy and plans to monitor the institution's progress with all conditions of approval for proposals that represent a material change to the institution's business model or risk profile. Supervisory strategies may include a reasonable combination of periodic certifications and progress reports from the institution, as well as offsite and/or onsite reviews.
    - Any recommended non-standard conditions, such as whether the institution agreed to the conditions in writing, who agreed to the conditions, and the date of agreement.

[3] The SOI should include a statement as to whether or not there is a dominant management official. Additional information on dominant officials can be found in the Risk Management Manual of Examination Policies.

- A statement as to who has delegated authority to act on the filing. If the Regional Director or designee does not have delegated authority, provide a statement as to why the RO does not have delegated authority.

- For filings forwarded to the WO for action, it should include the name, title, and complete address of the designated point of contact for the applicant, as well as the officials at the other regulatory agencies.

Conclusion and Recommendation

This section should include a brief statement regarding the recommended action on the filing and an executive summary supporting the recommendation. The level of detail in the Conclusion and Recommendation section should be commensurate with the significance of, and risk inherent in, the proposed transaction or activity. The Conclusion and Recommendation section should flow logically from the preceding sections and should include any mitigating information with respect to identified areas of concern, if applicable. A signature block with the name and title of the individual approving the recommended action and the date of action should be included immediately below this section.

III. REFERENCES

Sections 6, 18, 19, 32, and 42 of the FDI Act

Major Matters Resolution, Board Resolution, Seal No. 074956

Case Managers should implement the following procedures for filings that may be denied, disapproved, or subject to objection:

1. If, after receipt of any additional information, denial, disapproval, or objection remains appropriate, the Regional Director or designee and the Regional Counsel should be consulted and concur that the proposed action is supported by the facts and circumstances.

2. If the Regional Office (RO) intends to forward a recommendation for denial, disapproval, or objection to the Washington Office (WO), the Risk Management and Applications Section, Large Bank Supervision Branch, or Complex Financial Institutions Group Section Chief should be notified and consulted as soon as possible. WO Legal review should also be completed, as appropriate.

3. The Case Manager should consult with the appropriate members of Regional management and RO Legal regarding filings where disapproval, denial, or objection is considered. This consultation should involve determining which FDIC representatives will participate in discussion with the proponent(s). The Case Manager, together with RO Legal, should contact the proponent(s) and/or representing counsel as soon as possible to communicate concerns raised by the filing and to provide a final opportunity to submit any relevant information not previously provided that might impact the decision. When appropriate, such discussions should include an explanation of appeal rights and timeframes for such appeals, as outlined in Section 303.11(f) and Part 308 (Subparts D, L, and M) of the FDIC Rules and Regulations.

4. At the FDIC's discretion applicants may be offered the opportunity to withdraw the filing. In the event the filing is withdrawn, the FDIC's actions and communications should be documented in a memo to the file and at the appropriate system of record. Note that withdrawals must be received in writing.

5. If the filing is not withdrawn, the FDIC's determination and the basis for the action must be communicated either through an order and statement, or a letter, as appropriate. Whether through a cover letter to the order and statement, or through a separate letter, the applicant must be notified of their appeal rights should the filing be denied.

Note that the public may request copies of a denied, disapproved, or withdrawn filing, as well as the FDIC's determination, in accordance with the Freedom of Information Act (FOIA). The Case Manager should review the information in the application file to ensure confidential, personal, and proprietary information is not included in the non-confidential section of the file. If the RO receives a request for a copy of a denied, disapproved, or withdrawn filing under the FOIA, the Case Manager should consult with the RMS FOIA contacts, RO Legal, and as appropriate WO Legal and RMS.

REFERENCES

Sections 303.11(f) and 308 (Subparts D, L, and M) of the FDIC Rules and Regulations

I. BACKGROUND

Any person may inspect or request a copy of the non-confidential portions (the public file) of a filing (an application, a notice or request) subject to a public notice requirement until 180 days following the final disposition of the filing, in accordance with Sections 303.7 and 303.8 of the FDIC Rules and Regulations.[1] The FDIC provides the public with prompt notice of all filings that are subject to a public notice requirement via its website at https://www5.fdic.gov/cra/. The FDIC is required to produce the public file for review at the appropriate Regional Office (RO) not more than one business day after receipt of a request from an interested party.

Many interagency filings are subject to public notice requirements and involve simultaneous review and processing by the FDIC and other regulators. ROs should notify other interested federal and/or state banking regulators concerning the request for and release of public files on institutions supervised by the other respective agencies. Any significant differences in regulatory agency views regarding the nature of information, whether it is considered public or confidential, should be promptly brought to the attention of the Washington Office Risk Management and Applications Section.

II. PUBLIC INFORMATION

The public file generally consists of the non-confidential portion of the filing, along with supporting data and supplementary information considered public, and comments submitted by interested persons (if any). Case Managers should review the information included in the public portion of the filing to identify any information that should be withheld or, if appropriate, redacted as confidential. Any significant redactions to the public file should be communicated to the applicant prior to the release of the materials to the public.[2]

Case Managers should also review information included in the confidential portion of the submission to identify any information that should be treated as public information. Any such public information should be included in any release for the public, after consulting with RMS FOIA contacts and RO Legal, and notifying the applicant.

Neither the Summary of Investigation nor the Report of Investigation, if applicable, should be made a part of the public file.

The following information is generally included in the public file (not an all-inclusive list):

- Non-confidential portions of filings and supporting data, such as:

    1. General information contained in the business plan, such as economic data;
    2. Lists of the organizers, proposed directors, senior executive officers, and a signed Oath of Director for each proposed director (redact signatures and do not include any other personally identifiable information (PII), such as personal addresses (both physical and electronic) or social security numbers);[3]
    3. List of board committees and members;
    4. Descriptions of each proposed senior executive officer's duties and responsibilities;
    5. Copies of the articles of association, articles of incorporation, charter, proposed bylaws, and other organizational documents (if publicly available from the state in which the

[1] A written request for copies of the public file following closure of the file 180 days after the FDIC's final disposition of a filing should be submitted to the FDIC pursuant to the Freedom of Information Act (5 U.S.C. 552) and Part 309 of the FDIC Rules and Regulations.

[2] Routine redactions such as signatures do not need to be communicated.

[3] In certain situations Case Managers may need to consider confidentiality requests on behalf of the individuals listed in the application materials. In such cases, RMS FOIA contacts and RO Legal should be contacted.

institution is organized);
6. Copies of the CRA Plan submitted pursuant to the filing, including the assessment area(s); summaries of the institution's performance context; summaries of the credit needs of the institution's proposed assessment area(s); identification of the CRA evaluation test under which performance will be evaluated; and discussions of the institution's programs, products, and activities that will help meet the community's needs, including the needs of low- and moderate-income geographies and individuals; and
7. Descriptions of general issues pertaining to applicable state or federal laws or regulations.

- Copies of materials related to public stock offerings and public debt issuances.

- Copies of public portions of other filings submitted to the FDIC in conjunction with any particular proposal, such as filings for trust powers, branch offices, service corporations, and other subsidiaries.

- Non-confidential supplementary information filed during the review process.

- Comments received by the FDIC from interested parties (excluding other regulators).

Documents or information not listed above should be assumed to include confidential information. As such, the potential inclusion of such material in the public file should be carefully considered and, as appropriate, reviewed by RO FOIA subject matter experts, RO Legal, and WO RMS and Legal prior to release.

III. CONFIDENTIAL INFORMATION

The following categories of information are considered confidential and exempt from public disclosure under the FOIA:

a) Personal information, the release of which would constitute a clearly unwarranted invasion of privacy;
b) Commercial or financial information, the disclosure of which would result in substantial competitive harm to the submitter; and
c) Information, the disclosure of which could adversely affect the financial condition of any depository institution.

Specific examples of items that generally should be accorded confidential treatment include the following:

- Biographical and financial information for proposed directors, officers, and principal shareholders;
- Business plans and pro-forma financial projections;
- Assumptions underlying the financial projections and overall proposal;
- Information related to the projected pricing of assets and liabilities;
- Operating policies for key bank functions, such as lending, investments, asset/liability management, and Bank Secrecy Act compliance;
- Copies of contracts, leases, service agreements, merger agreements, and similar legal documents containing confidential information; and
- Signatures, personal phone numbers (whether home or mobile), and personal addresses (whether physical or electronic). Any such information must be redacted; under no circumstances should the Case Manager allow the release of PII.

The Case Manager should consult with the appropriate RMS' FOIA contacts, RO Legal, and WO RMS and Legal if questions arise regarding whether information should be considered confidential and exempt from

public disclosure. The Case Manager should also discuss with the applicant any questions raised regarding the confidentiality of information included in the filing.

IV. REQUESTS FOR CONFIDENTIAL TREATMENT OF INFORMATION

A request by the applicant for confidential treatment should include written justification for such treatment, and RO management should make an independent determination regarding the appropriateness of the request. The applicant's reasons for requesting confidentiality should specifically demonstrate the harm (for example, impact on competitive posture or invasion of privacy) that would result from the public release of the information. An applicant should follow the same procedure when requesting confidential treatment for submissions of supplemental information. The RO, after consultation with the Legal, should notify the applicant before including in the public file any information for which the applicant requested confidential treatment.

In addition, even though an applicant may not have requested confidential treatment for an item, the FDIC, on its own initiative, may determine that the information should be treated as confidential and withheld from the public file. In such cases, the FDIC's considerations should be guided by an overriding regulatory or supervisory concern.

V. FREEDOM OF INFORMATION ACT REQUESTS

Requests for information withheld from the public file or copies of the public file following closure of the file 180 days after the FDIC's final disposition of a filing should be submitted in writing to the FDIC pursuant to the FOIA (5 U.S.C. 552) and Part 309 of the FDIC Rules and Regulations using any of the following processes:

- By completing the online request form on the FDIC's FOIA Service Center website: FOIA Website;
- By faxing a clearly marked FOIA request to the FOIA/Privacy Group at (202) 898-6910; or
- By sending a letter to: Legal Division, FDIC, ATTN: FOIA/Privacy Group, 550 17th Street N.W., Washington, D.C. 20429.

Many documents created on or after November 1, 1996, are available on the FDIC's website. The FDIC also maintains a Public Information Center (PIC) that makes available corporate records, including many reports, summaries, and manuals. The PIC is located at 3501 North Fairfax Drive, Room E-1005, Arlington, VA 22226. It can be reached during business hours by calling 1 (877) 275-3342 or (703) 562-2000.

VI. REFERENCES

Sections 303.7 and 303.8 and Part 309 of the FDIC Rules and Regulations

Procedures for Processing Freedom of Information Act Requests, Corporate Directive 1023.1

I. INTRODUCTION

On January 22, 1988, the Federal Financial Institutions Examination Council (FFIEC) issued the "Joint Statement of Guidelines on Conducting Background Checks and Change in Control Investigations." These guidelines detail the member agencies' agreement on when and how such investigations should be conducted. All FFIEC member agencies currently perform background investigations in accordance with these guidelines.

In line with the joint statement, the FDIC has established responsibilities and procedures for conducting background investigations in connection with certain filings submitted to the FDIC, such as applications for federal deposit insurance, notices of change in control, applications subject to Section 19 of the Federal Deposit Insurance (FDI) Act, and notices subject to Section 32 of the FDI Act.

Background investigations may be initiated before an application is accepted for processing. Applications subject to Section 19 of the FDI Act should not be accepted for processing until the results of the background investigations are received. However, other types of applications subject to background investigations may be accepted for processing while the investigation is ongoing (prior to receiving results of the background investigations) if, for instance, the individuals involved are known to the FDIC or preliminary review of the materials submitted and other available information sources indicate no concerns. In situations where the application has not been accepted for processing pending the results of the background investigation, the system record should reflect this treatment. However, no background investigations should be started or requested until a signed application and an Interagency Biographical and Financial Report (IBFR) has been received.

II. REQUESTING BACKGROUND INVESTIGATIONS

Background investigations are processed through the appropriate background investigation system, which provides each Regional Office (RO) and the Washington Office (WO) with a nationwide, real-time, automated management tool to initiate, process, and track all background investigations. Appropriate RO and WO staff should be granted access to the background investigation system. Assistant Regional Directors (ARD) are responsible for coordinating RO access to this system in accordance with appropriate security policies and procedures. The system holds personally identifiable information (PII) of the greatest sensitivity, and accessing the information requires the highest level of security within the FDIC. Temporary access to this background investigation system should be promptly terminated as soon as access is no longer needed.

Case Managers are responsible for ensuring that the required documentation for a background investigation is forwarded to the Division of Risk Management Supervision (RMS) Cyber Fraud and Financial Crimes (CFFC) Section in the WO. Case Managers should initiate background investigations in the background investigation system.

Each RO is responsible for coordinating background investigations with the other federal regulatory agencies in the case of companion or duplicate filings. However, the regulatory agencies, including the FDIC, no longer share the results of investigations due to privacy concerns associated with PII and the Right to Financial Privacy Act. As such, the FDIC will likely need to perform an independent background investigation. The CFFC Section forwards requests for background investigations received from the ROs through the appropriate system to relevant law enforcement agencies. Results of investigations are communicated back to the requestor via this internal system when received by the CFFC Section.

The FDIC requires Federal Bureau of Investigation (FBI) Fingerprint Identification Checks, FBI Name Checks, and Suspicious Activity Report (SAR) searches of the Financial Crimes Enforcement Network (FinCEN) Query System for all subject applications. Additionally, Immigration and Customs Enforcement (ICE) Name Checks are required for federal deposit insurance applications and change in control notices. However, with respect to filings under Sections 19 and 32 of the FDI Act, ICE investigations are only conducted when warranted.

III. REQUESTS PRODUCED AND ROUTED TO CFFC FOR PROCESSING

The following background investigation requests should be made using the background investigation system and routed to the CFFC Section for processing.

FBI Fingerprint Identification Checks

Parties Within the United States

The FBI requires fingerprints to establish positive identification for background investigations and has advised the FDIC that this is the best method to ensure that all potential criminal background information is obtained. Accordingly, the FDIC requires that all individuals subject to background investigations have an FBI Fingerprint Identification Check performed in connection with applications for federal deposit insurance, notices of change in control, applications subject to Section 19 of the FDI Act, and notices subject to Section 32 of the FDI Act. Completing the fingerprinting requirement is the sole responsibility of the applicant or acquiring party. ROs will use the background investigation system to document the FBI Fingerprint Identification Check requests and process.

The RO will notify applicants located in the United States, Guam, Puerto Rico, and the Virgin Islands in writing that fingerprints are required for the filing(s), and that they are required to use the FDIC's approved agent to complete this requirement. The notification will provide the applicant with the required information to complete the fingerprinting process, including appointment scheduling information, Fieldprint Code, Background Investigation (BI) Case Number, and the agent's customer service contact information. Applicants will be encouraged to complete the fingerprinting process as soon as possible. Difficulties in obtaining fingerprints should be referred to the CFFC Section.

These reports are for FDIC's use only and cannot be disclosed to outside parties.

Parties Outside the United States

U.S. citizens and U.S. residents living outside the U.S. that are not able to complete their FBI Fingerprint Identification Check with the FDIC's approved agent will continue to submit ink fingerprint cards to the FDIC. The RO will notify the affected parties in writing that fingerprints are required for the application. The notification will include several ink fingerprint cards per applicant and encourage applicants to use a police department or local law enforcement agency to complete their ink fingerprint cards to ensure clarity of the prints. Applicants should be advised of the possibility of an FBI rejection of the ink fingerprint cards, and corresponding delays in the application process, if prints are not clear. It is also important that all information blocks on the ink fingerprint cards be completed to avoid possible rejection by the FBI. The RO will convey a reasonable period of time for the fingerprinting process to be completed. The RO will contact the CFFC Section for detailed guidance and procedures in such instances.

FBI Name Checks

The FDIC requires an FBI Name Check background investigation for all individuals subject to background

investigations in connection with applications for federal deposit insurance, notices of change in control, applications subject to Section 19 of the FDI Act, and notices subject to Section 32 of the FDI Act. When requesting FBI Name Checks for individuals, the background investigation system should be used to generate, process, and deliver these requests to the CFFC Section. The system will generate a cover letter and the required Name Check Forms detailing the request for the name checks, individuals for whom the name checks are requested, and the RO contact person(s).

These reports are for FDIC's use only and cannot be disclosed to outside parties.

ICE Name Checks

ICE Name Check background investigations are required and should be requested for all deposit insurance filings and change in control notices. These requests are not required for filings under Sections 19 and 32 of the FDI Act, but may be requested when warranted. Like FBI Name Checks, ICE Name Checks are requested using the background investigation system to notify the CFFC Section and generate a cover letter and Name Check Forms detailing the request for the name checks, for whom the name checks are requested, and the RO contact person.

These reports are for FDIC's use only and cannot be disclosed to outside parties.

Special Name Checks

Special Name Check background investigations may be requested for applicants under limited, specific circumstances, but are not conducted routinely and should only be used when justified. Acceptable uses of Special Name Checks may include an applicant who is a foreign national, non-resident, or a U.S. citizen who was born in a foreign country and/or lived a portion of their adult working life in any foreign country. Special Name Checks are processed through the background investigation system, which should be used to generate, process, and deliver requests to the CFFC Section. Special Name Checks require that the Foreign Nationals Section be completed prior to submitting a request. The system will generate a cover letter and required Name Check Forms detailing the request, for whom the Name Checks are requested, and the RO contact person(s). Incomplete requests cannot be processed and will be returned to the submitting RO to obtain the necessary information.

These reports are for FDIC's use only and cannot be disclosed to outside parties.

IV. REQUESTS PRODUCED AND ROUTED TO FDIC LIBRARY FOR PROCESSING

Each of the following reports may be obtained through the FDIC Library by a request through the background investigation system. The system will generate a cover letter and required forms stating the date of the request, the names of companies or individuals for whom the reports are to be produced, the types of reports requested, the RO contact person, and the ARD who approved the request.

These reports are for FDIC's use only and cannot be disclosed to outside parties.

Company Financial Reports

Dun & Bradstreet (D&B) Business Information Reports include information regarding assets and liabilities, officer and director listings, Uniform Commercial Code (UCC) records, tax liens, and some payments data. Experian Business Profile Reports generally include detailed payment histories.

Consumer Credit Reports

Consumer credit reports may be requested to more thoroughly evaluate an individual's financial condition and ability to participate in the affairs of the financial institution. The consumer credit reporting agencies offer an independent, third-party check of the applicant's stated financial position. The information available includes, but may not be limited to, year of birth, current address, previous addresses, place of employment, credit history, and public information such as judgments, bankruptcies, tax and mechanic's liens, lawsuits, and wage assignments.

Requests require the individual's name, social security number, and current primary address including zip code. All requests must be supported by a legitimate business need for the information and must be approved by regional management (ARD or above). Requests for consumer credit reports may be appropriate for applications for federal deposit insurance, notices of acquisition of control, applications subject to Section 19 of the FDI Act, and notices subject to Section 32 of the FDI Act. The Fair Credit Reporting Act (FCRA) limits access to these reports.

LexisNexis

The FDIC Library has online access to the LexisNexis public records database, which, among other things, provides consolidated information from a variety of public records sources, as well as major regional and national newspapers and other publications. The service also offers information concerning disciplinary actions against securities dealers and brokers and limited access to other public records.

The public record reports contain sensitive PII. Under the provisions of the Gramm-Leach-Bliley Act and the terms of use agreement with LexisNexis, the requestor must have a permissible purpose to obtain the information in the report. For requestors without a permissible purpose, the report will only include unregulated information. The terms of use agreement specifies that these reports are only to be used for purposes that are not related to the FCRA, are for FDIC use only, and cannot be disclosed to outside parties.

Public Records

The FDIC Library has access to several other public records databases, which include public record filings for individuals and corporations. Among the types of records that may be available are bankruptcy filings, UCC records, tax liens, judgments, tax assessor records, and various corporate records. Records availability varies greatly by state and/or locality.

V. ADDITIONAL BACKGROUND INVESTIGATIONS THAT SHOULD BE COMPLETED

The FDIC requires that ROs complete a SAR search using the FinCEN Query System for all individuals subject to background investigations. Case Managers should also consider performing the following record searches using the FinCEN Query System:

- Currency Transaction Reports;
- Reports of International Transportation of Currency or Monetary Instruments;
- Reports of Foreign Bank Accounts; and
- Reports of Cash Payments Over $10,000 Received in a Trade or Business (IRS Form 8300).

The results of FinCEN Query System searches should be documented under the "Other Investigations" tab within the background investigation system. Due to limited access to FinCEN Query system, the Case Manager may need to consult with the RO Case Manager – Special Activities.
These reports are for FDIC's use only and cannot be disclosed to outside parties.

VI. RESPONSIBILITY FOR AN ADVERSE ACTION

Generally, Case Managers should not recommend adverse action with respect to a party subject to background investigations based solely on the receipt of summary scores, indicators, or similar responses to a background inquiry or investigation request. Case Managers are expected to conduct reasonable and appropriate due diligence, to the extent possible, and to consult with Legal, prior to recommending adverse action with respect to the individual in question.

In the case of information submitted directly by applicants, as well as cases in which public information is obtained by or otherwise available to the FDIC, Case Managers should generally provide the applicant a reasonable opportunity to provide explanatory or supplemental information that may mitigate FDIC concern. In the case of confidential information obtained by or otherwise available to the FDIC (such as law enforcement reports containing adverse information), Case Managers should determine the most appropriate course of action in consultation with RO management, Legal and, as appropriate, the appropriate WO review section.

Adverse Actions Under the Fair Credit Reporting Act

An adverse action has been defined under the FCRA to include, among other matters:

- The denial of employment involving the consumer;
- Any other decision for employment purposes that adversely affects any current or prospective employee;
- An action taken or a determination that is adverse to the interests of the consumer, which is made in connection with an application made by (or a transaction that was initiated by) any consumer; and
- A denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of any license or benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility status.

Given the broad definition of adverse action, RMS may be required to notify the applicant orally, in writing, or by electronic notice that the FDIC has taken adverse action against them, based in whole or in part, on information contained in their consumer credit report. The notice provided to the consumer should include the following information:

- Contact information for the consumer reporting agency that provided the consumer credit report;
- A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken;
- Information about the applicant's right under the FCRA to obtain a free copy of his or her consumer

credit report from the consumer reporting agency if requested within 60 days of receiving the notice; and

- The applicant's right to dispute the accuracy or completeness of any information with the consumer reporting agency.

Legal should be consulted before advising an applicant that adverse action has been taken against him or her, and should also be consulted in the drafting of any correspondence.

VII. REFERENCES

Fair Credit Reporting Act

Protecting Sensitive Information, Corporate Directive 1360.9

FDIC Statement of Policy for Section 19 of the FDI Act

Section 308 of Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) establishes several goals related to minority depository institutions (MDIs): (1) preserving the number of MDIs; (2) preserving the minority character of institutions in cases involving mergers or acquisition; (3) providing technical assistance to prevent insolvency; (4) promoting and encouraging creation of new MDIs; and (5) providing for training, technical assistance, and educational programs. The FDIC Board of Directors adopted the *Statement of Policy Regarding Minority Depository Institutions* (*Policy Statement*) to describe the FDIC's program to support the goals set forth in Section 308 of FIRREA.

Case Managers should remain cognizant of the tenets of the FDIC's program outlined in the *Policy Statement*. Consistent with Regional Office procedures, the Case Manager may be responsible for (1) coordinating responses to requests for technical assistance regarding application-related matters, such as providing an explanation of an application process or the type of analysis and information required for different application filings, and (2) meeting with groups that may be interested in establishing a new MDI to discuss the application process, the requirements of becoming FDIC-insured, and the various programs geared toward MDIs.

The FDIC has established a process for FDIC supervised institutions or applicants to obtain the FDIC's acceptance of the institution's or applicant's determination that it meets one of the MDI eligibility requirements set forth in Part 308 of FIRREA and described in the *Policy Statement*. FDIC supervised institutions or applicants may submit a written request to be designated as an MDI at any time.[1] For specifics regarding the process to request an MDI designation, see Financial Institution Letter FIL-24-2022. Refer to the FDIC Minority Depository Institutions Program Webpage for additional information on the program, including the list of MDIs.

Case Managers must work closely with the Regional MDI Coordinator regarding changes in the minority status of institutions in their portfolio, whether a result of an institution being newly designated as an MDI or when a pending application, such as a change in control, may affect an institution's current designation. For any newly designated MDIs, the Regional MDI Coordinator will familiarize the institution with the FDIC's MDI program.

REFERENCES

Statement of Policy Regarding Minority Depository Institutions

Section 308 of the Financial Institution Reform, Recovery, and Enforcement Act of 1989

[1] Such requests may also be submitted in connection with a deposit insurance or merger application, or a change in control notice.

I. INTRODUCTION

Certain filings require the proponents to post a public notice of their request, generally in the form of a legal announcement, in one or more newspapers of general circulation. The notice informs the public of its right to comment on or to protest the filing during the relevant comment period. Information regarding filings subject to the Community Reinvestment Act (CRA) or public comment is available to the general public through the FDIC external website at FDIC CRA applications. Public materials associated with the filing may be requested from the FDIC, and public comments may be submitted to the FDIC regarding the filing.

Under Section 303.5 of the FDIC Rules and Regulations, the FDIC takes into account the record of performance under the CRA of each applicant in considering a filing for approval of:

- The establishment of a domestic branch;
- The relocation of the bank's main office or a domestic branch;
- The relocation of an insured branch of a foreign bank;
- A transaction subject to the Bank Merger Act; and
- Deposit insurance.

Under Section 303.7 of the FDIC Rules and Regulations, the public must be provided prior notice of a filing to 1) establish a domestic branch, relocate a domestic branch or the main office, relocate an insured branch of a foreign bank, 2) engage in a merger transaction, 3) initiate a change of control transaction, or 4) request deposit insurance.

Members of the public can submit comments that may address a number of areas, which can be either supportive or critical of the filing, and may protest the filing on the basis of, for example, CRA considerations or convenience and needs of the community to be served.

Section 303.2(*l*) of the FDIC Rules and Regulations defines the term "CRA protest" to mean any adverse comment from the public related to a pending filing that raises a negative issue relative to the CRA, whether or not it is labeled a protest and whether or not a hearing is requested. An "adverse comment" is defined under Section 303.2(c) of the FDIC Rules and Regulations, as any objection, protest, or other adverse written statement submitted by an interested party relating to a filing. The term does not include any comment that the appropriate Regional Director or designee determines to be frivolous (for example, a non-substantive comment submitted primarily as a means of delaying action on the filing).

II. PROCESSING

The Case Manager should forward any protest or comment (collectively, submission) based on CRA or compliance considerations via the appropriate document distribution system to the appropriate Division of Depositor and Consumer Protection (DCP) counterparts and the Regional Office (RO) Community Affairs Officer for review and comment. Within three business days of receipt, the DCP Review Examiner must send an acknowledgement letter to the submitter stating that the matter has been received and referred for further review and analysis. The Case Manager should work closely with their DCP counterparts to ensure the letter is prepared and sent.

When submissions are received after the public comment period has closed, the comment period may be extended or reopened if: (1) all required information was not filed on a timely basis to permit review by the public or a request for confidential treatment was not granted that delayed public availability; (2) it was satisfactorily demonstrated that additional time was necessary to develop factual information; or (3) for

good cause. All CRA-related submissions will be considered by DCP.[1] Submissions based on factors other than CRA or compliance considerations will be assessed by the Case Manager and appropriate RO management staff.[2]

If a submission is received and no application is anticipated or pending, the submission should be handled as a routine inquiry or complaint. The Case Manager should ensure that DCP staff has advised the submitter that if an application is not filed within 30 days, the submission will be evaluated as either a consumer complaint through the consumer complaint process, or as part of the next CRA examination as a public comment on the institution. If an application is anticipated or expected to be filed, the Case Manager should coordinate with DCP staff regarding appropriate treatment of the submission. Section 303.9 of the FDIC Rules and Regulations provides additional guidance for the submission of comments, comment period, extension, solicitation of comments, and applicant response.

Review and Processing of the Submission[3]

If the submission is not deemed to be a protest, within seven business days of receipt, the Case Manager must send a letter to inform the submitter that the issues raised do not constitute a protest and provide an explanation for the decision.

If the submission is deemed a protest, the Case Manager must send a letter to the submitter within seven business days, acknowledging receipt of the submission. The letter must advise the submitter that the submission will be forwarded to the applicant and that a copy of any future submissions should be sent to both the applicant and the Regional Director. The Case Manager should send a letter advising the applicant of the receipt of the submission and enclose a copy of the submission. The letter should:

1) include the name and address of each submitter;

2) request that the applicant notify the FDIC within three business days after receipt of the letter, whether the applicant intends to respond to the submission;

3) instruct the applicant that any response should be in writing and should be sent on or before ten business days after the date of the FDIC letter; and

4) advise the applicant to send copies of any responses to the FDIC, each submitter, and each supervisory authority that received a copy of the application (for example, the appropriate Federal Reserve Bank or state banking department).

The Case Manager must coordinate closely with DCP staff who will evaluate and process the protest. Such coordination should include collaborating on the response letter, Summary of Investigation preparation, possible conditions to include in an Order, and development of the approval letter and Order, if applicable.

Statement on Protests

When DCP staff receives and evaluates a CRA protest, they will prepare a Statement that will summarize

[1] Within five business days, the DCP Deputy Regional Director will make a determination whether the adverse comment is a CRA protest. Further, within 45 business days of receipt of a CRA protest, Regional DCP staff shall submit a brief memorandum, or summary email, to the Case Manager describing the analysis and recommendation on the application.
[2] Within five business days of a final determination on approval of an application, Regional DCP shall send a letter to the protester describing the final action taken on the application.
[3] Whether a submission is a comment or a protest, the Case Manager should coordinate with DCP staff, and Legal (as appropriate) regarding preparation and sending of the letter.

the allegations of the CRA protest received, the attendant analysis, and how the entity will serve the convenience and needs of the community. This Statement will be provided by DCP staff to the Case Manager, who should ensure the Statement is attached to the document transmitting FDIC approval of such covered application, such as a letter or Order.

III. PROCESSING HEARING REQUESTS

Before the end of the comment period[4] related to a certain filing, any person may submit to the appropriate Regional Director a written request for a hearing on a filing. The request must describe the nature of the issues or facts to be presented and the reasons why written submissions would be insufficient to make an adequate presentation of those issues or facts to the FDIC. A person requesting a hearing shall simultaneously submit a copy of the request to the applicant.

Section 303.10 of the FDIC Rules and Regulations covers hearings and other proceedings in connection with filings for:

- Deposit insurance;
- The establishment of a domestic branch or the relocation of a main office or domestic branch;
- The relocation of an insured branch of a foreign bank;
- A transaction subject to the Bank Merger Act, except for mergers that the FDIC Board determines must be acted upon immediately to prevent the probable failure of one of the institutions involved or a transaction that must be handled expeditiously due to an emergency;
- Nullification of a decision on a filing; and
- Any other purpose or matter that the FDIC Board in its sole discretion deems appropriate.

After receiving a hearing request, the FDIC may choose to:

- Hold a formal hearing,
- Hold an informal proceeding, or
- Not hold a hearing or informal proceeding.

The Regional Director, after consultation with RO Legal, may grant or deny a request for a hearing and may limit the issues to those deemed relevant or material. The FDIC generally grants a hearing request only if it determines that written submissions would be insufficient or that a hearing otherwise would be in the public interest. If the Regional Director, after consultation with Legal, denies a hearing request, he or she shall notify the person requesting the hearing of the reason for the denial. A decision to deny a hearing request is a final agency determination that is not appealable to the FDIC Board.

Formal Hearing

If the FDIC decides to hold a hearing, the Regional Director must coordinate with the Office of Communications to issue a notice of that hearing stating the subject and date of the filing, the time and place of the hearing, and the issues to be addressed. The FDIC will send a copy of the notice of hearing to the applicant, to the person requesting the hearing, and to anyone else requesting a copy. Any person who

[4] The length of the comment period will vary depending on the type of filing. Refer to the applicable sections of these Procedures and Part 303 of the FDIC Rules and Regulations for information regarding comment periods.

wishes to appear (participant) shall notify the appropriate Regional Director of his or her intent to participate in the hearing no later than ten calendar days from the date that the FDIC issues the notice of hearing. At least five calendar days before the hearing, each participant shall submit to the appropriate Regional Director, the applicant, and any other person as required by the FDIC: the names of witnesses, a statement describing the proposed testimony of each witness, and one copy of each exhibit the participant intends to present.

The FDIC will appoint a presiding officer to conduct the hearing, who will usually be the appropriate Regional Director. The presiding officer is responsible for procedural questions not covered by Section 303.10 of the FDIC Rules and Regulations.

Informal Proceedings

The Regional Director may arrange for an informal proceeding in connection with a filing, either upon receipt of a written request for such a meeting made during the comment period, or upon the FDIC's own initiative. No later than ten calendar days prior to an informal proceeding, the Regional Director shall notify the applicant and each person who requested a hearing or oral presentation of the date, time, and place of the proceeding. The proceeding may assume any form, including a meeting with FDIC representatives at which time the participants will be asked to present their views orally. The Regional Director may hold separate meetings with each of the participants. If the Regional Director decides not to hold a meeting, the Regional Director, or designee, shall notify the applicant and all persons who requested an opportunity to be heard. The notification should explain the Regional Director's rationale for their decision.

IV. REFERENCES

Sections 303.2(l), 303.5, 303.9, and 303.10 of the FDIC Rules and Regulations

I. INTRODUCTION

Per Parts 303 and 345 of the FDIC Rules and Regulations, the FDIC must review and consider the applicant's record of performance under the CRA and Compliance for any of the following "covered" applications:

- The establishment of a domestic branch;
- The relocation of the institution's main office or a domestic branch;
- The relocation of an insured branch of a foreign bank;
- A transaction subject to the Bank Merger Act; and
- Deposit insurance.

The Case Manager should ensure that the Division of Depositor and Consumer Protection (DCP) Review Examiner is included in the distribution of covered applications. The appropriate internal application tracking form can also be used to initiate contact with DCP, summarize key elements of the application, and provide any comments. The Case Manager should consult with Washington Office (WO) DCP, Division of Risk Management Supervision (RMS), and Legal Division staff, as appropriate.

II. EXPEDITED PROCESSING AND REMOVAL

For an institution to be eligible for expedited processing,[1] it must have been assigned an Outstanding or Satisfactory CRA rating and a 1 or 2 Compliance rating by its Primary Federal Regulator as a result of its most recent examination.

The following circumstances may warrant the removal of the application from expedited processing following consultation among DCP, RMS, and Legal:

- Filings subject to public notice or if an adverse comment is received that warrants additional investigation or review;
- Filings subject to an evaluation of CRA performance; a CRA protest is received that warrants additional investigation or review;[2]
- The Regional Director determines that the filing presents a significant CRA[3] or compliance concern;
- Filings that present a significant supervisory concern or raise a significant legal or policy issue; or
- Other good cause as determined by the Regional Director.

III. APPLICATION CONSIDERATIONS

Upon receipt of a covered application, the Case Manager will request a review, and DCP personnel must make an assessment of the applicant's record of performance under the CRA and Compliance for each covered application filed with the FDIC and must provide a recommendation based on that assessment. The FDIC will consider the institution's CRA performance, Compliance rating, merits of any CRA protest, and other information in reaching a finding on the statutory factors involving the Management, Convenience and Needs of the Community to be Served, and other factors, as appropriate. In reviewing a

[1] It is the responsibility of DCP and RMS to determine whether an application should be removed from expedited processing because of a CRA protest or compliance problem of significant concern. DCP has the responsibility for determining whether comments received regarding an applicant's CRA record constitutes a protest. Refer to Section 1.1 of these Procedures entitled, *Applications Overview*, for a full definition of expedited processing.

[2] In situations where a CRA protest has been received, the Case Manager should refer to Section 1.9 of these Procedures entitled, Protests.

[3] A significant CRA concern could include, among other scenarios, a determination that although an institution may have an institution-wide CRA rating of satisfactory or better, the rating is less than satisfactory in one or more rated areas.

merger application, these elements should be considered for each institution involved in the transaction, as well as for the resultant institution.

Adverse findings concerning an applicant's CRA performance could result in denial or conditional approval of an application. The FDIC will consider the evaluation of CRA performance, as well as other information such as management performance, in reaching a finding on the statutory factors involving Management and Convenience and Needs of the Community to be served.

An institution's CRA and Compliance performance will generally not raise supervisory concerns if it has been assigned a CRA rating of Outstanding or Satisfactory and a compliance rating of 1 or 2. In addition, the institution should not be subject to any outstanding formal or informal enforcement actions related to discrimination or other illegal credit practices impacting CRA performance. Further, the institution should not present any other significant compliance issues, such as a less than satisfactory CRA rating in one or more rated areas, or other concerns.

An institution with a CRA rating of Needs to Improve and/or a compliance rating of 4 or 5 or an outstanding formal or informal enforcement action related to fair lending or compliance performance will be considered to have a record that raises supervisory concerns. In a case of an institution with a compliance rating of 3, Case Managers should consult with Regional Office (RO) management and DCP. An adverse recommendation will generally be warranted unless:

- The time period since the previous CRA examination has been longer than one year, and the institution asserts and the RO verifies, that the applicant has taken appropriate action to address the criticisms in the Report of Examination.

- An institution has demonstrated that it substantially addressed outstanding CRA and/or compliance related provisions set forth in an outstanding informal or formal enforcement action that is similar to performance requirements that otherwise would be established for conditional approval, and the RO has confirmed, either through an examination or visitation, that corrective action has been taken.

An institution will be considered to have a record that warrants a recommendation of denial when its CRA rating is Substantial Non-Compliance. This recommendation will remain appropriate until a future examination shows that the institution has improved its performance to a composite Satisfactory level.

Commitments for future action, offered by an applicant to address specific concerns raised in the Compliance and CRA Report of Examination, will be considered in the application process.

IV. COORDINATION OF APPLICATION REVIEWS

The RO must consult with the WO before it makes a recommendation for approval with conditions. The terms of any proposed conditions and their imposition will be discussed with the applicant. RMS may extend or reopen the comment period under certain circumstances and if good cause exists.

DCP should advise RMS as to whether any concerns exist regarding CRA or compliance performance within seven calendar days of receipt of RMS notification for applications by institutions with a Satisfactory or Outstanding CRA Rating, no CRA Protest, and a 1 or 2 Compliance Rating and no outstanding informal or formal enforcement action.

For any institution in which there are significant CRA or compliance concerns, DCP will provide the appropriate application tracking form to RMS within 15 calendar days of receipt of the notification for any application.

For applications for deposit insurance, DCP will review the institution's descriptive plan for meeting its CRA objectives and provide a recommendation to RMS within seven calendar days of receipt of the notification. If DCP proposes to conduct a field investigation, it should be coordinated with RMS's field investigation, and the results must be forwarded to RMS within seven calendar days of the conclusion of DCP's onsite review.

V. REFERENCES

Section 303.5 and *Part 345 of the FDIC Rules and Regulations*

I. INTRODUCTION

This Section provides general guidance for developing and applying conditions related to a filing seeking the FDIC's approval or non-objection. While standard and commonly used non-standard conditions are referenced within other Sections of these Procedures, this Section provides guidance on developing additional non-standard conditions that are tailored or customized to address the particular facts and circumstances of each filing.

Important: While non-standard conditions may reference applicable laws, rules, and regulations, the conditions should not establish any expectation for an applicant to implement, comply, or otherwise conform to a statement of policy or other forms of guidance (guidance). Unlike a law or regulation, guidance does not have the force and effect of law, and the FDIC does not take enforcement actions based on guidance. Rather, guidance outlines the FDIC's supervisory expectations or priorities, and articulates the FDIC's general views regarding appropriate practices for a given subject area. Guidance often provides examples of practices that the federal banking agencies generally consider consistent with safety and soundness standards or other applicable laws and regulations, including those designed to protect consumers. Conditions that direct an applicant to follow particular guidance are inappropriate.

II. CONDITIONS

Standard Conditions

Section 303.2(bb) of the FDIC Rules and Regulations defines s*tandard conditions* as those conditions that the FDIC may impose as a routine matter when approving a filing, whether or not the applicant has agreed in writing to the conditions. The following conditions, or variations thereof, are standard conditions and must be included, as applicable, in all approvals and non-objections:

(1) That the applicant has obtained all necessary and final approvals from the appropriate federal, state, or other appropriate authorities;

(2) That if the transaction does not take effect within a specified time period and a request for an extension of time has not been approved before the expiration of that time period, the consent granted shall expire at the end of the specified time period;[1]

(3) That until the conditional commitment of the FDIC becomes effective, the FDIC retains the right to alter, suspend, or withdraw its commitment should any interim development be deemed to warrant such action;[2] and

(4) In the case of a merger transaction (as defined in 303.61(a)), , including a corporate reorganization, that the proposed transaction not be consummated before the 30th calendar day (or shorter time period as may be prescribed by the FDIC with the concurrence of the Attorney General) after the date of the order approving the merger transaction.[3]

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[1] Any approval of a written request to extend the approval date must be in writing.

[2] Any decision to alter, suspend, or withdraw the FDIC's approval or non-objection must be fully supported in an internal memorandum, and signed by the individual with authority to act on the original filing (but should not extend below the Assistant Regional Director). In all cases, the Case Manager should coordinate the decision with Regional Office management and Legal, and as appropriate, the Washington Office, prior to the decision being communicated to the applicant.

[3] Under Section 18(c)(6) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(c)(6), transactions solely between an insured depository institution and one or more of its affiliates do not necessitate a competitive factors report and may be consummated immediately upon FDIC approval. For merger transactions involving non-affiliates, which do necessitate a competitive factors report from the Attorney General, the Attorney General typically concurs with a 15-day post-approval waiting period.

Non-Standard Conditions

Non-standard conditions include all conditions (other than the standard conditions set forth in Section 303.2(bb)) that the FDIC imposes in connection with its approval or non-objection to a filing. A number of commonly used non-standard conditions for deposit insurance applications are addressed in the *Deposit Insurance Applications Procedures Manual* and in the corresponding Delegations of Authority – Filings matrix for deposit insurance applications. Other commonly used non-standard conditions that may be imposed in conjunction with other types of filings are addressed in the applicable Sections of these Procedures. Certain non-standard conditions are also included in the Delegations of Authority – Enforcement Actions matrix.

Non-standard conditions unique to the filing can also be used in addition to the standard conditions and the commonly used non-standard conditions referenced above.

III. PROCESS FOR USING NON-STANDARD CONDITIONS

Typically, non-standard conditions are used when it is determined through the filing review process that such conditions are necessary or appropriate. The non-standard conditions imposed can be proactive or restrictive and are designed to address, for instance, specific risks, unique elements of a filing, matters for which the FDIC would require prior review or approval, or required actions not yet completed at the time the approval or non-objection action is issued. In drafting new or adapting commonly used non-standard conditions, staff should consider the sources of potential concerns, such as, particular aspects of the business plan, management's depth or ability to address the requirements of the condition, or the timeframe the condition is intended to cover. Conditions should clearly and specifically address the requirement or restriction that is the subject of the condition, the timing of any action to be taken, the duration of the condition, and any follow-up activities such as reporting and monitoring.

Non-standard conditions (and the use of written agreements as discussed below) do not replace the need to favorably resolve the statutory factors applicable to an underlying filing. While non-standard conditions may address specific issues or concerns, their imposition will not lead to the favorable resolution of any statutory factor where the facts and circumstances are otherwise unfavorable.

An applicant's written agreement to all non-standard conditions must be obtained prior to taking action on a filing. For deposit insurance applications, all conditions (both standard and non-standard) must be agreed to in writing. If non-standard conditions are not agreed to by the applicant for which the region has delegated authority to act, the filing must be forwarded to the Washington Office (WO) for final action.

The following resources should be consulted with respect to standard and non-standard conditions:

- Section 303.2(bb) of the FDIC Rules and Regulations lists the standard conditions that the FDIC may impose as a routine matter when approving a filing, whether or not the applicant has agreed to their inclusion (excluding deposit insurance applications, where the applicant must also agree to the standard conditions).

- The Delegations of Authority – Filings matrix lists the standard and commonly used non-standard conditions for granting deposit insurance, and addresses other matters related to the imposition of conditions.

- Supervisory Filings, Enforcement Matters, Capital Determinations, and Information Sharing Agreements (Board Resolution Seal No. 086825), dated October 20, 2020, provides guidance on delegated authority when certain conditions are met and the applicant agrees to non-standard conditions in writing.

All conditions should be included within the transmittal letter conveying approval or non-objection to the filing or, if applicable, within the accompanying Order. The Case Manager should also document any non-standard conditions imposed in the Non-standard Conditions comments portion in the application tracking system. Compliance with conditions is typically assessed during risk management examinations or visitations, but depending on the circumstances, may also be monitored by the Case Manager on an interim basis. When each condition has been satisfied, the Case Manager should enter the date in the application tracking system.

IV. WRITTEN AGREEMENTS

Depending on the nature and complexity of the filing, the FDIC may impose non-standard conditions that require the institution and/or other applicable parties (such as certain affiliates or investors) to enter into a separate written agreement with the FDIC. Written agreements provide a supplemental tool that may address specific risks or supervisory matters with regard to an institution, and have been routinely used in conjunction with approving or non-objecting to certain deposit insurance applications, change in control notices, and other filings. They also may help ensure that a parent company serves as a source of strength for its subsidiary insured depository institution.[4]

Written agreements may include parent company agreements, capital and liquidity maintenance agreements (CALMAs), operating agreements, and passivity agreements. The Case Manager should consider whether the organizational structure, parental or affiliate relationships, nature or complexity of the business model, or circumstances involving certain investors may warrant the use of one or more written agreements. If a written agreement is contemplated, the RO should seek the input of Legal and the WO.

Generally, parent company agreements and CALMAs have been used in cases in which the organizational structure includes companies not subject by operation of law to supervision by the Federal Reserve Board (FRB) (*i.e.*, parents of non-bank banks). Such organizational structures often pose unique risks due to the lack of bank or savings and loan holding company supervision by the FRB, the potentially wide scope of operations of the parent company or its affiliates (which may include commercial activities), the inter-dependence on affiliated entities for key business functions or processes, and the potential for dual roles within the organization.

Parent company agreements may address a variety of circumstances regarding supervision, corporate governance, and the control exercised over the insured depository institution, and will include consent to examination by the FDIC. Among other items, a parent company agreement may help ensure that the institution's board and executive officers are sufficiently independent of the parent company and any affiliates, that the institution operates under a separate and distinct business plan, and that the institution maintains separate books and records that adhere to U.S. Generally Accepted Accounting Principles.

CALMAs formally establish definitive commitments under which the parent company is required to provide any necessary capital or liquidity support to the insured depository institution. CALMAs will normally require that all capital contributions be in the form of cash unless other assets are approved. Liquidity provisions in a CALMA may require financial support to meet any ongoing liquidity obligations, as well as the establishment of a line of credit by the parent company that can be drawn upon at the option of the institution. CALMAs are often executed in conjunction with parent company agreements and have been used in cases involving non-bank banks and foreign ownership or control.

Both parent company agreements and CALMAs also generally include provisions under which the FDIC may pursue formal enforcement action under Sections 8 and 50 of the Federal Deposit Insurance Act if a

[4] Refer to Section 38A of the FDI Act.

party fails to comply with provisions of an agreement. Parent company agreements and CALMAs are generally executed by the FDIC, the institution, and the parent company (or companies).

Operating agreements have been used in limited cases to address certain risks or concerns regarding a proposed business model, primarily with respect to a proposed niche institution. Such agreements should not be pursued to overcome an otherwise unacceptable business plan. Rather, an operating agreement may be used to ensure that the institution's risk profile, growth, activities, and business relationships (including any relationships with affiliates) remain within the parameters established in an otherwise acceptable business plan. Operating agreements are generally executed by the institution and the FDIC.

Passivity agreements have been entered into with investors seeking to rebut the presumption of control under Section 303.82(b) of the FDIC Rules and Regulations. Generally, such investors seek to control, directly or indirectly, the power to vote at least 10 percent, but less than 25 percent, of the institution's outstanding shares. In cases involving parent companies not supervised by the FRB, the FDIC will evaluate the extent of control at the parent company level. Passivity agreements may address matters such as business transactions and relationships between the investor and the insured depository institution, as well as the investor's use of the control position to influence the institution's management or policies. Passivity agreements are generally executed by the FDIC and the subject investor.

Certain Written Agreements Required for Industrial Banks

Part 354 of the FDIC Rules and Regulations establishes certain requirements for filings involving an industrial bank or a "Covered Company," as that term is defined in Part 354. Refer to Part 354 for further details regarding the required commitments and provisions of the written agreement(s). Part 354 also includes restrictions on industrial bank subsidiaries of Covered Companies, which are typically included as conditions as part of the approval of, or non-objection to, the applicable filing.

V. REFERENCES

Section 303.2(bb) of the FDIC Rules and Regulations

Section 303.82(b) of the FDIC Rules and Regulations

Part 354 of the FDIC Rules and Regulations

Delegations of Authority – Enforcement Actions matrix

Delegations of Authority – Filings matrix

Deposit Insurance Applications Procedures Manual (DIAPM)

DIAPM Supplement – Applications from Non-Bank and Non-Community Bank Applicants

Case Managers and other professional staff should refer to the FDIC Deposit Insurance Applications Procedures Manual (Manual) for guidance related to processing federal deposit insurance (FDI) applications. The Manual provides direction for each stage of the FDI application process, from pre-filing activities through final action. The Manual also addresses important post-opening considerations, and includes a list of resources with corresponding links and appendices that provide other helpful tools and information.

I. INTRODUCTION

The FDIC Legal Division has concluded that operating insured banks or state savings associations converting from one kind of charter to another (i.e. Federal to Federal, State to State, Federal to State, or State to Federal), need not reapply for Federal deposit insurance. An exception to this is due to Section 8(o) of the FDI Act which explicitly withdraws insurance from the successor institution when a bank that is a member of the Federal Reserve System converts to a nonmember institution. In such a case, an application for deposit insurance is required.

II. FORM OF APPLICATION

Applicants should submit a letter application to the appropriate Regional Director in accordance with Section 303.25(a) of the FDIC Rules and Regulations. The application shall consist of the following information:

1. A copy of the letter, and any attachments thereto, sent to the appropriate Federal Reserve Bank stating the bank's intention to terminate its membership;

2. A copy of the letter from the appropriate Federal Reserve Bank acknowledging the bank's notice to terminate membership;

3. A statement regarding any anticipated changes in the bank's general business plan during the next 12-month period; and

4. A statement by the bank's management that there are no outstanding or proposed corrective programs or supervisory agreements with the FRS. If such programs or agreements exist, a statement by the applicant that its board of directors is willing to enter into similar programs or agreements with the FDIC, which would become effective upon withdrawal from the FRS.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process these applications following the steps below and refer to *Applications Overview,* Section 20.1 of these Procedures, for general processing guidance for all application types.[1]

1. Section 303.25(b) of the FDIC Rules and Regulations requires the FDIC to notify the applicant, within 15 days of receipt of a substantially complete application, either that federal deposit insurance will continue upon termination of membership in the FRS, or that additional review is warranted and the applicant will be notified, in writing, of the FDIC's final decision regarding continuation of deposit insurance. Thus, it is imperative that these applications be reviewed upon receipt, and communication with the applicable Federal Reserve Bank and state chartering agency counterparts begin as soon as practical; however, if the FDIC does not act within the expedited processing period, it does not constitute an automatic or default approval.

[1] Case Managers should follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other instructions as applicable in *Applications Overview*, Section 1.1 of these Procedures.

2. All applications are to be entered into the appropriate internal system of record within three business days of receipt. In all cases, dates and comments in the record are to be updated regularly to reflect the current status of the application.

3. Initially review all materials for completeness, and request additional information if necessary. Applications for continuation of deposit insurance submitted in conjunction with a withdrawal from the FRS are typically processed without a field investigation. However, under certain circumstances, an onsite investigation may be warranted. The Case Manager should discuss any concerns regarding the condition of the applicant and recommendations to conduct an onsite investigation with the appropriate Assistant Regional Director.

4. Analyze the application and complete the appropriate Summary of Investigation form (SOI).[2] Retrieve the Application Summary Statement from the appropriate internal database and attach it to the SOI. In the comments section, describe and assess the transaction, the financial condition of the bank and the holding company (if applicable), any outstanding or contemplated supervisory actions by the FRS, any proposed or recently implemented material changes in the business plan, comments from other applicable regulators, and the seven statutory factors set forth in Section 6 of the FDI Act. Timely communication with the FRS and state counterparts regarding the applicant's supervisory standing and the proposal are key factors in processing and analyzing the proposal.

   Case Managers must fully consider and provide well supported findings and/or recommended resolutions for each statutory factor. The *FDIC Statement of Policy on Applications for Deposit Insurance* provides guidance regarding the analysis of the statutory factors, and the *FFIEC Statement of Policy on Regulatory Conversions* (FIL-40-2009) provides additional information on supervisory matters and strategies in situations where a change in the primary federal regulator is proposed.

5. If approval is being recommended, prepare an approval letter notifying the applicant that federal deposit insurance will continue upon termination of membership in the FRS. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should 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 instructions.

6. If deficiencies may result in a denial of the application, the Regional Office (RO) should advise the applicant of the deficiencies to ensure that all necessary facts are obtained prior to making a final decision. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for further instructions.

7. If a denial is recommended, or if an approval is recommended but the applicant has not agreed in writing to non-standard conditions, submit the SOI and the draft letter to the Washington Office (WO) for final action. Refer to *Applications Overview*, Section 1.1 of these Procedures, for instructions regarding applications that require WO action or input.

[2] Case Managers should follow the general instructions and 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.

8. Update the system of record within the appropriate internal database to reflect the date of final action, the date forwarded to the WO, if applicable, the hours devoted to the application, and any other required information.

IV. TIMEFRAME FOR PROCESSING

Statutory: Per Section 303.25(b), the appropriate Regional Director shall notify the applicant, within 15 days of receipt of a substantially complete application, either that federal deposit insurance will continue upon termination of membership in the FRS or that additional review is warranted, and that the applicant will be notified, in writing, of the FDIC's final decision regarding continuation of deposit insurance. If the FDIC does not act within the processing period, it does not constitute an automatic or default approval.

RO Processing Guideline: 30 days after receipt of a substantially complete application.

WO Processing Guideline: 30 days, as applicable.

V. PUBLICATION REQUIREMENT

None.

VI. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures. Generally, the RO may act on applications to continue deposit insurance after withdrawal from the FRS when approval is contemplated and the applicant has agreed in writing to any non-standard conditions. If denial is recommended or in cases where the applicant has not agreed in writing to proposed non-standard conditions of approval, the RO cannot act on the application.

VII. REFERENCES

Section 8(o) of the Federal Deposit Insurance Act; Section 303.25 of the FDIC Rules and Regulations; FDIC Statement of Policy on Applications for Deposit Insurance

FDIC Advisory Opinion 92-18, Whether Deposit Insurance of National Bank Will Continue Under FDI Act if Bank Converts to State Charter and Terminates Its Membership in the Federal Reserve System, dated April 3, 1992

FFIEC Statement on Regulatory Conversions, FIL-40-2009, July 7, 2009

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.[1] 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).[2] 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).

[1] 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.

[2] 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[3] 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).

[3] 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.[4] 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

[4] 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 is 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[5] 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:**

[5] 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.

- o A state allows a greater percentage of total deposits to be controlled by a resulting bank; **or**
- o 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:

  - o Comply with the responsibilities of the FDIC regarding the Community Reinvestment Act (CRA);
  - o Take into account the most recent written CRA evaluation of any bank which would be an affiliate of the resulting bank; and
  - o 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[6] 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[7] 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[8] 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)[9]

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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[6] 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.

[7] Or equivalent LBS or CFI staff, as applicable.

[8] 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).

[9] 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 FDIC*connect.* Refer to *Applications*

Overview, Section 1.1 of these Procedures, for more information regarding applications filed through FDIC*connect*. 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.[10] 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.

[10] 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.[11] 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.[12] 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

[11] 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.

[12] Information relative to each bank's number of offices and Summary of Deposits (SOD) can be retrieved at www2.fdic.gov/sod. SOD data is only updated as of June 30th 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[13]:

- 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

[13] 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.[14]

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

[14] 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 difficult in resolving the resulting firm, such as the opaqueness 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)

I. INTRODUCTION

The Change in Bank Control Act of 1978 (CBC Act), Section 7(j) of the Federal Deposit Insurance Act (FDI Act), and Subpart E of Part 303 of the FDIC Rules and Regulations (Sections 303.80 – 303.88) generally prohibit any person, acting directly or indirectly or in concert with other persons, from acquiring control of a "covered institution" (as defined below), without providing at least 60 days prior written notice (Notice) to the FDIC. Subpart E sets forth the regulations applicable to the filing requirements and processing procedures for a Notice to acquire control of a covered institution. The notificant(s) may complete the proposed acquisition upon receipt of written notice that the FDIC does not disapprove of the acquisition or if the FDIC fails to act on a substantially complete Notice within the statutory time period. See *Time Frame for Processing*, Part X of this Section.

II. DEFINITIONS UNDER SECTION 303.81 OF THE FDIC RULES AND REGULATIONS

Acting in concert means knowing participation in a joint activity or parallel action towards a common goal of acquiring control of a covered institution whether or not pursuant to an express agreement.

Control means the power, directly or indirectly, to direct the management or policies of a covered institution or to vote 25 percent or more of any class of voting securities of a covered institution. In addition, as described in Section 303.82 of the FDIC Rules and Regulations, the FDIC presumes that an acquisition of voting securities of a covered institution constitutes the acquisition of the power to direct the management or policies of that institution if, immediately after the transaction, the acquiring person will own, control, or hold with power to vote 10 percent or more of any class of voting securities of the institution, and if: (i) the institution has registered securities under Section 12 of the Securities Exchange Act of 1934; or (ii) no other person will own, control, or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction.

Covered institution means an insured state nonmember bank, an insured state savings association, and any company that controls, directly or indirectly, an insured state nonmember bank or an insured state savings association (other than a holding company subject to an exemption described in Section 303.84(a)(3) or (a)(8) of the FDIC Rules and Regulations).

Immediate family means a person's parents, mother-in-law, father-in-law, children, step-children, siblings, step-siblings, brothers-in-law, sisters-in-law, grandparents, and grandchildren, whether biological, adoptive, adjudicated, contractual, or *de facto*; the spouse of any of the foregoing; and the person's spouse.

Person means an individual, corporation, limited liability company, partnership, trust, association, joint venture, pool, syndicate, sole proprietorship, unincorporated organization, voting trust, or any other form of entity; and includes each party to a voting agreement and any group of persons acting in concert.

III. TRANSACTIONS THAT REQUIRE PRIOR WRITTEN NOTICE

Pursuant to Section 303.82 of the FDIC Rules and Regulations, unless exempted by the FDIC, a Notice is required prior to effecting an acquisition of control in the following instances:

1. The acquisition of voting securities of a covered institution if, immediately after the transaction, the acquiring person (or persons acting in concert) will own, control, or hold with power to vote, 25 percent or more of any class of voting securities of the covered institution.

2. The acquisition of the power, directly or indirectly, through ownership or otherwise, to direct the management or policies of a covered institution.

3. The acquisition of additional voting securities of a covered institution by a person who has previously been approved by the FDIC to acquire control of a covered institution and who has maintained that control, that would increase a person's ownership, control, or power to vote from less than 25 percent to 25 percent or more of any class of voting securities of the covered institution.

4. The acquisition of voting securities of a covered institution if, immediately after the transaction, the acquiring person will own, control, or hold with power to vote 10 percent or more of any class of voting securities of the institution, and if: (i) the institution has registered securities under Section 12 of the Securities Exchange Act of 1934; or (ii) no other person will own, control, or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction.

Acquisition of Loans in Default

The acquisition of a defaulted loan secured by voting securities of a covered institution is considered to be an acquisition of the underlying securities. Before acquiring a defaulted loan in an amount that would, if the loan were foreclosed, provide the acquirer with the power to control the covered institution, the potential acquirer is required to provide the FDIC with prior written Notice.

Rebuttable Presumptions

The FDIC presumes that an acquisition of convertible securities, or options or warrants to acquire voting securities, constitutes the acquisition of voting securities for change in bank control purposes.

The FDIC presumes that an acquisition of voting securities of a covered institution constitutes the acquisition of the power to direct the management or policies of the covered institution if the acquiring person (or persons acting in concert) will own, control, or hold with the power to vote, 10 percent or more of any class of voting securities of the institution, and if:

- The institution has registered securities under Section 12 of the Securities Exchange Act of 1934; or no other person will own, control, or hold the power to vote a greater percentage of that class of voting securities immediately after the transaction. When no other shareholder owns or controls a greater percentage of that class of voting securities, if two or more persons, not acting in concert, will acquire equal percentages of 10 percent or more of the same class of voting securities of a covered institution, each person should file a prior Notice with the FDIC.

Certain relationships raise a rebuttable presumption of acting in concert, including:

- A company and a controlling shareholder or management official of the company;
- Persons who are immediate family;
- Companies under common control or a company and each company it controls;
- Two or more persons who have made, or propose to make, a joint filing related to the proposed acquisition under Sections 13 or 14 of the Securities Exchange Act of 1934;
- A person and any trust for which the person serves as trustee or any trust for which the person is a beneficiary; and
- Persons who are parties to any agreement or other arrangement, written or otherwise, regarding the acquisition, voting, or transfer of control of voting securities of a covered institution (other than certain revocable voting proxies).

The FDIC will afford any party seeking to rebut a presumption regarding control; acting in concert; or acquisition of convertible securities, options, or warrants an opportunity to present its views in writing.

Case Managers, after conferring with Regional Office (RO) management and RO Legal, must consult Washington Office (WO) Legal regarding the receipt and review of a request to rebut a presumption regarding control or acting in concert, including any proposed passivity agreements. Authority has not been delegated to the RO to make determinations on requests to execute passivity agreements related to requests regarding control. Such requests must be closely reviewed to ensure that no concerns or other problematic issues exist. As appropriate, such reviews should also be coordinated with staff from the Board of Governors of the Federal Reserve System (FRS) and other banking agencies which may have received related filings.

Notices Involving the Qualifications for Acquisition of Failed Insured Depository Institutions

The RO must immediately contact the WO upon receipt of any Notice which involves the acquisition of control of a bank or savings association for the purpose of acquiring the deposits and/or assets of failed insured depository institutions (IDIs). In conjunction with the review of the statutory factors of the CBC Act, the FDIC will consider whether the proposed acquisition of control includes an acceptable business plan, readily available capital, and a satisfactory management team. Investors that are interested in acquiring control of an institution as a vehicle for ultimately acquiring failed IDIs must obtain the requisite approvals or clearances from other applicable regulatory agencies and satisfy any other criteria established by the FDIC, including with respect to the *Final Statement of Policy on Qualifications for Failed Bank Acquisitions,* dated August 26, 2009.

Changes in Control of Holding Companies Requiring FDIC Non-Objection

The acquisition of control of a holding company that controls an insured state nonmember bank or insured state savings association may require the filing of a Notice with the FDIC if (a) the transaction is not subject to approval under Section 3 of the Bank Holding Company Act (BHC Act) or Section 10 of the Home Owners' Loan Act (HOLA), and (b) the FRS does not review a Notice for the acquisition under the CBC Act. Refer to Sections 303.84(a)(3) and (8) of the FDIC Rules and Regulations.

IV. TRANSACTIONS THAT REQUIRE NOTICE, BUT NOT PRIOR NOTICE

Pursuant to Section 303.83(a) of the FDIC Rules and Regulations, the following acquisitions of voting securities of a covered institution, which would otherwise require prior Notice, instead

require the acquiring person to provide Notice to the appropriate RO within 90 calendar days after the acquisition:

- The acquisition of voting securities as a bona fide gift;

- The acquisition of voting securities in satisfaction of a debt previously contracted in good faith, except that the acquisition of a defaulted loan secured by a controlling amount of a covered institution's voting securities requires the filing of a prior Notice as described earlier; and

- The acquisition of voting securities through inheritance.

Pursuant to Section 303.83(b) of the FDIC Rules and Regulations the following acquisitions of control of a covered institution, which otherwise would require prior Notice, instead require the person acquiring control to provide Notice to the appropriate RO within 90 calendar days after receiving notice of the event giving rise to the acquisition of control:

- Acquisition of control resulting from redemption of voting securities by the issuing covered institution; and

- Acquisition of control as the result of any event or action (including the sale of securities) by any third party that is not within the control of the person acquiring control.

The relevant information that the FDIC may require for a post-acquisition Notice includes all information and documents routinely required for a prior Notice. If the FDIC disapproves a post-acquisition Notice, the notificant(s) must divest control in a manner and within such time period that the FDIC determines.

V. TRANSACTIONS THAT DO NOT REQUIRE NOTICE

Pursuant to Section 303.84 of the FDIC Rules and Regulations, a Notice is not required for the following acquisitions of voting securities:

1. Acquisition of additional voting securities of a covered institution by a person who:

    - Held the power to vote 25 percent or more of any class of voting securities of the institution continuously since the later of March 9, 1979, or the date that the institution commenced business; or

    - Is presumed to have controlled the institution continuously since March 9, 1979, if the aggregate amount of voting securities held does not exceed 25 percent or more of any class of voting securities, or in other cases in which the FDIC determines that the person has continuously controlled the institution since March 9, 1979.

2. Acquisition of additional voting securities of a covered institution by any person who has lawfully acquired and maintained control of the institution after complying with the

procedures of the CBC Act and the FDIC Rules and Regulations or other procedures then in effect.[1]

3. Acquisitions of voting securities subject to approval under Section 3 of the BHC Act, Section 18(c) of the FDI Act, or Section 10 of HOLA.

4. Any transaction described in Sections 2(a)(5), 3(a)(A), or 3(a)(B) of the BHC Act by a person described in those provisions.

5. A customary, one-time solicitation of a revocable proxy.

6. The receipt of voting securities of a covered institution through a pro rata stock dividend or stock split if the proportionate interests of the recipients remain substantially the same.

7. Acquisition of voting securities in a foreign bank that has an insured branch in the U.S.[2]

8. Acquisition of voting securities of a bank holding company or a savings and loan holding company for which the FRS reviews a Notice filed pursuant to the CBC Act.

VI. FORM OF NOTICE

The Interagency Notice of Change in Control Form (Notice Form) generally is used for any Notice. Section 7(j)(6) of the FDI Act sets forth specific requirements for the content of any Notice, which can generally be met with the submission of the Notice Form and an Interagency Biographical and Financial Report (IBFR) for each person named in the Notice. Use of the IBFR is not mandatory; however, all of the information required by the form must be submitted. When the acquiring person is an individual, the requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary, together with a statement of any material changes since the date of the statement or summary. Each notificant must also submit an FBI Fingerprint Card and a Consent for Release of Information.

Additional information may be requested by the FDIC, as appropriate. The Division of Risk Management Supervision (RMS) Director may waive any of the Notice informational requirements, if it is determined that such waiver is in the public interest. The notificant(s) should notify the appropriate RO immediately of any material changes in any Notice submitted, including changes in financial or other conditions. The Notice Form and the IBFR are available in the Forms section of the FDIC's public website at: https://www.fdic.gov/regulations/laws/forms/notices.html

VII. ACCEPTING AND PROCESSING THE NOTICE

Case Managers should process all Notices using the steps below. In many cases, it will be helpful to discuss filing requirements and other relevant matters during a pre-filing meeting

[1] A Notice is required if the person's ownership, control, or power to vote would increase from less than 25 percent to 25 percent or more of any class of voting securities of the covered institution. However, the FDIC may waive this Notice requirement. Refer to Section 303.82(a)(2) of the FDIC Rules and Regulations.

[2] This exemption does not extend to the reports and information required under paragraphs 9, 10, and 12 of the CBC Act (Sections 7(j)(9),(10) and (12) of the FDI Act).

among the notificant(s) and the appropriate regulatory agencies. Refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.[3]

1. Establish the record under CHGCON - Change of Control in the appropriate internal database. All Notices should be entered into the system of record 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 Notice.

2. Initially review all materials for completeness, and request additional information if necessary. If related filings are involved, the Case Manager should coordinate with the notificant(s) and the other agencies to ensure that all information submissions are promptly provided to the FDIC.

   A substantially complete Notice will consist of complete and informative responses, with attachments if necessary, to items 1 through 15 of the Notice Form with the original signature of each notificant, as well as a completed and signed IBFR or other financial documents as previously described, an FBI Fingerprint Card, and a Consent for Release of Information for each notificant.

   Note that the Interagency Notice of Change of Control form requires the applicant to discuss the proposal, including the purpose, terms, and conditions of the acquisition, and the manner in which the acquisition will be made. The applicant is also directed to describe in detail any plans or proposals that any acquirer may have to: (a) liquidate the depository institution or holding company to be acquired, (b) sell its assets, (c) merge it with any company, or (d) make any other significant change in its business strategy or corporate structure. The Case Manager should carefully review the answers to these questions and ensure that significant changes in business strategy or corporate structure are fully supported by comprehensive business plans. If not, the extension provisions of Section 7(j)(1) of the CBC Act should be invoked. See *Time Frame for Processing*, Part X of this Section, for additional information.

   The Financial Services Regulatory Relief Act of 2006 amended the CBC Act to allow the federal banking agencies time to extend the time for review of change-in-control notices to analyze the safety and soundness of the proposed business plans and the institution's future prospects. In addition, the amendment also permits the federal banking agencies to disapprove a change-in-control if the institution's future prospects are unsatisfactory. Prior use of stripped charters as a way to gain deposit insurance was one reason for the amendment.

   A stripped charter is essentially a charter for a depository institution that has federal deposit insurance, but that does not have any significant, ongoing business operations. Such stripped charters may result from a purchase and assumption transaction where all or virtually all of the assets and liabilities of an insured depository institution are transferred to another depository institution, but the charter for the transferring insured depository institution is not cancelled. They may also result from an insured depository institution winding down its operations by disposing of all or substantially all of its assets

[3] Case Managers should also read and follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, WO action or input, delegations, *etc.*, in *Applications Overview,* Section 1.1 of these Procedures.

and liabilities over time. In some instances, stripped charters have been purchased and used in connection with the establishment of new financial institution operations, as an alternative to de novo charter and deposit insurance applications.

The FDIC has long held the view that organizing groups or individuals seeking to use a stripped charter as a means of gaining deposit insurance should be required to provide the information required in the Interagency Charter and Federal Deposit Insurance Application, and the FDIC should be an active participant in the consideration of the application. A change of control of a relatively small institution could be viewed similarly. Accordingly, Case Managers should give careful attention to all Notices of Change of Control, including those forwarded by other agencies for FDIC comment.

If the preliminary review indicates that the Notice will require WO action or input, RO staff should consult with WO staff before accepting the Notice. For those cases where the RO does not have delegated authority, the RO should not formally accept the application until concurrence from the WO has been received. When the Notice is considered substantially complete, an acceptance letter should be prepared and sent to the notificant(s).

3. Failure to act on a Notice within the statutory time frames will result in an automatic approval effective as of the date the processing period expires. Action on the Notice must be completed within 60 days after the date the Notice is accepted as substantially complete, unless the FDIC notifies the notificant(s) in writing that the disapproval period has been extended. The FDIC can extend the disapproval period for 30 days at its discretion. The FDIC can extend the processing period for two additional times not to exceed 45 days each for any of the reasons detailed in Section 7(j)(1) of FDI Act. The record should be updated to reflect any extension and describe why the review period is being extended in the RO/FO Comments section.

   Note: Extension of the processing period for the discretionary 30 days should be considered if the Notice is being forwarded to the WO for action or input.

4. Letters requesting comments from the OCC, the FRS, and the appropriate state authority should be prepared when the Notice is considered substantially complete and sent promptly to allow those authorities a 30-day period to provide comments. A copy of the Notice, including the IBFR or other personal financial data, must accompany the request for comment.

5. Verify that the publication requirements for the Notice are met (refer to *Publication*, Part XI of this Section, for further details).

6. Request name checks through the background investigation database and route fingerprint cards to the Cyber Fraud and Financial Crimes (CFFC) Section to be forwarded to the FBI. Refer to *Background Investigations*, Section 1.5 of these Procedures, for additional information.

7. Thoroughly analyze the Notice and any supporting exhibits and materials *(e.g.*, agreements or contracts related to the proposed acquisition, business plan, financial projections, supporting assumptions/exhibits, organizational structure, affiliate-related information, *etc.*). The Case Manager should verify the source of the funding and validate the likelihood of the availability of the funds. As necessary, promptly

communicate any follow-up questions, issues, and information requests to the notificant(s) and the other applicable regulators.

8. Complete the appropriate Summary of Investigation form.[4] The SOI narrative should detail the nature of the request, relevant background information regarding the notificant(s), financial and supervisory information regarding the covered institution, any pertinent legal analysis, and comments from other regulators, as applicable. The SOI narrative should address each of the statutory factors set forth in Section 7(j)(7) of the FDI Act and listed in *Statutory Factors*, Part IX of this Section. Retrieve the Application Summary Statement from the appropriate internal database, and attach it to the SOI.

9. If a non-objection is recommended, prepare a draft non-objection letter. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should 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 instruction. If the RO has delegated authority, distribute the non-objection letter to the notificant(s), with copies to the appropriate regulatory agencies. The letter should state that the transaction can proceed immediately, provided the 20-day public comment period has elapsed.

10. If non-objection appears warranted, but the RO does not have delegated authority, send the SOI and the draft non-objection letter to the WO for final action. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding filings that require WO action or input. The WO will complete the FDIC's review of the Notice and distribute the final documents.

11. If an objection appears warranted, RO Legal and WO Risk Management and Applications Section (RMAS) and Legal should be consulted as soon as possible for an assessment of the basis for recommending the objection. ROs do not have delegated authority to disapprove a CBC Act filing. A letter extending the disapproval period should be considered if the period is not already exhausted. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for further information. If RMS takes an adverse action against a notificant based, in whole or in part, on information presented in a consumer credit report, RMS must contact and provide certain information to the notificant. Refer to *Background Investigations*, Section 1.5 of these Procedures, for information regarding the Fair Credit Reporting Act.

    Note: For any Notice that presents significant concerns or deficiencies that may result in an objection, the RO should advise the notificant(s) of the concerns or deficiencies and provide the notificant(s) an opportunity to submit additional information or explanations. Such communication may be delayed until the WO concurs.

12. If Legal concurs that the recommendation for objection is warranted, send the SOI and a draft objection letter to the WO for final action. The draft letter should include the basis for disapproval and advise the notificant(s) of the appeal rights under Part 308 of the FDIC Rules and Regulations. At the FDIC's discretion applicants may be offered the opportunity to withdraw the filing.

[4] Case Managers should be familiar with and follow the general instructions and SOI requirements for all types of applications located in *Summary of Investigation*, Section 1.2, as well as the specific instruction in this Section.

13. Update the appropriate internal database to reflect the date forwarded to the WO, if applicable, the final action, the date of the action, the expiration date, hours devoted to the Notice, and any other required information.

Notices Involving Foreign Ownership[5]

If the Notice indicates that 25 percent or more of the voting securities of the target institution are under foreign control or the institution will be controlled by foreign owners, the Case Manager should consult with WO RMAS and Legal. In addition, the International Affairs Branch of the Division of Insurance and Research (IAB) is available to assist in the application review, and may assist in facilitating requests for information and communication with foreign regulatory agencies. RMAS and Legal, in coordination with IAB, will provide language for any non-standard conditions related to foreign ownership.

Parallel-owned banking organizations (PBO) and foreign banking organizations (FBO)[6]

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.

In contrast, a foreign banking organization is created when a foreign bank operates a branch (insured or uninsured), agency, or commercial lending company subsidiary in the United States; controls a depository institution in the United States; or controls an Edge corporation; *and* encompasses any company of which the foreign bank is a subsidiary.

RMS does not have delegated authority to act on any Notice involving an institution that will be part of a PBO. The RO also does not have delegated authority to act on a Notice by which an institution will be subject to foreign ownership (25 percent or more in the aggregate) or control, and will *not* be part of an FBO. In determining whether a Notice involves a PBO or FBO, Case Managers should consult with the WO RMAS and Legal after forwarding a copy of the Notice and related materials.

After receiving a Notice involving foreign controlling ownership, the Case Manager should contact the notificant(s) and explain that the FDIC requires controlling persons or entities to execute an agreement appointing a designated agent in the U.S. to receive service of process on behalf of the foreign controlling person or entity for banking law matters and consenting to the jurisdiction of the U.S. courts, the federal banking agencies, and the U.S. Departments of Treasury and Justice for such matters. Such an agreement, referred to as a "consent to jurisdiction and agreement to maintain agent for service of process," essentially enables the respective authorities to exercise legal jurisdiction over a foreign controlling person or entity for

[5] Foreign ownership includes ownership by a foreign non-banking entity, a foreign bank, or a person who is not a U.S. citizen.

[6] Foreign banks that conduct operations in the U.S. are known as FBO. FBOs generally have a longstanding presence in the U.S. and their activities can generally be divided into four main categories: branches, agencies, foreign-owned U.S. bank subsidiaries, and representative offices.

purposes of enforcement or other banking-related legal proceedings. The Case Manager should consult with WO RMAS and Legal in the development and execution of the agreement. The agreement must state that each agreement will be updated as circumstances warrant. The Case Manager will send the agreement to the notificant(s) for execution.

The Case Manager should request that the notificant(s) execute and return the agreement as quickly as possible, but within a specific stated deadline to be determined based on the timeline for the specific Notice.

- If the agreement is signed outside the U.S., the foreign person or designated agent must appear in person at a U.S. Embassy or Consulate, sign the agreement in the presence of the consular official, and obtain the consular official's authentication of execution.

- If the agreement is signed within the U.S., the signature of the foreign person or the designated agent must be properly notarized under state law.

Generally, the RO should receive the original, signed agreement before sending the Notice to the WO for final action.

Following consultation with the WO RMAS and Legal, the FDIC may determine to not pursue a "consent to jurisdiction and agreement to maintain agent for service of process" if it is determined that the Primary Federal Regulator is taking similar action as a result of a concurrent Notice or application, and nothing would be served by the FDIC's companion agreement.

VIII. AFTER-THE-FACT NOTICES

Regarding *Transactions That Require Prior Written Notice* as discussed in Part III of this Section, if a change in control has occurred without the required filing of the 60-day advance Notice, or regarding *Transactions That Require Notice, But Not Prior Notice* as discussed in Part IV of this Section, if the required Notice is not filed within 90 days, the Regional Director should require a Notice to be filed and should consider appropriate enforcement action.[7] The consideration of appropriate enforcement action, decision, and factors leading to the decision should be summarized in the SOI.

Processing of an after-the-fact Notice will be substantially similar to the procedures noted in *Accepting and Processing the Notice*, Part VII of this Section. If the transaction is to be approved, the non-objection letter should use the phrase "we do not object to the acquisition which has previously occurred." Publication will be required unless disclosure of the Notice or solicitation of public comment would seriously threaten the safety and soundness of the institution. See *Publication*, Part XI of this Section, for additional information. The time limitations imposed by Section 7(j) of the FDI Act for prior Notices are not applicable in the case of an after-the-fact Notice.

In the case of an after-the-fact Notice for which it appears likely the FDIC would issue an objection, and following consultation with RMS management, Legal, and, as appropriate, WO staff (RMAS and Legal), the notificant should be instructed to submit a plan acceptable to the

[7] The FDIC's specific investigative and enforcement authority for violations of the change of control Notice requirements are specified in Section 7(j)(15) of the FDI Act. Violations of the CBC Act or the FDIC's implementing regulations may result in the requirement for divestiture (or other equitable relief), temporary or permanent injunction, or the issuance of restraining orders. The FDIC also may assess civil money penalties as set forth in Section 7(j)(16) of the FDI Act.

FDIC to terminate, reverse, and/or divest within a prescribed period of time. The notificant's plan should include a reasonable timeframe and appropriate milestones to achieve full implementation. To the extent the plan is unsupported or incomplete, the notificant should be informed of the deficiencies and required to submit additional information. If the FDIC determines the submitted plan is unacceptable, the notificant should be instructed to modify the plan and resubmit to the FDIC. After receipt of an acceptable plan, the notificant should be instructed to fully implement the plan within a prescribed timeframe. Depending on the facts and circumstances of the activity, and if sufficient supervisory concerns are identified, the notificant may be required to immediately reverse, terminate, or divest. The Case Manager should refer to *Applications Overview,* Section 1.1 of these Procedures, for further expectations regarding after-the-fact filings.

IX. STATUTORY FACTORS

The statutory factors considered in evaluating Notices are detailed in Section 7(j)(7) of the FDI Act. A proposed acquisition of control may be disapproved by the FDIC if:

- The proposed acquisition of control would result in a monopoly or aid an attempt to monopolize banking in any part of the U.S.;

- The effect of the proposed acquisition of control in any section of the country may be to substantially lessen competition or tend to create a monopoly or would in any other manner be in restraint of trade, and the anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community;

- The financial condition of any acquiring person or the future prospects of the institution might jeopardize the financial stability of the bank or prejudice the interests of the depositors of the bank;

- The competence, experience, or integrity of any acquiring person or of any of the proposed management personnel indicates that it would not be in the interest of the depositors of the bank, or in the interest of the public to permit such person to control the bank;

- Any acquiring person neglects, fails, or refuses to furnish all the information required by the FDIC; or

- The FDIC determines the transaction would result in an adverse effect on the Deposit Insurance Fund.

X. TIME FRAME FOR PROCESSING

Statutory: The notificant(s) may proceed with the proposed acquisition following the expiration of the 60-day period after a substantially complete Notice is accepted by the FDIC, unless the FDIC issues a notice of disapproval or extends the time period for disapproval. The FDIC may extend the review period for 30 days at its discretion. In addition, the review period may be extended for two additional periods for no more than 45 days each if:

- The FDIC determines that any notificant has not furnished all the information required

under Paragraph 6 of the CBC Act (Section 7(j)(6) of the FDI Act);

- In the FDIC's judgment, any material information submitted is substantially inaccurate;

- The FDIC has been unable to complete the investigation of any notificant due to any delay caused by, or the inadequate cooperation of, the notificant; or

- The FDIC determines that additional time is needed to:
  - investigate and determine whether any notificant has a record of failing to comply with the requirements of Subchapter II of Chapter 53 of Title 31, U.S.C. (Monetary Transactions);
  - analyze the safety and soundness of any plans or proposals which the notificant(s) may have to liquidate the bank, sell its assets, merge it with any other company, or make any major change in its business, corporate structure, or management; or
  - analyze the future prospects of the institution.

Note: Failure to act on a substantially complete Notice within these timeframes constitutes approval.

RO Processing Guideline: 45 days from receipt of a substantially complete Notice.

XI. PUBLICATION

Any person filing a Notice must publish an announcement seeking public comment on the proposed acquisition conforming to the requirements of Section 303.7 of the FDIC Rules and Regulations. The announcement must appear in a newspaper of general circulation in the community in which the home office of the covered institution is located. The announcement should be published as close as practical to the date the Notice is filed with the appropriate Regional Director, but no more than 10 calendar days before or after the filing date.

The FDIC may permit a delay in publication if the FDIC determines, for good cause, it is in the public interest to grant such a delay. WO staff must be consulted before permitting a delay in publication.

The FDIC may shorten the public comment period to a period of not less than 10 days, or waive the public comment or newspaper publication requirements, or act on a Notice before the expiration of a public comment period, if it determines in writing either that an emergency exists or that disclosure of the Notice, solicitation of public comment, or delay until expiration of the public comment period would seriously threaten the safety or soundness of the institution to be acquired. WO staff must be consulted before determining to delay or waive publication, or shorten or waive public comment, or act before the close of the comment period.

Whenever a Notice is not filed in accordance with the CBC Act and FDIC regulations, the acquiring person(s) should publish a newspaper announcement of the acquisition of control within 10 days after being directed by the FDIC. The newspaper announcement should contain, in addition to the information required in Section 303.7 of the FDIC Rules and Regulations, the date of the acquisition and a statement indicating that the FDIC is currently reviewing the acquisition of control.

Public comments must be submitted to the FDIC within 20 days following the required newspaper publication, or, if the FDIC has shortened the comment period, within such shorter

time period. Section 303.9 of the FDIC Rules and Regulations provides that the FDIC may extend or reopen a comment period under certain circumstances, including when good cause exists. Refer to *Applications Overview*, Section 1.1 of these Procedures, for further instruction.

XII. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices and other filings are discussed in *Applications Overview,* Section 1.1 of these Procedures. Case Managers should be aware of the special circumstances that affect the delegation of actions pertaining to Notices and follow the appropriate processing procedures. Among other special circumstances, the FDIC Board retains authority to accept and act on any Notice in which the acquiring, assuming, or resulting institution would be an ILC.

XIII. REFERENCES

Section 7(j) of the FDI Act (12 U.S.C. §1817(j))

Sections 303.7 and 303.9, 303.80 – 303.88, and 308.110-308.114 of the FDIC Rules and Regulations

Risk Management Manual of Examination Policies

Final FDIC Statement of Policy on Qualifications for Failed Bank Acquisitions

I. INTRODUCTION

Subpart F of Part 303 of the FDIC Rules and Regulations implements Section 32 of the Federal Deposit Insurance (FDI) Act and sets forth the circumstances under which an insured state nonmember institution or state savings association must notify the FDIC of any replacement or addition to its board of directors or any senior executive officers, or any change in the responsibilities of any senior executive officer, and the procedures for filing such Notice. Section 303.102(a) of the FDIC Rules and Regulations requires that an insured state nonmember institution give the FDIC written Notice (described below in *Form of Notice,* Part III), at least 30 days prior to adding or replacing any member of its board of directors, employing any person as a senior executive officer of the bank, or changing the responsibilities of any senior executive officer so that the person would assume a different senior executive officer position, if:

(1) The bank is not in compliance with all minimum capital requirements applicable to the bank, as determined on the basis of the bank's most recent Call Report or report of examination;

(2) The bank has been designated in troubled condition; or,

(3) The FDIC determines, in connection with its review of a capital restoration plan required under Section 38(e)(2) of the FDI Act or otherwise, that such Notice is appropriate.

Insured branches of foreign banks: Section 303.102(b) of the FDIC Rules and Regulations states that in the case of the addition of a member of the board of directors or a change in a senior executive officer in a foreign bank having an insured state branch, the Notice requirement does not apply to additions and changes in the foreign bank parent, but only to changes in senior executive officers in the state branch.

Definitions under Section 303.101 of the FDIC Rules and Regulations:

Director - A person who serves on the board of directors or board of trustees of an insured state nonmember institution. However, a director does not include an advisory director who: (1) is not elected by the shareholders; (2) is not authorized to vote on any matters before the board of directors or any committee thereof; (3) solely provides general policy advice to the board of directors or any committee thereof; and (4) has not been identified by the FDIC as a person who performs the functions of a director for purposes of Subpart F of Part 303.

Senior executive officer - A person who holds the title of president, chief executive officer, chief operating officer, chief managing official (in an insured state branch of a foreign bank), chief financial officer, chief lending officer, or chief investment officer, or, without regard to title, salary, or compensation, performs the function of one or more of these positions. Senior executive officer also includes any other person identified by the FDIC, whether or not hired as an employee, with significant influence over, or who participates in, major policy making decisions of the insured state nonmember bank.

Troubled Condition - a state nonmember bank that:

- Has a composite rating of 4 or 5, as determined in the most recent report of examination, or an equivalent rating in the case of an insured state branch of a foreign bank, an equivalent rating;

- Is subject to a proceeding initiated by the FDIC for termination or suspension of federal deposit insurance;
- Is subject to a Cease and Desist Order, Consent Order (Order), or a written agreement issued by either the FDIC or the state banking authority that requires action to improve the financial condition of the bank, or is subject to a proceeding initiated by either agency that contemplates the issuance of an Order requiring action to improve the financial condition of the bank (unless otherwise informed in writing by the FDIC); or,
- Is informed in writing by the FDIC that it is in troubled condition for purposes of the requirements of Subpart F of Part 303 of the FDIC Rules and Regulations on the basis of the most recent Call Report or report of examination, or other information available to the FDIC.

II. WAIVER OF PRIOR NOTICE

While a prior Notice is always required for institutions subject to Section 32 of the FDI Act, there are two instances where the 30 day advanced Notice requirements can be waived. One occurs through the FDIC granting the waiver and the other is "automatic." The following conditions must be met to warrant a waiver:

- Waiver Requests: The FDIC may permit an individual, upon petition by the bank to the appropriate Regional Director, to serve as a senior executive officer or director before filing the Notice, if the FDIC finds that: (1) delay would threaten the safety and soundness of the bank; (2) delay would not be in the public interest; or (3) other extraordinary circumstances exist that justify waiver of prior Notice. Written confirmation of the waiver should be provided to the applicant. Granting a waiver does not affect the authority of the FDIC to disapprove a Notice within 30 days after a waiver is granted.

- Automatic Waiver: In the case of the election of a new director not proposed by management at a meeting of the shareholders of a state nonmember bank, the prior 30-day Notice is automatically waived and the individual may begin serving immediately, provided that a complete Notice is filed within two business days after the individual's election. The automatic waiver does not affect the authority of the FDIC to disapprove a Notice within 30 days after the election of an individual who has filed a Notice and is serving pursuant to an automatic waiver.

III. FORM OF NOTICE

Notices are to include:

- Interagency Notice of Change in Director or Senior Executive Officer (Notice)
- Interagency Biographical and Financial Report (IBFR)
- Consent for Release of Information

Notifications of changes in senior executive officers or the board of directors must be submitted by the institution or an agent thereof, such as bank counsel. In addition to the Notice, any employment contracts must be provided to review for compliance with Part 359 of the FDIC Rules and Regulations, *Golden Parachute and Indemnification Payments*. Use of the IBFR is not mandatory; however, all of the information required by the IBFR must be submitted. The requirement to provide personal financial data may be satisfied by a current statement of assets and liabilities and an income summary. The applicant is required to submit fingerprints even if the individual is, or was recently, a director or officer of another insured institution. The

applicant will be asked to submit fingerprints via procedures established by the FDIC. Refer to Section 1.5 of these Procedures for additional information regarding fingerprinting. The Notice and IBFR are available on the external FDIC website at:

https://www.fdic.gov/regulations/laws/forms/applications.html.

The Notice can also be filed electronically through the FDIC's online secure information exchange. Refer to *Applications Overview*, Section 1.1 of these Procedures, for more information regarding applications filed through the secure exchange.

The FDIC may request additional information at any time while processing the application.

IV. ACCEPTING AND PROCESSING THE NOTICE

The following steps provide general guidance on processing a Notice. Refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.[1]

1. All applications are to be entered into 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. The Case Manager should forward the Notice to Legal for review.

2. The Case Manager should promptly review the Notice upon receipt due to the statutory time limit for issuing a disapproval.

3. The Regional Office (RO) shall notify the applicant in writing of the date on which the Notice is accepted as substantially complete for processing and of the date on which the 30-day notice period will expire. The 30-day review period begins on the date the FDIC receives a substantially complete Notice. If processing cannot be completed within 30 days, the RO must advise the notificant in writing, prior to expiration of the 30-day period, of the reason for the delay in processing and of the additional time period, not to exceed 60 days, in which processing will be completed. Any extensions should be documented in the appropriate internal database.

   Letters requesting comments from the OCC, FRB, and the appropriate state authority should be sent once the Notice is deemed substantially complete. A copy of the individual's employment history or resume should accompany the request for comment.

4. The Case Manager will Initiate background checks through the appropriate background investigation system. FBI Fingerprint Identification and FBI Name Checks are required for all Section 32 applications. Consumer credit reports may be requested if there is a legitimate business need for the information, but such requests must be approved by Regional management (Assistant Regional Director or above). If an adverse action is taken against the notificant based, in whole or in part, on information contained in a credit report, RMS may be required to provide the notificant certain information. Refer to *Background Investigations*, Section 1.5 of these Procedures, for additional information

[1] Case Managers are to follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other applicable instructions in *Applications Overview*, Section 1.1 of these Procedures.

regarding the fingerprinting process and background reviews.

5. Refer to *Section 32 Review Considerations*, Part V of this Section, for information on the review and assessment of Section 32 Notices. Assess the Notice and complete the appropriate SOI form.[2] Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI. The SOI narrative should address:

   - The reason for the Notice;
   - The condition of the institution;
   - The institution's compliance with BSA/AML;
   - The competence, experience, character, and integrity of the candidate; and,
   - Comments from other regulators.

6. If non-objection (approval) of the Notice is being recommended, prepare a non-objection letter to be sent to the bank, with a copy sent directly to the individual. Given the short processing timeframe, it is not uncommon that a non-objection letter will be sent prior to receipt of the FBI Name Check. However, the non-objection letter should include a non-standard condition allowing the FDIC to rescind the non-objection if the results of the background investigation warrant such action. 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 instructions.

   If an employment contract, severance agreement, or other compensation agreement is contemplated in connection with the change, a sentence similar to the following should be added to the letter:

   "This non-objection shall in no way be construed as approval of an employment contract, severance or other compensation agreement pursuant to Section 18(k) of the FDI Act."

   However, if an application under Part 359 of the FDIC Rules and Regulations to enter into an employment agreement was processed simultaneously, the Part 359 approval and the Notice non-objection letter may be combined. Refer to Part 359 - *Golden Parachute and Indemnification Payments,* and Section 21 of these Procedures, for additional information.

   Note: In the case of an after-the-fact Notice, the standard Notice acceptance and non-objection letters should be modified to reflect that the individual has already assumed a position at the institution.

7. If objection (disapproval) of the Notice is being recommended, prepare an objection letter to be sent to the bank, with a copy sent directly to the individual. The letter should be reviewed by RO Legal. Refer to *Section 32 Review Considerations*, Part V of this Section, for additional information regarding disapproval cases. Subpart L of Section 308 of the FDIC Rules and Regulations sets forth the following required content for Notice disapproval letters:

[2] Case Managers 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.

(1) Summarize or cite the relevant considerations specified in Section 308.152;
(2) Inform the individual and the bank that a request for review of the disapproval may be filed within fifteen days of receipt of the disapproval letter; and
(3) Specify that additional information, if any, must be contained in the request for review.

8. Update the appropriate internal database to reflect the final action, the date of the action, hours spent on the application and any other required information.

V. SECTION 32 REVIEW CONSIDERATIONS

Troubled institutions require strong, experienced management. Bankers who might perform adequately in a small composite 1- or 2-rated institution may lack the experience and skills to effectively perform in an executive capacity at a more complex or troubled institution. Similarly, individuals who have had serious financial problems may not be appropriate candidates to serve as directors or senior executive officers. While greater emphasis should be placed on the individual's qualifications to serve in a specific capacity, a review of financial information is considered valuable as it relates to, or reflects on, the individual's integrity and character.

Proposed directors and senior executive officers should reflect backgrounds of strong personal and professional financial responsibility and exemplary track records for honesty and integrity.

Case Managers must develop an opinion as to the competence, experience, character, and integrity of the proposed candidate. If the individual is, or has been, a director or senior executive officer of another insured institution, information may be available from RO supervisory records. Case Managers should contact other RO personnel, Field Supervisors, Supervisory Examiners, and prior Examiners-in-Charge to obtain information that may be helpful in assessing the candidate's suitability. If the individual's experience is at a national bank, federal savings and loan association, or state member bank, it may be advisable to contact the other agencies, particularly if there is an indication that unfavorable information may exist.

If the individual was previously associated with a failed institution, DRR should be contacted to determine whether the individual is a "person of interest." The Legal Division's Litigation and Resolutions Branch, Professional Liability and Financial Crimes Division, should be contacted to verify whether there is an ongoing investigation and to obtain any comments. Refer to Evaluating Management Associated with a Troubled or Failed Institution, in *Applications Overview*, Section 1.1 of these Procedures, for additional guidance. Case Managers should also review any material loss review, or other similar analyses, to retrieve any relevant information regarding the failure.

Background and prior experience issues that have resulted in objections include the following:[3]

- Individuals in key decision making positions who have limited executive level experience or who have been associated with failed financial institutions or financial institutions that are or were in troubled condition as a result of the individual's omissions or decisions.

[3] Refer to Applying for Deposit Insurance - A Handbook for Organizers of De Novo Institutions.

- Individuals, singularly or through related business interests, who have a history of bankruptcy filings or defaults on obligations that have resulted in losses to insured financial institutions or the DIF, or exhibit other behaviors that indicate a lack of financial responsibility; or individuals who have been unable or unwilling to demonstrate the financial capacity to meet their personal obligations.

Notices for which Disapproval Appears Warranted

The FDIC may object to a Notice, if it finds that the competence, experience, character, or integrity of the individual subject to the Notice indicates that it would not be in the best interest of the depositors, bank or public to permit the individual to be employed by, or associated with, the bank. Disapproval of a Section 32 Notice does not exclude the individual from banking, only from the position in question.

If consideration of the facts and circumstances may result in a recommendation to object to a Notice, RO Legal should be consulted for its assessment of the basis for the non-objection. The Case Manager should also facilitate appropriate and timely discussions with the bank and the candidate to ensure that all necessary facts are obtained prior to making a decision. RO staff should also consult with WO RMS and Legal, as appropriate. The concurrence of Regional Counsel and records of all discussions and meetings should be placed in the document distribution repository and summarized in the system of record. If disapproval is the appropriate action, and if the bank and candidate elect not to withdraw the Notice, a formal letter objecting to the Notice will be issued to the bank and candidate. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, and *Requests for Review of Notice of Disapproval*, Part VI of this Section for more information.

VI. REQUESTS FOR REVIEW OF NOTICE OF DISAPPROVAL

Pursuant to Section 308.153 of the FDIC Rules and Regulations, the bank and/or the candidate may file a Request for Review with the RO within 15 days of receipt of the Notice of Disapproval. The Request for Review must be in writing and should specify the reasons why the FDIC should reconsider its disapproval and set forth relevant, substantive and material documents, if any, that for good cause were not previously set forth in the Notice.

Upon receipt of a Request for Review, RO staff should send copies of the date-stamped Request for Review and the Notice of Disapproval file to the appropriate Section Chief (RMAS or LBS) and to the Supervision and Legislation Branch of the Legal Division. The RO should draft a memorandum that includes the RO's recommendation related to the Request for Review. The memorandum should also include support for the recommendation along with any necessary supporting documents.

The RO's recommendation is due to the WO no later than 10 days after the Request for Review is filed. A decision on the Request for Review by the RMS Director is due to the bank and candidate within 30 days of the RO's receipt of the Request for Review. If the objection is upheld, the bank and/or candidate may request a hearing of that decision by filing a request with the FDIC's Executive Secretary within 15 days after receipt of the RMS Director's decision. Refer to Sections 308.154 and 308.155 of the FDIC Rules and Regulations for additional information.

VII. TIME FRAME FOR PROCESSING THE NOTICE

Statutory: 30 days from receipt of a substantially complete Notice. If processing cannot be completed within 30 days, the RO must advise the notificant in writing, prior to expiration of the 30-day period, of the reason for the delay in processing and of the additional time period, not to exceed 60 days, in which processing will be completed. If the FDIC does not respond within 30 days of receiving a substantially complete Notice, or within 60 days if the period was extended, non-objection is automatic and the individual may commence service with the bank.

The statutory time limitation does not apply in the case of an after-the-fact Notice.

RO Processing Guideline: 25 days from receipt of a substantially complete Notice.

Note: RMS policy is to act on all applications as soon as possible and not allow the timeframe to expire.

VIII. TIME FRAME FOR PROCESSING REQUESTS FOR REVIEW

Statutory: 30 days from receipt.

Internal Processing Guideline: RO 10 days, WO 20 days.

IX. PUBLICATION REQUIREMENT

None.

X. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

Interim delegations of authority regarding issuance of decisions pursuant to Section 308.154(b), Requests for Review of Section 32 Notices of Disapproval, may exist and should be followed accordingly.

XI. REFERENCES

Section 32 of the FDI Act

Parts 303 (Subpart F), 308 (Subpart L), 390 and 391 of the FDIC Rules and Regulations

I. INTRODUCTION

Pursuant to Section 18(d) of the Federal Deposit Insurance (FDI) Act, an insured state nonmember bank must receive FDIC approval before establishing a new branch. Section 18(d) states that the factors to be considered in granting or withholding the consent of the FDIC under this subsection shall be those enumerated in Section 6 of the FDI Act. Section 303, Subpart C, Establishment and Relocation of Domestic Branching Offices, of the FDIC Rules and Regulations provides filing procedures and definitions. However, other guidance is listed for reference throughout this Section.

Interstate Branching: Section 18(d)(4) of the FDI Act permits, subject to certain requirements and conditions, interstate branching through *de novo* branches. Under this authority, the FDIC may approve an application by a state nonmember bank to establish and operate a *de novo* branch in a state that is not the bank's home state and in which the bank does not currently maintain a branch, if the requirements and conditions of this subsection are met. While interstate branching applications are generally processed the same as others, Case Managers should be mindful of unique procedures involved with these applications, which are included in this Section.

State Savings Associations: The establishment of state savings association branches is not subject to approval under the Home Owners' Loan Act or other federal statute. Title III of the Dodd-Frank Act transferred to the FDIC the functions, powers, and duties of the former Office of Thrift Supervision (OTS) relating to state savings associations and also amended Section 3 of the FDI Act to designate the FDIC as the appropriate federal banking agency for state savings associations. Consistent with this authority, the FDIC Board approved the transfer and redesignation of certain OTS regulations to the FDIC. The regulations developed by the OTS and subsequently adopted by the FDIC do not have provisions that relate to applications for branch establishments. The FDIC may take the following actions related to OTS transferred rules: incorporating them into other FDIC regulations, amending them, or rescinding them, as appropriate. As of July 2021, the FDIC has not implemented regulations for the establishment of a branch by a state savings association. As with all institutions, Case Managers should be alert to any supervisory or other concerns that may arise through established offsite monitoring or onsite reviews as state savings associations establish new branch locations.

The Regional Office (RO) must consult with the Risk Management and Applications Section (RMAS), and as appropriate Washington Office (WO) Legal, on any application or notice related to a state savings association to ensure that the proper procedures and timelines are followed. Refer to *Applications Overview*, Section 1.1 for information on filings involving state savings associations.

Definitions contained in Section 303.41 of the FDIC Rules and Regulations that pertain to establishing a domestic branch:

- **Home State** means the state in which the bank is chartered.

- **Host State** means a state other than the bank's home state in which the bank maintains, or seeks to establish and maintain, a branch.

- **Branch** means any branch bank, branch office, additional office, or any branch place of business located in any state of the United States or in any territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands[1], the Virgin Islands, and the Northern Mariana Islands at which **deposits are received or checks are paid or money is lent.** A branch does not include an automated teller machine (ATM), automated loan machine (ALM), remote service unit (RSU), or a facility used for financial education programs. Facilities that are remotely

[1] If an application to establish a branch in or by a bank in the Trust Territory of the Pacific Islands (now known as Federated States of Micronesia, the Marshall Islands, and Palau) is received, Legal should be consulted.

staffed and incorporate interactive features are often referred to as interactive teller machines (ITMs). When considering the appropriate classification of an ITM or similar facility, Case Managers should ascertain the capabilities of the facility and as appropriate, consult RMAS staff, as well as RO and WO Legal.

Note: Applications to establish a foreign branch of a domestic bank are covered under Section 303.182 of the FDIC Rules and Regulations - Establishing, moving or closing a foreign branch of an insured state nonmember bank. Procedures for such applications are discussed in *Foreign Activities of Insured State Nonmember Banks*, Section 26 of these Procedures.

The term branch also includes the following:

- **Messenger Service** - a service operated by a bank or its affiliate that picks up and delivers items relating to transactions in which deposits are received, checks are paid, or money is lent. A limited service messenger service branch application is required for instances in which the institution will be using bank employees to operate this service (and for which the institution will retain liability). A messenger service established and operated by a non-affiliated third party generally does not constitute a branch. If a non-affiliated party is to operate the service, the Case Manager should forward the application and all agreements to Legal for a determination as to whether the non-affiliated party is adequately insured. An application would still be required if it is determined that the institution would retain liability.

  An application for a messenger service must specify the geographic area in which service will be provided, but does not have to include a schedule. A specific address is required for ViSION purposes, but it could be the same address as the institution's main office or a branch out of which the messenger service will be operated. The code for the type of branch will differentiate the messenger service as a separate branch.

- **Mobile Branch** – a service, other than a messenger service, that does not have a single, permanent site and uses a vehicle that travels to various locations to enable the public to conduct banking business. A mobile branch may serve defined locations on a regular schedule, or may serve a defined area at varying times and locations. For example:

  A bank wishes to serve defined locations at regular times – A bank intends to establish a mobile unit that travels to specific communities on specific days (such as in sparsely populated areas where it may not be cost effective for a bank to establish a permanent branch). In such a case, the bank would file an application and include the various communities the mobile unit will serve and planned hours in the required publication. Approval letters for mobile branches should include conditions that direct the applicant to notify the appropriate RO of changes to the days of service specified in the application. If the bank wishes to add communities, a new application is required. If the mobile unit stops serving any of the designated communities, it is considered a branch closing and would be subject to the branch closing notice requirements.

  A bank wishes to serve a certain type of community in a defined area – A bank intends to establish a mobile unit that travels to certain types of communities (such as retirement communities). In such a case, the bank would file an application and submit a schedule of locations within a defined geographic area that the mobile unit will serve. The publication must include the specific type of communities to be served within the defined geographic area. Subsequent to approval, the bank could add new locations within the previously approved community type and geographic area without filing a new application. However, discontinuing service at any specific location is considered a branch closing and subject to the branch closing notice requirements.

- **Temporary Branch** – a location that operates for a limited period of time, not to exceed one year, as a public service, such as following an emergency or disaster situation.

- **Seasonal Branch** - a location that operates at various, periodically recurring intervals, such as during state and local fairs, college registration periods, and other similar occasions. This differs from a temporary branch in that, after an application is approved for a seasonal branch, the applicant bank may return to that site on a recurring basis without the need to reapply. In this case, only the initial publication is required.

- **A *De Novo* Branch** - a location that is newly established by the bank as a branch and does not become a branch as a result of: the acquisition of an insured depository institution (IDI) or a branch of an IDI; or the conversion, merger, or consolidation of any institution or branch. The purchase of only fixed assets from another institution for the purpose of housing a new branch is also treated as establishing a new branch. (**Note**: the purchase of assets and assumption of liabilities of an existing branch from another financial institution is treated as a merger transaction. Refer to *Merge or Consolidate,* Section 4 of these Procedures, for additional information.)

Proposals that May Not Require a Branch Application

The key criteria for a proposed facility to be considered a branch are accepting deposits, paying checks, or lending money (core banking functions) pursuant to Section 3(o) of the FDI Act. Facilities that do not engage in any of these activities are not considered branches and, therefore, are not subject to FDIC approval under Section 18(d) of the FDI Act.

Loan Production Offices (LPO)

The following activities can be conducted at an LPO without causing the facility to be considered a branch.

- Loan Origination: Credit information may be assembled and loan applications can be solicited or processed.

- Loan Approval: Loan applications may be approved at the LPO facility in either a public or nonpublic area of the facility.

- Loan Closing Activities: Loan closing activities, such as the execution of promissory notes and deeds of trust, may be conducted at an LPO facility. The customer may not, however, take actual receipt of the loan funds at the LPO facility. Loan proceeds may be received by a customer by mail or in person at a place that is not the bank's headquarters office and is not licensed as a branch, provided that a third party is used to deliver the funds and the location is not established by the lending bank. A third party includes a person who customarily delivers loan proceeds directly from bank funds under accepted industry practice, such as an attorney or escrow agent at a real estate closing. Similarly, computer equipment located at the LPO through which the bank initiates electronic disbursements of loan funds to the customer will not cause the LPO facility to constitute a "branch", as long as the customer does not receive the loan funds at the LPO facility.

Deposit Production Offices (DPO)

A DPO may not receive deposits, pay withdrawals, or make loans. Generally, a DPO may advertise the availability of deposit accounts for an institution, provide information about deposit products, and assist customers and prospective customers in completing forms and documents related to opening or maintaining a deposit account. Deposit and withdrawal transactions must be performed by the customer, either in person at the main office or a branch office of the institution, or by mail, electronic transfer, or similar method. An

institution may contract with third parties in its deposit production activities.

Back Office Facilities

The following activities can be conducted at a back office facility without causing the facility to be considered a branch subject to FDIC approval. A back office facility is a bank facility that is neither accessible to nor visited by the public.

- Loan Origination: Credit information may be assembled and loan applications can be solicited or processed.

- Loan Approval: Loans that originate at an LPO or other bank facility may be approved at a back office facility.

- Receipt of Loan Funds: Since back office facilities only refer to bank facilities that are neither accessible to nor visited by the public, there should be no situation in which a customer receives loan funds at the back office facility. A back office facility may credit loan funds (through ACH, wire transfer, or other electronic method) to a deposit account of the borrower at the bank without any in-person contact between the back office facility and the borrower.

FDIC supervised institutions that contact the FDIC regarding a new site not intended to be a branch should be informed that none of the core banking functions may subsequently be conducted at that location, unless a formal application is filed and approved.

Financial Education Programs

Section 303.46 of the FDIC Rules and Regulations states that a branch application or prior approval is not required for a state nonmember bank to participate in one or more financial education programs that involve receiving deposits, paying withdrawals, or lending money if:

(a) Such service or services are provided on school premises, or a facility used by the school;

(b) Such service or services are provided at the discretion of the school;

(c) The principal purpose of each program is financial education. For example, the principal purpose of a program would be considered to be financial education if the program is designed to teach students the principles of personal financial management, banking operations, or the benefits of saving for the future, and is not designed for the purpose of profit-making; and

(d) Each program is conducted in a manner that is consistent with safe and sound banking practices and complies with applicable law.

Evaluating whether a facility is a branch can be very technical, and any questions should be referred to the applicable WO staff (RMAS, LBS, or CISR) and Legal for a determination.

Branch Closings

Many states require an application to close a branch office. FDIC approval is not needed to close a branch. However, a notice is required under Section 42 of the FDI Act as the financial institution must take certain actions to notify depositors. Refer to *Branch Closings,* Section 9 of these Procedures, for further information.

Emergency or Disaster Events and Impact on Branches

In the case of an emergency or disaster at a main office or a branch that requires an office to be immediately closed and/or relocated to a temporary location, the affected bank typically notifies the appropriate Regional Director within three days of such temporary relocation. Also, within 10 days of any temporary relocation resulting from an emergency or disaster, the bank is expected to submit a written application to the appropriate FDIC office that identifies the nature of the emergency or disaster, specifies the location of the temporary branch, and provides an estimate of the duration of time that the bank plans to operate the temporary branch. Refer to *Move a Domestic Main Office or Relocate a Branch*, Section 8 of these Procedures, for further information.

As part of the review process, the Regional Director will determine on a case-by-case basis whether additional information is necessary, and may waive public notice requirements.

II. FORM OF APPLICATION

Section 303.42(a) of the FDIC Rules and Regulations requires branch applications to be submitted in letter form to the appropriate FDIC office on the date the notice is published in the newspaper, or within five days after the date of the last required publication. Applications to establish a new branch can also be filed electronically through FDIC*connect.* Refer to *Applications Overview,* Section 1.1 of these Procedures, for more information regarding applications filed through FDIC*connect*. The Uniform Application/Notice adopted by the Conference of State Bank Supervisors may be substituted.

The RO may receive a branch application after a branch was established in violation of Section 18(d) of the FDI Act. An after-the-fact filing requires a complete application, including publication, and is processed in the same manner as presented below. As appropriate, the FDIC may consider pursuing enforcement action, including monetary penalties. Refer to *Applications Overview,* Section 1.1 of these Procedures, for further guidance regarding after-the-fact filings.

The application should contain the following information:

1. A statement of intent to establish a branch.

2. The exact location of the proposed site, including the street address. If the site does not have a street address, a precise description of its location will have to be provided. For example, "the east side of U.S. Highway xxx, 400 feet south of the intersection of U.S. Highway XXX and State Road xx." If the site is at the intersection of two roads, the quadrant in which it lies should also be designated. The location of the site must be used for publication purposes.

   With regard to messenger services, the location is defined by the geographic area to be served, for example, "the Anytown metropolitan area" or "Anycounty and Othercounty, Anystate." With regard to a mobile branch, specify the locations to be served along with the approximate times of operation. If the mobile branch will not maintain a regular schedule, indicate the manner in which the branch will be used and specify the community or communities in which the vehicle will operate. A specific address where the messenger service or mobile branch will be parked is needed to establish the application tracking system record.

   If the branch is to be opened in temporary quarters, the application should contain a request for the use of temporary quarters and the reasons for this decision. If the site of the temporary quarters is other than the permanent building site, the applicant must furnish the exact address of the temporary site and the distance between the permanent and the temporary site.

3. Details concerning the involvement of any insider (as defined in Section 303.2(u) of the FDIC Rules and Regulations), including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts. Documentation provided by the applicant demonstrates that the proposed insider transactions are fair and reasonable in comparison to similar arrangements that could have been made with independent third parties.

4. Comments regarding any changes in services to be offered, the community to be served, or any other effect the proposal may have on the applicant's compliance with the Community Reinvestment Act (CRA).

5. A copy of each newspaper publication, the name and address of the newspaper, and date of the publication.

6. Applicants subject to Section 38 of the FDI Act (Prompt Corrective Action) should provide information required by Section 303.204 of the FDIC Rules and Regulations. Applications pursuant to Sections 38 and 18(d) of the FDI Act can be filed concurrently or as a single application. Refer to Prompt Corrective Action, Section 12 of these Procedures, for further details.

7. The FDIC may request additional information to complete processing.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process branch applications following the steps below and should refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.[2]

1. Branch applications filed by an eligible depository institution, as defined in Section 303.2(r) of the FDIC Rules and Regulations, will receive expedited processing, unless the applicant is notified in writing that the application is being removed from expedited processing and provided the basis for that decision prior to the deemed approved date. Absent such removal, applications by an eligible depository institution will be deemed approved as described in Time Frame for Processing, Part V of this Section. As such, branch applications should be reviewed upon receipt, or as promptly as possible, to determine if expedited processing applies, or if there are issues that would justify removal of the application from expedited processing pursuant to Section 303.11(c)(2) of the FDIC Rules and Regulations.

2. Matters that cause concern and possibly justify removing an application from expedited processing may include a "3" management component rating or a newly insured institution with which the FDIC has had little experience, for example.

3. Create a record in the application tracking system 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. Initially review all materials for completeness, and request additional information if necessary. Determine whether the branch proposal is consistent with the institution's current business plan and whether the proposal will result in an increase in the institution's risk profile. For instance, a proposed branch outside of the institution's current trade area, especially where the local economy differs from that within the existing market, may indicate a departure from the current business

[2] Case Managers should follow the general guidance and expectations for all applications regarding receipt and acceptance, ViSION AT responsibilities, Division of Depositor and Consumer Protection notifications, WO action or input, delegations, etc., in *Applications Overview*, Section 1.1 of these Procedures.

model. For branch applications that may materially change the institution's risk profile, whether through entrance into new trade areas, products or services, significant growth, or other changes that may significantly impact the business plan and financial projections for the institution as a whole, the RO should consider obtaining and evaluating additional information. Examples of additional information requests include, but are not limited to:

- Reasons and support for the proposed changes;
- Financial projections reflecting deposit and loan generation associated with the proposal, and the effect on earnings, liquidity and capital;
- Whether the proposed branch will offer products and services that differ from current offerings, or whether the new location's focus will result in a shift in balance sheet composition;
- Whether the proposed branch will serve a customer base that differs from the customers currently served; and/or
- Analysis of the target community's and the institution's ability to support another branch.

For *de novo* institutions, Case Managers should also ensure that the proposed branch application is consistent with the current, approved business plan.

5. Notify the Division of Depositor and Consumer Protection (DCP) of receipt of the application because it is a "Covered Application." Refer to *Applications Subject to CRA and Compliance Examinations,* Section 1.10 of these Procedures, for additional information. DCP staff will provide input into the determination as to the interstate provisions pertaining to compliance with the CRA and Section 109 of the Interstate Act, if applicable.

6. Analyze the application and complete the appropriate Summary of Investigation form.[3] The Application Summary Statement should be retrieved from the appropriate internal database and attached to the SOI. Refer below to *Areas of Consideration*, Part IV of this Section for guidance concerning the analysis of the proposal and the comments to be included in the SOI.

7. If approval is being recommended, prepare an approval letter. If the application was processed under expedited processing, the approval letter will state that the filing is deemed approved on a specific future date based on expedited processing timeframes. Pursuant to Section 303.45(c) of the FDIC Rules and Regulations, approvals expire after 18 months. The letter should request that the applicant notify the appropriate RO of the consummation date.

   The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written commitment to adhere to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions,* Section 1.11 of these Procedures, for additional guidance regarding the imposition of conditions.

8. If consideration of the statutory factors may result in a denial of the application, the RO should advise the applicant of the deficiencies to ensure that all relevant facts are obtained prior to making a decision. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further guidance.

[3] Case Managers 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.

9. Case Managers should determine upon receipt or as soon as possible thereafter whether the Regional Director has delegated authority to act on the application. For applications that cannot be acted on by the RO under delegated authority, the Case Manager should forward the draft letter, the SOI, and any other pertinent documents to the WO for final action no later than 30 days after receipt of a substantially complete application. The WO will prepare and/or finalize the necessary approval/denial documents. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.

10. **Procedures Specific to Interstate Branching**: Pursuant to Section 18(d)(4) of the FDI Act, applications involving interstate branching into a host state where the applicant does not currently operate a branch require additional matters be addressed. To approve an interstate branch application, the FDIC must:

    - Receive written confirmation from the host state that the applicant has complied with the state's filing requirements and that the applicant has submitted a copy of its FDIC filing to the host state bank supervisor;
    - Determine that the applicant is adequately capitalized as of the date the application is filed and will be well capitalized and well managed at consummation of the transaction;
    - Confirm that the host state will permit a bank chartered by the host state to establish the branch within the host state; and
    - Determine that the applicant is in compliance with the CRA and has not failed to meet the credit needs of the communities served in a host state pursuant to Section 109 of the Riegle–Neal Interstate Banking and Branching Efficiency Act (DCP counterparts will provide input into these determinations).

11. Update the application tracking system record with the final action date, expiration date, hours devoted to the application, and other required information.

IV. AREAS OF CONSIDERATION

When analyzing branch applications, the FDIC must evaluate each application in relation to the following seven statutory factors set forth in Section 6 of the FDI Act:

- Financial History and Condition;
- Adequacy of Capital Structure;
- Future Earnings Prospects;
- General Character and Fitness of Management;
- Risk to the Deposit Insurance Fund;
- Convenience and Needs of the Community to be Served; and
- Consistency of Corporate Powers with the Purposes of the FDI Act.

The narrative portion of the SOI should include consideration of each of the statutory factors and answer any questions raised by the general data or delegated authority sections. The level and depth of commentary, and the supporting analysis, should be commensurate with the risk profile of the institution and the risk posed by the application. Under expedited processing, the Financial History and Condition, Adequacy of Capital Structure, Future Earnings Prospects, and General Character and Fitness of Management factors may be favorably resolved by a review of the institution's CAMELS and Statistical CAMELS Offsite Rating, composite consumer Compliance rating, and CRA record, and other relevant supervisory information. Refer to Analysis of Statutory Factors in *Summary of Investigation*, Section 1.2 of these Procedures, for additional information regarding SOI comments.

The SOI should address any departures from the institution's current business plan within the comments for the affected statutory factors. For *de novo* institutions, the SOI comments should specifically address whether the proposal is consistent with the most recent, approved business plan. Material departures from the current business model and proposals inconsistent with the most recent approved business plans for *de novos* should be discussed with RO management. Such findings could adversely impact the analysis of applicable statutory factors.

The analysis of the General Character and Fitness of Management factor should consider whether any insider transactions are involved. Any financial arrangement or transaction involving the applicant and an insider (as defined in Section 303.2(u) of the FDIC Rules and Regulations) should be described and discussed in the SOI comments.

The Convenience and Needs of the Community to be Served factor may be favorably resolved when there is reasonable assurance of successful operation of the branch. The applicant's CRA history is especially relevant in evaluating this factor. Consistency of Corporate Powers will be applicable to branch proposals, if the bank contemplates some additional corporate power or activity not normally exercised by banks in connection with such applications. The Risk to the Deposit Insurance Fund factor can be favorably resolved by consideration and resolution of the other factors.

The FDIC must also evaluate each branch application in relation to the requirements of the CRA.

V. TIME FRAME FOR PROCESSING

Expedited Processing for Eligible Institutions:

The RO must take action on a branch application subject to expedited processing prior to the "deemed approved" date. Section 303.43(a) of the FDIC Rules and Regulations defines the "deemed approved" date as the **latest** of the following:

- The 21st day after receipt by the FDIC of a substantially complete filing,
- The 5th day after expiration of the comment period, or
- **Timeframe Specific to Interstate Branching**: In the case of an application to establish and operate a *de novo* branch in a state that is not the applicant's home state and in which the applicant does not maintain a branch, the 5th day after the FDIC receives confirmation from the host state that its application filing requirements have been met and that it has received a copy of the FDIC filing.

Expedited processing is not available if the Regional Director does not have delegated authority. The FDIC may remove an application from expedited processing prior to the "deemed approved" date for any of the reasons set forth in Section 303.11(c)(2) of the FDIC Rules and Regulations.

Standard Processing:

RO Processing Guideline: Within 30 days of 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. Such applications cannot be approved before the expiration of the comment period.

VI. PUBLICATION REQUIREMENT

Publication should occur once in a newspaper of general circulation in the community in which the main office is located, and once in the communities to be served by the branch (including messenger services and mobile branches). Publication should occur no more than five days prior to submission of the application to the appropriate FDIC office. Comments must be received by the appropriate FDIC office within 15 days after publication. Section 303.9 of the FDIC Rules and Regulations provides for comment period extensions in certain situations. Refer to *Applications Overview,* Section 1.1 of these Procedures, for further guidance regarding the submission of comments.

VII. DELEGATED AUTHORITY

The Case Manager should refer to the delegations of authority matrices; additional information is provided in *Applications Overview,* Section 1.1 of these Procedures.

VIII. REFERENCES

FDIC Rules and Regulations Parts 303, 309, 326, 345, and 390

Federal Deposit Insurance Act Sections 3(o), 6, 13(f), 13(k), 18(d), 38, and 44(b)

RMS Manual of Examination Policies

FDIC Introduces Electronic Submission of Branch Applications Through FDICconnect, FIL-96-2003, dated December 18, 2003

I. INTRODUCTION

Section 18(d) of the Federal Deposit Insurance (FDI) Act requires a state nonmember bank to receive the FDIC's prior written approval before moving its main office or any branch from one location to another. Section 18(d) states that the factors to be considered in granting or withholding the consent of the FDIC under this subsection shall be those enumerated in Section 6 of the FDI Act. Section 303, Subpart C of FDIC's Rules and Regulations, *Establishment and Relocation of Domestic Branches and Offices*, provides filing procedures, definitions, processing information, and public notice requirements, as well as information on special provisions discussed in greater detail later in this section.

A branch relocation means a move within the same immediate neighborhood of the existing branch which does not substantially affect the nature of the business of the branch or the customers of the branch. Moving a branch to a location outside its immediate neighborhood is considered the closing of an existing branch and the establishment of a new branch. Refer to *Establish a Domestic Branch,* Section 7 of these Procedures, for branch definitions, and the *Interagency Policy Statement Concerning Branch Closing Notices and Policies* (Policy Statement) and Section 303.41 of the FDIC Rules and Regulations for additional details.

A consolidation is the combination of one existing branch into another existing branch that is located within the same immediate neighborhood. The combination of an existing branch into another existing branch that is not located within the same immediate neighborhood would constitute a branch closing with respect to the branch that will no longer exist. A consolidation requires no application. However, subsequent notice is requested so that the appropriate internal database can be updated to reflect the closing.

Applications to interchange a branch office and the main office, also referred to as a redesignation, are processed as main office relocations. If an applicant desires to redesignate its main office as a branch and redesignate an existing branch as the main office, a single application should be submitted. Only one application tracking record is required. The Regional Director should generally waive the requirements for a newspaper publication if the redesignation is within the applicant's home state and the application presents no significant policy, supervisory, Community Reinvestment Act (CRA), compliance, or legal concerns.

Determination of Whether Proposal Meets Relocation/Consolidation Criteria:

Banks that apply for office relocations may not have considered the possibility that the proposed transaction could be considered either the establishment of a new branch and the closing of another, or a consolidation of two branches. Consequently, after reviewing the application and the position of the bank, as well as the applicable regulations and requirements, if provided, the Case Manager must determine if a transaction is a relocation, a branch opening and closing, or a branch consolidation (consolidations require no application). This determination is made in accordance with the provisions of Section 42 of the FDI Act and the Policy Statement. Please note that main office moves are not within the scope of Section 42 and the Policy Statement. Refer to *Branch Closings,* Section 9 of these Procedures, for further information.

The Policy Statement indicates that a relocation will have occurred if the new branch and the closed branch are within the same immediate neighborhood and the nature of the business and the customers served by the branch are substantially unaffected by the change. Generally, relocations will have occurred only when short distances are involved: for example, moves across the street, around the corner, or a block or two away, and moves of less than 1,000 feet will generally be considered relocations. In less densely populated areas, where neighborhoods extend farther and a longer move would not substantially affect the nature of the business or the customers served by the branch, a relocation may occur over longer distances.

A relocation outside the immediate community will be treated separately as both a branch closing and a request to establish a new branch. This requires written notification of the closing in accordance with

Section 42 of the FDI Act, as well as an application for consent to establish a branch office. Refer to the Policy Statement for additional discussion.

Interstate Relocations

Section 18(d)(3)(B) of the FDI Act permits a state nonmember bank, after the relocation of its main office to another state, to retain branches in its former home state. In effect, this provision means that a state nonmember bank can relocate its main office to another state and retain its existing branches in the original state if, as a bank chartered in the new state, it would have been able to establish those branches in the original state. An applicant seeking to relocate its main office to another state must indicate whether it intends to retain its existing home state branches. Additionally, Section 18(d)(4)(A) of the FDI Act provides, generally, that a host state cannot prevent the establishment of a *de novo* branch in its state by an out-of-state bank, if a bank chartered by the host state could establish the branch.

Additional guidelines and information on interstate branching requirements are discussed in *Accepting and Processing the Application,* Part III of *Establish a Domestic Branch*, Section 7 of these Procedures.

State Savings Associations

Case Managers must consult with the Washington Office (WO) on any application or notice 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 information regarding filings involving state savings associations.

II. FORM OF APPLICATION

Section 303.42 of the FDIC Rules and Regulations requires branch relocation applications to be submitted in letter form to the appropriate Regional Office (RO) on the date the required notice is published in the newspaper, or within five days after the date of the last required publication. Applications to relocate the main office or a branch can also be filed electronically through FDIC*connect.* Refer to *Applications Overview*, Section 1.1 of these Procedures, for further information regarding applications filed through FDIC*connect*. The Uniform Application/Notice adopted by the Conference of State Bank Supervisors may be used.

Without regard to the format used, all applications of this nature must contain the information required by 303.42. Any application submitted should contain the following information:

1. A statement of intent to relocate the main office or a branch.

2. The exact location of the proposed site, including the street address. If the site does not have a street address, a precise description of its location will have to be provided. For example, “the east side of U.S. Highway xxx, 400 feet south of the intersection of U.S. Highway XXX and State Road xx." If the site is at the intersection of two roads, the quadrant in which it lies should also be designated. The location of the site must be used for publication purposes.

   If the relocated main office or branch is to be opened in temporary quarters, the application should also contain a request for the use of temporary quarters and the reasons for using temporary quarters. If the site of the temporary quarters is other than the permanent building site, the applicant should indicate the exact address of the temporary site and the distance between the permanent and the temporary site.

3. Details concerning any involvement in the proposal by an insider (as defined in Section 303.2(u) of the FDIC Rules and Regulations), including any financial arrangements relating to fees, the

acquisition of property, leasing of property, and construction contracts. Case Managers should review documentation provided by the applicant to demonstrate that the proposed insider transactions are fair and reasonable in comparison to similar arrangements that could have been made with independent third parties.

4. Comments on any changes in services to be offered, the community to be served, or any other effect the proposal may have on the applicant's compliance with the CRA.

5. A copy of each newspaper publication, the name and address of the newspaper, and date of the publication.

6. **Requirement Specific to Interstate Main Office Relocation**: When an application is submitted to relocate the main office of the applicant from one state to another, a statement of the applicant's intent regarding retention of branches in the state where the main office exists prior to relocation.

   Note: Applications by undercapitalized institutions subject to Section 38 of the FDI Act to establish a branch should also include the information required by section 303.204 of the FDIC Rules and Regulations. Applications pursuant to Sections 38 and 18(d) of the FDI Act may be filed concurrently or as a single application.

7. The FDIC may request additional information to complete processing.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process branch applications following the steps below and should refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.[1]

1. If the application is for a branch relocation, determine that the criteria for relocation have been met. Legal and Division of Depositor and Consumer Protection (DCP) personnel can be consulted, as needed, in determining whether the application should be handled as a relocation or an application to establish a branch with a notice to close the corresponding branch. If the proposal does not meet the criteria for relocation, but is instead a closing and an establishment of a new branch, advise the applicant to send notification of the branch closing to the appropriate RO and request that the application be amended to an application to establish a branch. In such instances, process the application following the guidelines in *Establish a Domestic Branch,* Section 7 of these Procedures.

2. An application filed by an eligible depository institution, as defined in Section 303.2(r) of the FDIC Rules and Regulations, will receive expedited processing unless the applicant is notified in writing that the application is being removed from expedited processing and provided the basis for that decision prior to the deemed approved date. Absent such removal, an application filed by an eligible depository institution will be deemed approved as described in *Time Frame for Processing*, Part V of this Section. As such, branch-related applications should be reviewed upon receipt, or as promptly as possible, to determine if expedited processing applies or if there are issues that would justify removal of the application from expedited processing pursuant to Section 303.11(c)(2) of the FDIC Rules and Regulations.

[1] Case Managers should follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, etc., in *Applications Overview*, Section 1.1 of these Procedures.

3. Matters that may cause concern and possibly justify removing an application from expedited processing include, for example, a "3" management component rating or a newly insured institution with which the FDIC has had little experience.

4. Create a record in the application tracking system 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.

5. Initially review all materials for completeness, and request additional information if necessary.

6. Notify DCP of receipt of the application because it is a "covered" application per Parts 303 and 345 of the FDIC Rules and Regulations. Refer to *Applications Using CRA and Compliance Information*, Section 1.10 of these Procedures, for additional information. DCP counterparts will provide input into the determination as to the interstate provisions pertaining to compliance with the CRA and Section 109 of the Interstate Act, if applicable.

7. Analyze the application and complete the Summary of Investigation (SOI) form.[2] The Application Summary Statement should be retrieved from the appropriate internal database and attached to the SOI. Refer below to *Areas of Consideration*, Part IV of this Section, for guidance concerning the analysis of the proposal and the comments to be included in the SOI.

8. If approval is being recommended, prepare an approval letter. If the application was processed under expedited processing, the approval letter will state that the filing is deemed approved on a specific future date based on expedited processing time frames. Pursuant to Section 303.45(c) of the FDIC Rules and Regulations, approvals expire after 18 months. The approval letter should request that the applicant notify the appropriate RO of the consummation date.

9. The approval letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written commitment to adhere to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions,* Section 1.11 of these Procedures, for additional guidance regarding the imposition of conditions.

10. If consideration of the statutory factors may result in a denial of the application, the RO should advise the applicant of the deficiencies to ensure that all relevant facts are obtained prior to making a decision. If recommending denial, prepare a draft denial letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further guidance.

11. Case Managers should determine upon receipt, or as soon as possible thereafter, whether the Regional Director has delegated authority to act on the application. For applications that cannot be acted on by the RO under delegated authority, the Case Manager should forward the draft letter, the SOI, and any other pertinent documents to the WO for final action no later than 30 days after receipt of a substantially complete application. The WO will prepare and/or finalize the necessary approval/denial documents. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.

12. **Procedures Specific to Interstate Branching**: Pursuant to Section 18(d)(4) of the FDI Act, applications involving interstate branching into a host state where the applicant does not currently operate a branch require additional matters be addressed. To approve an interstate branch application, the FDIC must:

[2] Case Managers 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.

- Receive written confirmation from the host state that the applicant has complied with the state's filing requirements, and that the applicant has submitted a copy of its FDIC filing to the host state bank supervisor;
- Determine that the applicant is adequately capitalized as of the date the application is filed and will be well capitalized and well managed at consummation of the transaction;
- Confirm that the host state will permit a bank chartered by the host state to establish the branch within the host state; and
- Determine that the applicant is in compliance with the CRA and has not failed to meet the credit needs of the communities served in a host state pursuant to Section 109 of the Interstate Act (DCP counterparts will provide input into these determinations).

13. Update the application tracking system record with the final action date, expiration date, hours devoted to the application, and other required information.

IV. AREAS OF CONSIDERATION

When analyzing branch or main office relocation applications, the FDIC must evaluate each application in relation to the following seven statutory factors set forth in Section 6 of the FDI Act:

- Financial History and Condition;
- Adequacy of Capital Structure;
- Future Earnings Prospects;
- General Character and Fitness of Management;
- Risk to the Deposit Insurance Fund;
- Convenience and Needs of the Community to be Served; and
- Consistency of Corporate Powers with the Purposes of the FDI Act.

The narrative portion of the SOI should include consideration of each of the statutory factors and answer any questions raised by the general data or delegated authority sections. The level and depth of commentary should be commensurate with the risk profile of the institution and the risk posed by the application. The SOI should address any departures from the institution's current business plan within the comments for the affected statutory factors. For *de novo* institutions, the SOI comments should specifically address whether the proposal is consistent with the most recent, approved business plan. Material departures from the current business model and proposals inconsistent with the most recent approved business plans for *de novos* should be discussed with RO management. Such findings could adversely impact the analysis of applicable statutory factors.

The analysis of the General Character and Fitness of Management factor should consider whether any insider transactions are involved. Any financial arrangement or transaction involving the applicant and an insider (as defined in Section 303.2(u) of the FDIC Rules and Regulations) should be described and discussed in the SOI comments.

The Convenience and Needs of the Community to be Served factor will be favorably resolved when there is reasonable assurance of successful operation of the office to be relocated or redesignated. The applicant's CRA history is especially relevant in evaluating this factor. Consistency of Corporate Powers will rarely be applicable to relocation proposals, unless the bank contemplates some additional corporate power not normally exercised by banks in connection with such applications. The Risk to the Deposit Insurance Fund factor can be resolved by virtue of favorable resolution of the other factors.

V. TIME FRAME FOR PROCESSING

Expedited Processing for Eligible Institutions:

The RO must take action on a branch relocation or main office redesignation application receiving expedited processing prior to the "deemed approved" date. Section 303.43(a) of the FDIC Rules and Regulations defines the "deemed approved" date as the **latest** of the following:

- The 21st day after receipt by the FDIC of a substantially complete filing;
- The 5th day after expiration of the comment period; or
- **Timeframe Specific to Interstate Branching**: In the case of an application to relocate a branch into a state that is not the applicant's home state and in which the applicant does not maintain a branch, the 5th day after the FDIC receives confirmation from the host state that its application filing requirements have been met and that it has received a copy of the FDIC filing.

Expedited processing is not available if the Regional Director does not have delegated authority. The FDIC may remove an application from expedited processing prior to the "deemed approved" date for any of the reasons set forth in Section 303.11(c)(2) of the FDIC Rules and Regulations.

Standard Processing:

RO Processing Guideline: Within 30 days of 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. Such applications cannot be approved before the expiration of the comment period.

VI. PUBLICATION REQUIREMENT

Publications should occur once in a newspaper of general circulation for applications to relocate a branch. For applications to relocate a main office, notice shall be published at least once each week on the same day for two consecutive weeks.[3] The required publication shall be made in the following communities:

To relocate a main office: In the community in which the main office is currently located and in the community to which the main office proposes to relocate.

To relocate a branch: In the community in which the branch is located.

Lobby Notices: In the case of applications to relocate a main office or a branch, a copy of the required newspaper publication shall be posted in the public lobby of the office to be relocated for at least 15 days beginning on the date of the last required published notice.

Comments must be received by the appropriate FDIC office within 15 days after the date of the last required publication. Section 303.9(b)(2) of the FDIC Rules and Regulations provides for comment period

[3] The Regional Director may waive the requirements for a newspaper publication in cases where an applicant wishes to redesignate its main office as a branch and an existing branch as its main office if the redesignation is within the applicant's home state and the application presents no significant policy, supervisory, CRA, compliance, or legal concerns.

extensions in certain situations. Refer to *Applications Overview,* Section 1.1 of these Procedures, for further guidance regarding the submission of comments.

VII. SPECIAL PROVISIONS

Emergency or Disaster Events:

- In the case of an emergency or disaster at a main office or a branch that requires an office be immediately relocated to a temporary location, applicants shall notify the Regional Director within three days of such temporary relocation. In such limited cases, the FDIC will accept initial notification by whatever means available and appropriate. The FDIC has made this limited exception to accommodate the public's need to have uninterrupted access to banking services.

- Within 10 days of the temporary relocation resulting from an emergency or disaster, the bank shall submit a written application to the Regional Director that identifies the nature of the emergency or disaster, specifies the location of the temporary branch, and provides an estimate of the duration the bank plans to operate the temporary branch.

- As part of the review process, the Regional Director will determine on a case-by-case basis whether additional information is necessary and may waive the public notice requirements.

VIII. DELEGATED AUTHORITY

The Case Manager should refer to the delegations of authority matrices; additional information is provided in *Applications Overview,* Section 1.1 of these Procedures.

IX. REFERENCES

FDIC Rules and Regulations Parts 303, 309, 326, 345, 390, and 391

Federal Deposit Insurance Act Sections 3(o), 6, 13(f), 13(k), 18(d), 42, and 44

Section 613 of the Dodd-Frank Act

RMS Manual of Examination Policies

Interagency Policy Statement Concerning Branch Closing Notices and Policies, dated June 29, 1999

FDIC Introduces Electronic Submission of Branch Applications Through FDICconnect, FIL-96-2003, dated December 18, 2003

I. INTRODUCTION

Section 42 of the Federal Deposit Insurance (FDI) Act requires each insured depository institution opening one or more branches to:

1. Adopt a policy on branch closings;
2. Provide its primary federal regulator with a 90-day advance notice of a proposed branch closing;
3. Mail a notice to customers of a branch closing at least 90 days before the scheduled closing; and
4. Place a conspicuous notice at the affected branch at least 30 days prior to the scheduled closing.

The federal banking agencies adopted the *Interagency Policy Statement Concerning Branch Closing Notices and Policies* (Policy Statement) in June 1999. Among other things, the Policy Statement defines a branch for the purposes of Section 42, clarifies what constitutes a branch closing, and guides institutions in identifying customers to notify in the event of a branch closing.

The agencies consider a "branch" for purposes of Section 42 to be a traditional brick-and-mortar branch, or any similar banking facility other than a main office, at which deposits are received, checks paid, or money lent. Section 42 does not apply to the closing of non-branch facilities, such as an automated teller machine, remote service facility, or loan production office, or the closing of a temporary branch.

Moves within the same immediate neighborhood that do not substantially affect the nature of the business or customers to be served are generally considered to be branch relocations, rather than branch closings. Such transactions are, therefore, not subject to the requirements of Section 42. See section on "Relocations" below.

Section 42 also does not apply when a branch ceases operation but is not closed by an institution. Thus, Section 42 does not apply to:

- A temporary interruption of service caused by an event beyond the institution's control (e.g., a natural disaster), if the institution plans to restore branching services at the site in a timely manner;
- Transferring back to the FDIC, pursuant to the terms of an acquisition agreement, a branch of a failed bank or savings association operated on an interim basis in connection with the acquisition of all or part of a failed bank or savings association, so long as the transfer occurs within the option period or within an occupancy period, not to exceed 180 days, as provided in the agreement with the Division of Resolutions and Receiverships (DRR); and
- A branch that is closed in connection with an emergency acquisition under Sections 11(n) Bridge Institutions, 13(f) Assisted Emergency Interstate Acquisitions, or 13(k) Emergency Acquisitions of the FDI Act, or any assistance provided by the FDIC under Section 13(c) of the FDI Act.

<u>Interstate Bank Branch Closings</u>

For an interstate bank (defined in Section 42 as a bank that maintains branches in more than one state), the Regional Office (RO) must ensure that, if the branch to be closed is located in a low- or moderate-income area, the customer notice includes the mailing address of the appropriate Primary Federal Regulator (PFR) and a statement that comments on the proposed closing may be mailed to

the PFR. The notice should also state that the agency does not have the authority to approve or prevent the branch closing.

To validate the income category of the census tract for a proposed branch closing, visit the FFIEC's website, http://www.ffiec.gov, through the following steps:

- Select Geocoding/Mapping System under Consumer Compliance;
- Enter address of branch and select Search;
- Select Census Demographic Data; and
- Tract Income Level will be displayed (low, moderate, middle, upper).

If the subject branch is in a low- or moderate-income census tract, the customer notification letter should be reviewed to ensure that it includes the additional disclosures referenced above. If not included, the bank should be instructed to send a new letter, and inform the institution the 90-day timeframe should be reset to reflect the date of the revised notification letter. Include the appropriate Division of Depositor and Consumer Protection (DCP) Review Examiner and RO Community Affairs Officer in the appropriate document distribution database for any correspondence related to an interstate bank branch closing that is located in low- or moderate-income census tract. Refer to Section 42(d) of the FDI Act for additional information.

If the FDIC receives a written request by a person from the area in which the branch to be closed is located, and the comments include a discussion of the adverse effect of the closing on the availability of banking services in the area affected, the FDIC must review the substance of these comments. The comments will be reviewed and, if appropriate, DCP personnel in consultation with Division of Risk Management Supervision (RMS) personnel will:

- Convene a meeting of the representatives of the FDIC and other depository institution regulatory agencies, community leaders, and other relevant parties as appropriate; and
- Explore the feasibility of establishing adequate alternative facilities and services for the affected area, as specified in Section 42(d).

No action taken as a result of the meeting convened shall affect the authority of the interstate bank to close a branch, if the other requirements of Section 42 have been met with respect to the branch being closed. DCP staff will document the results of the meeting and will follow-up with interested parties concerning any commitments made at the meeting.

If written comments are received from a person residing in a low- or moderate-income census tract where the branch to be closed is located, and those comments do not include a discussion of the adverse effect of the closing on the availability of banking services in the area affected, the Regional Director or appropriate delegate should notify the party(ies) submitting the comments in writing that no further action will be taken based upon the comments presented.

Relocations

After reviewing the necessary documentation from the institution, the Case Manager must determine if a proposed branch move constitutes either (a) a branch relocation or (b) a branch establishment and a branch closing. The Policy Statement and Section 303.41(b) of the FDIC Rules and Regulations indicate that a relocation occurs when moves of relatively short distances are involved. For example, moves across the street, around the corner or a block or two away will be considered to be relocations. Moves of less than 1,000 feet will generally be considered to be relocations. In less densely populated areas where neighborhoods extend farther and a long move would not significantly affect the nature of the business or the customers served by the branch, a relocation

may occur over substantially longer distances. The Policy Statement is designed to provide flexibility, as long as the nature of the business or the customers served by the branch are not significantly affected. Branch relocations, though not subject to the requirements of Section 42, are subject to FDIC approval under Section 18(d) of the FDI Act. Refer to *Move a Domestic Main Office or Relocate a Branch,* Section 8 of these Procedures, for additional information.

Mergers

An institution must file a branch closing notice whenever it closes a branch in the context of a merger, consolidation, or other form of acquisition. Transactions subject to expedited approval under the Bank Merger Act must also file a branch closing notice. The responsibility for filing the notice typically lies with the acquiring or resulting institution; however, either party to such a transaction may give the notice. For example, the purchaser may give the notice prior to consummation of the transaction, if the purchaser intends to close a branch following consummation, or the seller may give the notice because it intends to close a branch at or prior to consummation. In the latter example, if the transaction were to close ahead of schedule, the purchaser, if authorized by the PFR, could operate the branch to complete compliance with the 90-day notice requirement without the need for an additional notice.

Consolidation of Branches

To determine if the branch closing provisions apply to branch consolidations, Case Managers should use the same criteria as is used for relocations. That is, if the consolidated branches are in the same neighborhood and the consolidation does not significantly affect the nature of the business or the customers served by the branches consolidated, a branch closing notice will generally not be required.

State Savings Associations

Case Managers must consult with the Washington Office on any application or notice 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 information regarding filings involving state savings associations.

II. PROCESSING PROCEDURES

1. Review the notice for completeness and ensure that the notice is dated at least 90 days in advance of the proposed branch closing. While the notice is not a "covered application," Case Managers should notify their DCP counterparts when a notice is received, as DCP has a shared supervisory interest in branch closings.

    (a) Ensure the proposed closing meets the definition of a branch closing. For example, remote service facility closings and relocations within the same immediate neighborhood **are not** covered by Section 42. Note that a closing in connection with a merger, consolidation, or other form of acquisition, **is** covered by Section 42 requirements. For merger and acquisition transactions, a notice contingent on approval by the PFR of an application is allowed. If the acquiring party will close the branch, the Case Manager should ensure branch notices are provided timely and that the acquirer has addressed all post consummation requirements. If the branch will be closed by the target or seller, ensure appropriate notification is completed prior to consummation. Consult with RO management and Legal on questions regarding joint submissions.

(b) The notice should include:

(1) an identification of the branch(es) to be closed;
(2) the proposed date of the closing;
(3) a detailed statement of the reasons for the decision to close the branch; and
(4) statistical or other information that supports the reasons and that is consistent with the institution's written policy for branch closings.

(c) Review the institution's customer notification and details regarding its release and posting to ensure it was, or will be, provided at least 90 days in advance of the proposed closing in at least one of the regular account statements mailed to customers, or in a separate mailing. The notification should:

(1) state the location of the branch to be closed;
(2) state the proposed date of closing; and
(3) identify either the location where customers can obtain service following the closing, or provide a telephone number for customers to call to determine alternative sites.

(d) For the closing of a branch of an interstate bank located in a low- or moderate-income area, the notice should also include:

(1) the mailing address of the PFR;
(2) a statement that comments on the proposed branch closing may be mailed to the PFR; and
(3) a statement that the PFR is not authorized to approve or prevent the closing.

(e) Ensure a notice providing information similar to the customer notice has been or will be posted in a conspicuous manner on the premises of the branch to be closed at least 30 days prior to the proposed closing.

(f) Review the census tract income data for any proposed branch closings if involving an interstate bank, and follow the procedures noted above, if applicable.

2. If the advance notice is in compliance with Section 42 and the Policy Statement, send the institution a letter acknowledging receipt of the notice and requesting notification when the branch has been closed, and make appropriate distribution.

A record should not be established. The notification and any documentation should be routed through the appropriate document distribution database to the bank file, appropriate field office, and state authority. When notice has been received that the branch has been closed, the Case Manager should ensure that the Structure Information Management System database is updated.

III. REFERENCES

Federal Deposit Insurance Act Sections 3, 18(d), and 42

Parts 303 and 390 of the FDIC Rules and Regulations

Interagency Policy Statement Concerning Branch Closing Notices and Policies

I. INTRODUCTION

Part 303 – Subpart I (12 CFR Part 303, Subpart I or "Subpart I") and Section 333.4 (12 CFR § 333.4) of the FDIC Rules and Regulations set forth requirements and procedures for the conversion of an insured mutual state-chartered savings bank to the stock form of ownership, and the OCC's Regulations at 12 CFR Part 192 address conversions by state savings associations (as discussed further below). Due to concerns about insiders and investors in mutual-to-stock (MTS) conversion transactions regarding excessive benefits from the transaction, the FDIC Board adopted these rules to address conversion issues and require advance notice of an institution's conversion plans. Among the problems noted were cases in which insiders at mutual savings banks influenced the setting of the stock offering price well below the true value of the institution, or obtained more than a fair share of the stock subscription. Excessive compensation packages for insiders were also noted. Such activities unjustly enrich insiders and often deny the converting institution all of the capital it should receive from the stock offering, to the detriment of depositors and the Deposit Insurance Fund (DIF).

Merger/conversions (the purchase of a mutual savings bank by a stock bank, with the depositors of the mutual bank offered the opportunity to purchase stock of the acquiring bank or holding company) are closely reviewed by the FDIC to ensure that (i) the value of the converting institution is fairly determined, and (ii) the value is distributed to the proper constituents of the mutual bank. Generally, merger/conversions have been limited to cases involving financially weak institutions or situations in which a converting institution could clearly demonstrate that a standard MTS conversion would not be economically feasible due to the ratio of expenses to gross proceeds or the converting institution's asset size.

Pursuant to Section 303.163(b) of the FDIC Rules and Regulations, in reviewing a MTS conversion Notice (Notice), the FDIC takes into account the extent to which the proposed conversion follows the various provisions of the MTS conversion regulations of the Office of the Comptroller of the Currency (OCC) (12 CFR Part 192) that are in effect at the time the Notice is submitted. Any non-conformity with those provisions will be closely reviewed. However, conformity with the OCC requirements will not be sufficient for FDIC regulatory purposes if the FDIC determines that the proposed conversion would pose a risk to the institution's safety or soundness, violate any law or regulation, or present a breach of fiduciary duty.

II. FORM OF NOTICE

A number of filings may be necessary in a MTS conversion, including those listed below.

- A letter request from the bank for non-objection to the conversion under Section 303.161 of the FDIC Rules and Regulations.

- A merger application, under Section 18(c) of the Federal Deposit Insurance (FDI) Act, for an interim merger if an interim institution is used, and/or for a corporate reorganization if a mutual holding company (MHC) is formed, to effect the MTS conversion.

- A deposit insurance application if a *de novo* stock savings bank is proposed to be formed under a purchase and assumption agreement in conjunction with the formation of a MHC. This will generally be included as part of a merger application. A deposit insurance application may also be necessary for a newly formed interim institution in certain states.

- A deposit insurance application when forming a MHC by the chartering of an interim savings association under the provisions of Section 10(o) of the Home Owners' Loan Act (HOLA), 12 U.S.C. § 1467a(o), if the transaction is structured as a purchase and assumption. In such cases, a letter application briefly describing the transaction and requesting deposit insurance, accompanied by a copy of the related filings, should be submitted.

- Notice of Supervisory Conversion. Supervisory conversions may be pursued in situations in which little to no shareholder value exists and the institution requires additional capital to preclude a failure. Although not conclusive, an institution that is categorized as Significantly or Critically Undercapitalized for Prompt Corrective Action purposes may qualify for a supervisory conversion. Regional Offices (ROs) are to process such conversion Notices on a priority basis and should, upon receipt, immediately contact the Associate Director, Risk Management Examination Branch (RMEB). Supervisory conversions require FDIC Board consideration.

The need for a deposit insurance and/or a merger application in connection with a Notice is often driven by the requirements of applicable state MTS conversion laws and regulations. The Case Manager should consult with RO Legal staff to ensure that all required filings have been submitted.

Filing Procedures

In addition to complying with the requirements in Section 333.4 of the FDIC Rules and Regulations, a state-chartered mutually owned savings bank that proposes a MTS conversion must file a Notice of intent to convert with the FDIC in accordance with Section 303.161. In accordance with Section 303.161(b), the Notice should be filed in letter form with the appropriate Regional Director at the same time as conversion application materials are filed with the institution's primary state regulator. An insured mutual savings bank chartered by a state that does not require the filing of a conversion application shall file the Notice with the appropriate Regional Director as soon as practicable after adoption of its plan of conversion. As set forth in Section 303.163(c), the Notice should provide a description of the proposed conversion and include all materials that have been filed with any state or federal banking regulator and any state or federal securities regulator. At a minimum, the Notice must include, as applicable, copies of:

1. The plan of conversion with specific information concerning the record date used for determining eligible depositors and the subscription offering priority established in connection with any proposed stock offering;

2. Certified board resolutions relating to the conversion;

3. A business plan, including a detailed discussion of how the capital acquired in the conversion will be used, expected earnings for at least a three-year period following the conversion, and a justification for any proposed stock repurchases;

4. The charter and bylaws of the converted institution;

5. The bylaws and operating plans of any other entities formed in connection with the conversion, such as a holding company or charitable foundation;

6. A full appraisal report, prepared by an independent appraiser, of the value of the converting institution and the pricing of the stock to be sold in the conversion transaction;

7. Detailed descriptions of any proposed management or employee stock benefit plans or employment agreements, and a discussion of the rationale for the level of benefits proposed, individually and by participant group;

8. Indemnification agreements;

9. A preliminary proxy statement and sample proxy;

10. Offering circular(s) and order form;

11. All contracts or agreements relating to the solicitation, underwriting, market-making, or listing of conversion stock and any agreements among members of a group regarding the purchase of unsubscribed shares;

12. A tax opinion concerning the federal income tax consequences of the proposed

13. conversion;

14. Consents from experts to use their opinions as part of the Notice; and,

15. An estimate of conversion-related expenses.

The FDIC may request any additional information it deems necessary to evaluate the proposed conversion.

A state-chartered mutually owned savings association seeking to convert should follow the filing procedures set forth in OCC regulation 12 CFR Part 192. Conversely, Subpart I and Section 333.4 of the FDIC Rules and Regulations are applicable to state-chartered mutually owned savings banks. Consult with the Washington Office (WO) regarding the filing process for state-chartered savings associations.

Waiver from Compliance

As set forth in Section 303.162(a) of the FDIC Rules and Regulations, an institution proposing to convert from mutual to stock form may file a letter requesting a waiver of compliance with Subpart I or Section 333.4 with the appropriate Regional Director:

1. When compliance with any provision of Subpart I or Section 333.4 would be inconsistent or in conflict with applicable state law; or,

2. For any other good cause shown.

For example, institutions in Massachusetts and Connecticut may request waivers of the FDIC's requirement that a majority of depositors vote in favor of the conversion where state law conflicts with this requirement by requiring a vote by the corporators of the institution. The FDIC Board has delegated its authority to approve such waivers to the Division of Risk Management Supervision (RMS) Director, Deputy Director or Associate Director, but retains its authority to approve "good cause" waiver requests. For example, the FDIC has granted a good cause waiver in situations where a state law was supplemental to, but not in conflict with, the FDIC's regulations requiring a majority vote of depositors. Generally, however, a request to change the regulatory stock purchase priorities (e.g., to place depositors below employee benefit plans in order of priority) would not be waived.

As required by Section 303.162(b) of the FDIC Rules and Regulations, in making a request for a waiver, the institution must demonstrate that the requested waiver, if granted, would not result in any effects that would be detrimental to the safety and soundness of the institution, entail a breach of fiduciary duty on part of the institution's management, or otherwise be detrimental or inequitable to the institution, its depositors, any other insured depository institution(s), the DIF, or the public interest.

III. PROCESSING THE APPLICATION

Notificants should provide one original copy of the Notice and any supporting documentation, along with an electronic copy of the materials. The Case Manager should inform the Notificant of procedures for secure electronic submission. The Case Manager should ensure that the below processing steps are followed.

1. Review the Notice promptly to determine that it is substantially complete and that all required information has been submitted. In general, a complete Notice will contain the 14 items detailed on the two preceding pages; however, depending on the transaction, more or less documentation may be appropriate. (For example, a Notice may not include an offering circular or stock order form if the institution is not conducting a public stock offering.) Some items such as employment agreements or legal opinions are submitted in draft form and finalized later in the conversion process. The most important documents are the business plan, appraisal, a draft copy of the prospectus or offering circular which will contain the plan of conversion, and copies of all documents submitted to the other regulators. Legal should be made aware of the Notice and assist on the review as necessary.

2. Send an electronic copy of the Notice with all supporting documentation to RMAS, WO and RO Legal, and the RMS Accounting and Securities Disclosure Section so they may begin their respective reviews. The Case Manager should discuss the specifics of the Notice with a Review Examiner in the WO Risk Management and Applications Section (RMAS) to ensure timely and consistent handling of the Notice.

3. A record must be created within the appropriate internal database upon receipt for all Notices complete or not, to maintain an accurate inventory. If considered incomplete, the Notice should be returned with a letter outlining the deficiencies, following entry into the system of record. If there are only minor deficiencies, the Notice should be entered into the system of record and the Notificant should be contacted in writing and requested to provide the missing information. If the Notificant fails to provide the information in a timely manner (Notices should usually not be held in abeyance for more than 30 days), the Notice and any related filings should be deemed abandoned and returned to the applicant.

4. If the Notice is deemed substantially complete, notify the institution by letter that the Notice has been accepted. The acceptance date should be the date the FDIC received a substantially complete Notice. (Importantly, a Notice should not be accepted until the FDIC has received all information necessary to process the Notice.)

   The acceptance letter should identify the Case Manager as the FDIC's primary point of contact for the Notice. As circumstances dictate, the Case Manager may advise the Notificant of names of individuals at either the RO or WO that may be directly contacted for specific matters related to the Notice (for example, individuals reviewing the appraisal or the disclosure materials).

5. Complete the Summary of Investigation (SOI) form. Refer to *Summary of Investigation*, Section 1.2 of these Procedures, for additional instruction. In addition to the format and content requirements described in Section 1.2, the narrative portion of the SOI should discuss the Notificant's rationale for the MTS conversion, the applicable statutory or regulatory considerations (*e.g.*, Subpart I, Section 333.4 of the FDIC Rules and Regulations, 12 CFR Part 192, and notable state law requirements), and any matters raising safety and soundness concerns.

6. Under statutory or regulatory considerations, the SOI must specifically review and discuss the following factors set forth in Section 303.163(a) of the FDIC Rules and Regulations:

   (a) the proposed use of the proceeds from the sale of stock, as set forth in the business plan;
   (b) the adequacy of the disclosure materials;*
   (c) the participation of depositors in approving the transaction (must be a majority of those members eligible to vote, with a simple majority required for approval);
   (d) the form of the proxy statement required for the vote of the depositors/members on the conversion (relates closely to the disclosure portion but there must be a depositor vote approving the conversion for a non-objection). Running proxies cannot be used. (There must be a separate vote on the conversion.);*
   (e) any proposed increased compensation and other remuneration (including stock grants, stock option rights, and other similar benefits, such as warrants or management recognition plans) to be granted to officers and directors/trustees of the bank in connection with the conversion;
   (f) the adequacy and independence of the appraisal of the value of the mutual savings bank for purposes of determining the price of the shares of stock to be sold to the public;*
   (g) the process by which the bank's trustees approved the appraisal, the pricing of the stock, and the compensation arrangements for insiders;
   (h) the nature and apportionment of stock subscription rights; and,
   (i) the bank's plans to fulfill its commitment to serving the convenience and needs of its community.

   **Primary review of these areas is the responsibility of the WO. Nonetheless, the RO should ensure a comprehensive review is completed and summarized in the SOI.*

   If applicable, the following conversion related issues should also be discussed in the SOI:

   (a) proposed waiver of dividends by a MHC;
   (b) applicability of Sections 23A and 23B of the Federal Reserve Act to any employee stock ownership plan (ESOP) borrowing to fund a stock purchase where the bank is the loan guarantor; and,
   (c) requirements of state law relative to depositor approval of proposed conversions.

   The SOI should resolve or provide mitigating information for any issues or concerns raised during the review of the Notice. If approval of an application or non-objection to a Notice is being recommended, there should be no significant unresolved matters.

   An SOI form must also be completed for the related merger and/or deposit insurance applications. The narrative portion should address the statutory factors applicable to those

filings (see Sections 6 and 18(c) of the FDI Act).

7. If a Notice contains deficiencies that may result in the issuance of an objection by the FDIC, the RO should consult with the WO prior to contacting the Notificant to discuss the deficiencies and provide an opportunity to make corrections or supplement the filing. Refer to the Applications Overview and Denials and Disapprovals sections of these Procedures (Sections 1.1 and 1.3, respectively) for further instruction.

8. Legal staff will be required to concur with all recommendations concerning the Notice.

9. Other involved regulators and the WO should be copied on all pertinent correspondence related to the Notice and the merger/deposit insurance application(s).

10. In accordance with Section 303.163(c)(2) of the FDIC Rules and Regulations, the FDIC, in its discretion, may send a letter to extend the Notice period for an additional 60 days.

11. Update the system of record with the date the notice was forwarded to the WO and other pertinent information.

IV. AREAS OF CONSIDERATION

In accordance with Section 303.163(d) of the FDIC Rules and Regulations, Case Managers should communicate to prospective Notificants that the FDIC will issue a letter of non-objection if it determines, in its discretion, that the proposed conversion transaction would not: 1) pose a risk to the institution's safety or soundness; 2) violate any law or regulation; or 3) present a breach of fiduciary duty. Case Managers should clearly identify any issues that may require a waiver request pursuant to Section 303.162 or could result in a recommendation to issue a letter of objection pursuant to Section 303.163(e).

In addition to other requirements that are imposed by applicable state and federal statutes and regulations, the FDIC will not allow an insured mutual state savings bank to convert to the stock form of ownership unless the following requirements of Section 333.4(c) of the FDIC Rules and Regulations are satisfied:

- Eligible depositors (as defined in Section 333.4(b)) shall have higher subscription rights than ESOPs;
- The proposed conversion shall be approved by a vote of at least a majority of the bank's depositors and, as reasonably determined by the bank's directors or trustees, other stakeholders of the bank who are entitled to vote on the conversion, unless the applicable state law requires a higher percentage, in which case the higher percentage shall be used. Voting may be in person or by proxy. Non-objection letters typically phrase this requirement in terms of approval by a vote of a majority of the votes eligible to be cast by depositors.
- Management shall not use proxies executed outside the context of the proposed conversion to satisfy the voting requirement imposed in the previous paragraph.

Stock Benefit Plan Limitations

In accordance with Section 333.4(e) of the FDIC Rules and Regulations, the FDIC will presume that a stock option plan or management or employee stock benefit plan that does not conform

with the applicable percentage limitations of OCC regulations constitutes excessive insider benefits and thereby evidences a breach of the board of directors' fiduciary responsibility. In addition, no converted insured mutual state savings bank shall be allowed by the FDIC, for one year from the date of the conversion, to implement a stock option plan or management or employee stock benefit plan, other than a tax-qualified ESOP, unless each of the following requirements is met:

1. Each of the plans was fully disclosed in the proxy solicitation and conversion stock offering materials;

2. All such plans are approved by a majority of the bank's stockholders, or in the case of a recently formed holding company, its stockholders, prior to implementation at a duly called meeting of shareholders, either annual or special, to be held no sooner than six months after the completion of the conversion;

3. In case of a savings bank subsidiary of a MHC, all such plans are approved by a majority of stockholders other than its parent MHC, prior to implementation at a duly called meeting of shareholders, either annual or special, to be held no sooner than six months following the stock issuance;

4. For stock option plans, stock options are granted at no lower than the market price at which the stock is trading at the time of grant; and,

5. For management or employee stock benefit plans, no conversion stock is used to fund the plans.

OCC regulations allow implementation of a stock option plan or management recognition plan (MRP) (*i.e.*, a management stock benefit plan) within 12 months after a conversion if the requirements outlined in 12 CFR § 192.500 are met. These requirements include:

1. The institution discloses the plan(s) in its proxy statement and offering circular and indicates in the offering circular that there will be a separate shareholder vote on the stock option and management stock benefit plan(s) at least six months after the conversion.

2. The stock option plan does not encompass more than 10 percent of the shares that are issued in the conversion.

3. The institution does not permit management stock benefit plans (in aggregate) to hold more than 3 percent of the shares issued at conversion. However, if a tangible capital ratio of 10 percent or more is present following conversion, the appropriate federal banking agency may permit up to 4 percent.

4. The institution does not permit the institution's ESOP and its management stock benefit plan(s), in the aggregate, to hold more than 10 percent of the shares issued in the conversion. However, if a tangible capital ratio of 10 percent or more is present following conversion, the appropriate federal banking agency may permit up to 12 percent.

5. No individual receives more than 25 percent of the shares under any plan.

6. Directors who are not officers do not receive more than 5 percent of the shares of any

plan individually, or 30 percent of the shares of any plan in aggregate.

7. Shareholders approve each plan by a majority of the total votes eligible to be cast at a duly called meeting before the plan is established or implemented and held at least six months after the conversion.

8. The institution does not grant stock options at less than market price at the time of grant.

9. The institution communicates to shareholders (via proxy or related material) that the plan(s) complies with the appropriate federal banking agency's regulations and that the appropriate federal banking agency does not endorse or approve the plan(s) in any way.

10. The institution does not use stock issued at the time of conversion to fund the stock option or management recognition plan.

11. The plan does not begin to vest earlier than one year after the shareholders approve the plan and does not vest at a rate exceeding 20 percent per year.

12. The plan(s) permits accelerated vesting only for disability, death, or a change of control.

13. The plan provides that executive officers or directors must exercise or forfeit their options in the event the institution becomes Critically Undercapitalized, is subject to appropriate federal banking agency enforcement action, or receives a capital directive.

14. The institution files a copy of the proposed stock option plan or management recognition plan with the appropriate federal banking agency and certifies to the agency in writing that the plan approved by the shareholders is the same plan filed with, and disclosed in, the materials distributed to shareholders in connection with the vote on the plan.

15. The institution files the plan and the certification with the appropriate federal banking agency within five calendar days after the shareholders approve the plan.

Under 12 CFR § 192.500(b), dividend equivalent rights or dividend adjustment rights – *e.g.*, rights that allow for stock splits or other adjustments to shares issued under a stock option, management, or employee stock benefit plan -- can be provided for in a plan.

As set forth in 12 CFR § 192.500(c), the foregoing restrictions do not apply to plans implemented more than 12 months after the institution's conversion, provided that materials pertaining to any shareholder vote regarding such plans are not distributed within the 12 month period following conversion. If a plan adopted in conformity with the foregoing restrictions is amended more than 12 months after conversion, the shareholders must ratify any material deviations to the foregoing restrictions. Case Managers should read 12 CFR § 192.500 for additional requirements.

Note that the above limits on stock benefit plans under 12 CFR § 192.500 are only applicable to plans that were implemented within one year after the conversion. In the event a MHC is created and the benefit plans are not implemented until more than one year after the conversion, the MHC as majority stockholder could potentially approve a plan that did not include such restrictions.

Under those conditions, the FDIC could consider including as a condition to its non-objection any such plan be approved by the minority shareholders, thus in effect excluding the MHC.

Sensitivity to the Securities and Exchange Commission's (SEC) 135- Day Rule

A common concern raised by Notificants is the perceived inability of conversion proponents to obtain conditional nonobjection by the FDIC to the conversion transaction prior to the date applicant's financial statements go "stale."

SEC Rule 3-12 provides that the "as of date" for financial statements in the registration statement filing must not be more than 135 days prior to the date the filing is expected to become effective. In addition, the SEC will not declare the filing "effective" unless the registrant confirms that, at the time acceleration is requested: (1) the offering will commence promptly after effectiveness, and (2) the registrant is in compliance with all regulatory requirements relating to the conversion. Therefore, an offering cannot commence until the applicant can assert to the SEC that the FDIC intends to issue a letter of non-objection.

Because financial statements are typically not issued until 30 to 45 days after the end of a financial reporting period and some additional time is often required by the Notificant's attorney to prepare the Notice submission, the FDIC may receive Notices well into the SEC's 135-day time period under Rule 3-12. If the 135-day time period expires during the FDIC's 60-day Notice review period, the Notificant may need to update its financial information (at additional expense) to comply with SEC requirements.

Under current processing procedures, a Notice that is filed with financial statements dated reasonably proximate to the FDIC's receipt date can be processed within the SEC Rule's 135-day time frame. However, if the financial statements are dated too close to the "stale" date for SEC purposes when the FDIC receives the Notice, and particularly if additional information or revisions to a Notice are necessary, the Notificant may not be able to avoid updating the financial statements. Case Managers should be aware of this potential issue and pay particularly close attention to whether the Notice is received more than 45 days after the "as of date" of the financial statements.

Holding Company Structures

The four most common organization structures resulting from MTS conversions are as follows:

(1) The mutual savings bank is converted into a stock savings bank. The stock savings bank's stock is 100 percent owned by the public:

Stock Bank

(2) The mutual savings bank is converted into a stock savings bank, and a stock bank holding company is formed. The stock savings bank's stock is 100 percent owned by the stock bank holding company. The stock bank holding company's stock is 100 percent owned by the public:

Stock Bank Holding Company

Stock Bank

(3) The mutual savings bank is converted into a stock savings bank, and a MHC is formed. Depending upon state law and the structure of the conversion, 50.01 percent to 100.0 percent of the stock savings bank's stock will be owned by the MHC and the remaining stock, if any, owned by the public.

Mutual Holding Company

Stock Bank

(4) The mutual savings bank is converted into a stock savings bank, and a stock bank holding company and a MHC are formed. The stock savings bank's stock is 100 percent owned by the stock bank holding company. Depending upon state law and the structure of the conversion, 50.01 percent to 100.0 percent of the stock bank holding company's stock will be owned by the MHC and the remaining stock, if any, owned by the public.

Mutual Holding Company

Stock Bank Holding Company

Stock Bank

Various conditions may be included in any FDIC non-objection. Conditions are designed to ensure that the FDIC will receive notice of subsequent transactions or significant corporate events. A database maintained by RMAS contains a listing of conditions that either should be included in each non-objection to a MTS conversion transaction, or considered for inclusion depending on the circumstances of the Notice. Other conditions may also be necessary or appropriate for specific situations. *Any condition proposed under such circumstances must be reviewed by the WO. Further, the relevant parties must agree in writing to any non-standard conditions imposed on the MTS conversion.*

Establishment of a two-tiered structure may permit a stock holding company, assuming it has issued stock to the public, to engage in stock repurchase programs without potential adverse tax consequences. The two-tier structure also gives MHCs greater flexibility in structuring and completing mergers and acquisitions and diversifying holding company operations.

Savings Associations

Federal Reserve Board (FRB) Regulation MM (Mutual Holding Companies), 12 CFR Part 239, permits a MHC to establish a subsidiary stock holding company that would hold all of the stock of a savings association subsidiary. The FRB permits the establishment of intermediate stock holding companies subject to restrictions that are substantially similar to those currently applicable to MHCs. The stock holding company, like the stock savings association subsidiary under the current rule, will be required to issue at least a majority of its shares to the MHC and may issue up to 49.9 percent of its shares to the public. The stock holding company structure may not be used to evade the purposes of the OCC regulations at 12 CFR Part 192 that govern MTS conversions by savings associations. Generally, the substantive and procedural limitations applicable to such transactions mirror those for a MTS conversion of a savings association. This helps to ensure that insiders or minority shareholders do not obtain a greater ownership interest through a MHC reorganization and subsequent conversion to stock form than they could accomplish through a direct MTS conversion.

Charitable Foundations

Foundations may be proposed to provide funding to support charitable causes and community development activities. The expectation is that the institution will receive recognition under the Community Reinvestment Act for the initial contribution to the foundation and for the foundation's activities. The institution's board may also be responsible for directing the activities of the foundation, including the management of the contributed common stock. Foundations should be carefully evaluated for the following potential issues:

Control by Management: Contributions of shares of stock to charitable foundations may present control issues if the institution's management also directs the voting of the foundation's shares. For this reason, the OCC regulations at 12 CFR § 192.575 require pro-rata voting (*i.e.*, that the foundation's shares are voted in the same ratio as all other shares voted on each proposal by the shareholders). The maximum contribution allowed by the OCC regulations is 8 percent of the number of shares sold in the offering.

Dilution of Shareholder Interests: As a result of a donation of stock to a foundation, shareholders will have their ownership, voting interests, and earnings per share diluted, as compared to completing the conversion without a foundation.

Impact on Appraisal: The establishment of a foundation can have a significant negative effect on the valuation of the institution.

Potential Anti-Takeover Effect: A foundation's shares, when combined with shares purchased directly by officers and directors, and shares held by an ESOP and other stock programs, could serve as an anti-takeover device. However, the FDIC has typically imposed a pro-rata voting condition, as discussed above, on stock held by the foundation.

OCC Conversion Regulations*:* The establishment of and contribution to a foundation should be consistent with the provisions of the OCC regulations at 12 CFR Part 192.550-575.

Return of Capital

The Case Manager should be aware of any discussions and review disclosures regarding the institution's plans to return capital to stockholders. A non-objection may include a condition requiring that the FDIC be notified of a return of capital that deviates materially from the business plan provided with the Notice. However, it is not the intention of the FDIC to prevent the payment of cash dividends in reasonable amounts typically paid by publicly traded savings institutions and their holding companies.

V. TIME FRAME FOR PROCESSING

As set forth in Section 303.163(c) of the FDIC Rules and Regulations, the notice period in which the FDIC may object to the proposed conversion transaction is the *later of*:

- 60 days after receipt of a substantially complete Notice; or
- 20 days after the last applicable state or other federal regulator has approved the proposed conversion.

The FDIC may, in its discretion, extend the initial 60-day review period for up to an additional 60 days by providing written notice to the institution per Section 303.163(c)(2).

If the FDIC does not act within these time periods (by issuing a letter of non-objection or objection), the institution may consummate the MTS conversion.

If a letter of objection is issued, the conversion shall not be consummated unless and until such letter is rescinded.

VI. PUBLICATION REQUIREMENT

If related merger or deposit insurance applications are filed, those publication requirements apply. The deposit insurance publication may be incorporated into the merger publication.

VII. DELEGATED AUTHORITY

Authority is delegated to the Regional Director and Deputy Regional Director to approve MTS conversions involving a corporate reorganization of a single institution in satisfactory condition with no public offering. The RO should consult with the WO as appropriate. RMAS will ask the Legal Division to concur in its decisions on any MTS Notices. Additional information regarding Delegations of Authority regarding Notices are discussed in *Applications Overview*, Section 1.1 of these Procedures.

VIII. REFERENCES

Part 303, Subpart I and Section 333.4 of the FDIC Rules and Regulations, 12 CFR Part 303, Subpart I and 12 CFR § 333.4

Statement of Policy - "Use of Offering Circulars in Connection with Public Distribution of Bank Securities"

Part 192 of the OCC Regulations (Conversions from Mutual to Stock Form), 12 CFR Part 192

Part 239 of the FRB Regulations (Regulation MM, Mutual Holding Companies), 12 CFR Part 239

Section 10(o) of the Home Owners' Loan Act (Mutual Holding Companies) 12 U.S.C. § 1467a(o)

SEC Regulation S-X, 17 CFR § 210.3-12

I. INTRODUCTION

Upon application, a savings bank (as defined in section 3(g) of the Federal Deposit Insurance (FDI) Act) and an insured cooperative bank (as defined in section 3(h) of the FDI Act) shall be deemed to be a savings association pursuant to Section 10(*l*) of the Home Owners' Loan Act (HOLA), if the appropriate Primary Federal Regulator (PFR) determines that such bank is a qualified thrift lender (QTL), as determined under Section 10(m) of HOLA. This process is called a 10(*l*) election and allows the institution's parent company (or companies, in the case of a multi-tiered parent company structure) to operate as a savings and loan holding company, rather than as a bank holding company.[1] The 10(*l*) election can be made by an existing state savings bank or state cooperative bank, or in conjunction with the conversion of a federal savings bank or association to a state savings bank or state cooperative bank. In the latter case, the Case Manager should also use the instruction in *Savings Association Conversions*, Section 11.2 of these Procedures.

The QTL status potentially impacts an institution's ability to engage in certain activities, establish branch offices, pay dividends, or retain certain investments. This Section sets forth the application process for institutions seeking to be deemed a savings association under Section 10(*l*). The application process is focused on the institution proving it meets either of the two QTL tests described in Section 10(m) of the HOLA. This Section also describes the notification process for institutions seeking to revoke an existing 10(*l*) election.

II. THE QUALIFIED THRIFT LENDER TEST

Section 10(m) of the HOLA sets forth the QTL test, which requires the following:

- The savings association qualifies as a domestic building and loan association (DBLA) (as defined in section 7701(a)(19) of the Internal Revenue Code of 1986)[2] or the savings association's qualified thrift investments (QTI)[3] equal or exceed 65 percent of the savings association's portfolio assets[4]; and
- The savings association's qualified thrift investments continue to equal or exceed 65 percent of the portfolio assets on a monthly average basis in 9 out of every 12 months.

The institution must remain a QTL to maintain its savings association status. If the level of qualifying assets falls below the QTL thresholds, the institution may become subject to restrictions with respect to certain activities, branching, and dividend payments. The status of the institution's holding company (or companies) as a savings and loan holding company (or companies) may also be impacted. If an institution fails to maintain its QTL status, it may re-qualify as a QTL. The FDIC may grant temporary and limited

[1] Certain activities that are permissible for a savings and loan holding company, such as acquiring, developing, improving, managing, and maintaining real estate, are generally not permissible for a bank holding company.

[2] In order to meet the domestic building and loan association test, an institution must meet a business operation test and an asset test. The business operations test requires that the business consists primarily of acquiring the savings deposits of the public and investing into loans. The asset test requires the institution to maintain a level of certain defined assets at or above 60 percent of total assets (as of the close of the taxable year or based on the average assets outstanding during the taxable year). However, an institution may alternate between the QTI test and the DBLA test without limitation.

[3] As defined in Section 10(m)(4)(C) of the HOLA.

[4] The term "portfolio assets" means the total assets of the savings association, minus the sum of (i) goodwill and other intangible assets; (ii) the value of property used by the savings association to conduct its business; and (iii) liquid assets of the type required to be maintained under section 6 of the HOLA (12 U.S.C. 1465), as in effect on the day before December 27, 2000, in an amount not exceeding the amount equal to 20 percent of the savings association's total assets (12 U.S.C. 1467a(m)(4)(B)). An institution ceases to be a QTL if the QTI-to-portfolio assets calculation is below 65 percent at month-end in any four of the preceding twelve months.

exceptions from the minimum actual thrift investment percentage required for compliance as a QTL. It is anticipated, however, that any temporary relief or exception[5] will be rare and subject to close scrutiny.

The institution is responsible for establishing processes to ensure that it remains a QTL. For state savings associations, as well as state savings banks and cooperative banks that have been deemed savings associations, QTL status and QTL monitoring processes will be assessed as part of the normal supervisory process. The supervisory strategy for the institution should be adjusted if the 10(*l*) election results in a change in the institution's business model or risk profile.

III. FORM OF APPLICATION

A state savings bank or state cooperative bank that seeks to be deemed a savings association for the purposes of Section 10(*l*) of the HOLA should submit a letter application to the appropriate Regional Office (RO) that includes the reason for the election, the status of any related applications for conversion, and documentation demonstrating that the institution qualifies as a QTL. Documentation could include details of the monthly ratio of QTI to portfolio assets for each of the past 12 months, and either a worksheet that details the ratio calculation, or documentation reflecting that the institution qualifies as a QTL under the Domestic Building and Loan Association (DBLA) test.

IV. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process 10(*l*) election applications following the steps below. Refer to Section 1.1 of these Procedures, *Applications Overview*, for general information regarding receipt and acceptance of applications.[6]

1. Establish the application tracking record in the internal system of record within three business days of receipt under Other Applications - HOLA 10(*l*) Election, and update the appropriate system of record accordingly while reviewing and processing the application. The *Transaction Description* comment should describe the reason for the election and include a brief summary of any conversion, if appropriate, as well as the status of any related applications for conversion. In all cases, dates and comments in the record should be updated regularly to reflect any changes regarding the details of the request, including the current status of the application.

2. Review the application for completeness and request additional information, if necessary. If filings to other agencies are involved, the Case Manager should coordinate with the applicant and the applicable state regulatory authority and PFR to ensure that responses to all information requests are promptly provided to the FDIC.

3. Prior to approving an application, the FDIC must confirm that the institution qualifies as a QTL under one of the two tests.

[5] Typically, these are granted when the PFR determines that extraordinary circumstances exist, such as when the effects of high interest rates reduce mortgage demand to such a degree that an insufficient opportunity exists for a savings association to meet such investment requirements; or such exception will significantly facilitate an acquisition under section 13(c) or 13(k) of the Federal Deposit Insurance Act; the acquired association will comply with the transition requirements of paragraph (7)(B); and the exemption will not have an undue adverse effect on competing savings associations in the relevant market.

[6] Case Managers are to follow the general instructions for all applications regarding receipt and acceptance, recordkeeping responsibilities, Legal and Division of Depositor and Consumer Protection (DCP) notifications, Washington Office action or input, delegations, and other applicable instructions, in *Applications Overview*, Section 1.1 of these Procedures.

4. Review the applicant's QTL calculations for accuracy. If the applicant has not been fully compliant with the QTL test in at least nine of the preceding 12 months, the applicant will generally be given an opportunity to withdraw the application and may submit a new application after the institution has been compliant for at least nine of the preceding 12 months.

5. Complete the appropriate Summary of Investigation (SOI) form - Other Applications.[7] Designate the type of application as Other - HOLA 10(*l*) Election. Retrieve the Application Summary Statement from the system of record and attach to the SOI. The narrative portion of the SOI should include the following:

   - A summary of the application, including the reason for the HOLA 10(*l*) election and any related filings;
   - A description of the institution's business model, financial condition, operating structure (including significant subsidiary/affiliate relationships), and risk profile and any related changes resulting from the 10(*l*) election;
   - An analysis of management, including any outstanding regulatory recommendations;
   - A summary of the views, actions, and/or recommendations of the other applicable regulatory agencies;
   - Legal analysis;
   - An assessment of QTL compliance; and
   - A statement regarding the RO's recommended action, including any non-standard conditions to be implemented. The Case Manager should obtain the applicant's written agreement to any non-standard conditions. See *Standard and Non-standard Conditions,* Section 1.11 of these Procedures, for additional instructions regarding the imposition of conditions.

   The extent to which each of the above items is addressed in the SOI will depend on the facts and circumstances of the specific application. For example, in situations where there are no planned changes in business activities or strategic focus and the institution has historically been satisfactorily rated and managed, commentary can be brief.

6. If approval is being recommended, the Case Manager should prepare a draft approval letter. The approval letter should include the following language:

   The FDIC has reviewed the request and has determined that the Bank satisfies the criteria to be a Qualified Thrift Lender (QTL) pursuant to §10(m) of the Home Owners' Loan Act (HOLA), and therefore meets the requirements to be deemed a savings association for purposes of §10(l) of the HOLA. The Bank must remain in compliance with the QTL test to maintain its savings association status, and should establish processes to ensure that it satisfies the QTL test on a continuing basis. If the level of qualifying assets falls below the QTL test thresholds, the Bank may become subject to restrictions with respect to certain new activities, branching, and dividend payments. [if applicable: Further, the Bank's parent company would be required to register as a bank holding company within one year of the Bank failing to maintain QTL status].

   If the Bank fails to satisfy the QTL test on a continuing basis, the Bank may requalify as a QTL under certain circumstances. If you have any questions concerning this letter, please contact [insert appropriate name and title].

[7] Case Managers should follow the general instructions and 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.

7. If the application presents deficiencies that may result in a denial, the Case Manager should consult with RO management, and the Washington Office (WO), if appropriate. The applicant should be advised regarding the specifics of the deficiencies and provided an opportunity to submit additional information. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for further guidance.

8. Update the application tracking record with the action and date, hours devoted to the application, and other required information.

V. PROCESSING REQUESTS TO REVOKE AN EXISTING HOLA 10(l) ELECTION

The HOLA and the relevant regulations do not articulate requirements for revocation of a HOLA 10(*l*) election. With no statutory basis for an application or an application process promulgated in accordance with the Administrative Procedure Act, a notice to the FDIC and the FDIC's non-objection to the notice is sufficient for revocation of an institution's HOLA 10(*l*) election.

The Case Manager should instruct the institution to submit a letter notification to the RO that includes the reason(s) for the revocation request, and a discussion of any recent or planned changes to the institution's business plan, if relevant. Case Managers should also review the notification in the context of any related applications. Case Managers are to process such notices following the steps below:

1. Establish the application tracking record in the internal system of record within three business days of receipt under Other Applications - HOLA 10(*l*) Revocation, and update the record while reviewing and processing the request. In all cases, dates and comments in the record should be updated regularly to reflect the current status.

2. Review the notification for completeness and request any additional information, if necessary. If related filings to other agencies are involved, the Case Manager should coordinate with the institution and the applicable state regulatory authority and PFR to ensure that responses to all information requests are promptly provided to the FDIC.

3. Review the notification and communicate any follow-up questions, issues, and/or information needs to the institution and the other applicable regulatory agencies.

4. Complete the appropriate SOI form.[8] Designate the type of application as Other – HOLA 10(*l*) revocation. Retrieve the Application Summary Statement from the system of record and attach to the SOI. The narrative portion of the SOI should include or describe the following:

   - Summary of the notice, including the reason for the 10(*l*) revocation and any related filings;
   - Summary of the institution's business plan and risk profile; and any related changes resulting from the 10(*l*) revocation; and
   - Statement regarding the RO's recommended action.

5. The Case Manager should prepare the draft approval letter, which should state that the effective date of the revocation is the date the parent company becomes a bank holding company, if applicable, and should request that the institution notify the RO of the consummation date.

[8] Case Managers should follow the general instructions and 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.

6. Update the application tracking record to reflect the action and date, hours devoted to the application, and other required information.

VI. TIME FRAME FOR PROCESSING

Statutory: None.

RO Processing Guideline: 30 days from receipt of a substantially complete application for the HOLA 10(*l*) election or notification for the HOLA 10(*l*) revocation.

VII. PUBLICATION REQUIREMENT

None.

VIII. DELEGATED AUTHORITY

The Case Manager should refer to the delegations of authority matrices for specific information; additional information is also provided in *Applications Overview*, Section 1.1 of these Procedures.

IX. REFERENCES

Section 10(l) of the Home Owners' Loan Act (12 U.S.C. §1467a(*l*))

Section 10(m) of the Home Owners' Loan Act (12 U.S.C. §1467a(m))

FFIEC Instructions for Preparation of Consolidated Reports of Condition and Income, Schedule RC-M, Item No. 15.

I. INTRODUCTION

On October 13, 2006, the Financial Services Regulatory Relief Act of 2006 amended Section 5(i)(5)(A) of the Home Owners' Loan Act (HOLA)[1] to state that any Federal savings association (FSA)[2] chartered and in operation before November 12, 1999, with branches in operation in one or more states before such date, may convert into one or more state or national banks,[3] with the approval of the appropriate state bank supervisor and the appropriate Primary Federal Regulator (PFR) for each state bank, and the approval of the Office of the Comptroller of the Currency (OCC) for each national bank.

The approval authority in Section 5(i)(5)(A) is conditioned upon the resulting institution(s) meeting all financial, management, and capital requirements applicable to the resulting state bank (collectively "statutory factors"). Furthermore, pursuant to Section 5(i)(5)(B)(ii) of the HOLA, if more than one national or state bank will result from an FSA conversion, each resulting institution must have received approval for deposit insurance from the FDIC under Section 5(a) of the Federal Deposit Insurance (FDI) Act prior to approval of the conversion.

Pursuant to Section 5(i)(6) of the HOLA, an FSA may not convert to a state bank or state savings association during any period in which the FSA is subject to a cease and desist order or other formal enforcement order issued by, or a memorandum of understanding entered into with, the OCC with respect to a significant supervisory matter.

There are differences between the transferred Office of Thrift Supervision filing regulations relevant to FSAs, which are contained in Part 390 of the FDIC Rules and Regulations and the filing rules contained in Part 303 of the FDIC Rules and Regulations. As such, Case Managers should ensure that the appropriate procedures and timelines are followed on any filing related to an FSA.

II. CONVERSIONS SUBJECT TO FDIC APPROVAL

Any conversion to a state nonmember bank by any FSA, and by definition any federal savings bank, that meets the criteria above is subject to the approval of the FDIC and the appropriate state bank supervisor.

III. FORM OF APPLICATION

Pursuant to Section 5 of the HOLA, FSAs may convert to a state nonmember bank with the approval of the appropriate state bank supervisor and the FDIC through either a direct conversion or a conversion by merger.[4] Each FSA seeking to convert to a state nonmember bank should submit a letter application to the appropriate Regional Office (RO) prior to the anticipated conversion date. As the conversion will allow the institution to engage in a wider range of activities than are otherwise permissible for an FSA, the FDIC will require submission of a business plan and financial projections for the first three years of operations. Though the FDIC may request additional information at any time during processing, Case Managers should ensure, at a minimum, that the application includes the following information:

[1] 12 U.S.C. 1464(i)(5)(A).
[2] Per Section 3 of the FDI Act, the term ''Federal savings association'' means any FSA or federal savings bank that is chartered under 12 U.S.C. Section 1464.
[3] Each of which may encompass 1 or more of the branches of the Federal savings association in operation before such date of enactment in 1 or more states.
[4] No merger application under Section 18(c) of the FDI Act is required for a conversion under Section 5(i)(5) of HOLA.

- A description of the proposed conversion, including the plan of conversion, and all materials that have been filed with any state or Federal regulator;[5]
- An analysis demonstrating that the conversion is in compliance with laws of the applicable jurisdictions regarding the permissibility, requirements, and procedures for conversions, including any applicable stockholder or account holder approval requirements;
- A three year business plan, including financial projections; and
- A description of how the resulting bank(s) will meet each of the statutory factors.

IV. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process conversion applications following the steps below. Refer to Section 1.1 of these Procedures, *Applications Overview*, for general information regarding receipt and acceptance of applications.[6]

1. Establish the application tracking record in the internal system of record within three days of receipt under Other Applications - HOLA 5(i)(5) FSA charter conversion to state nonmember bank. In all cases, dates and comments in the record should be updated regularly to reflect any changes regarding details of the request, including the current status of the application.

2. Review the application for completeness and request additional information, if necessary. If filings to other agencies are involved, the Case Manager should coordinate with the applicant and the applicable state regulatory authority and PFR to ensure that responses to all information submissions are promptly provided to the FDIC.

3. Thoroughly review the application with emphasis on any proposed material changes to the current business strategy and risk profile, and analyze the institution's condition and supervisory status, including, at a minimum, recent supervisory records and current financial information. Communicate any follow-up questions, issues, and/or information needs to the applicant and the other applicable regulatory agencies.

4. Complete the appropriate Summary of Investigation (SOI) form.[7] Designate the type of application as HOLA 5(i)(5) charter conversion. Retrieve the Application Summary Statement from the system of record and attach to the SOI. The narrative portion of the SOI should include the following:

    - A summary of the application, including the reason for the conversion;
    - A brief description of the FSA's structure, financial condition (e.g., asset quality, earnings, liquidity, and sensitivity to market risk), and history, including confirming that the applicant was chartered and in operation before November 12, 1999;
    - A description of the strategic focus, including discussion of holding company activities, any significant subsidiaries, non-traditional banking products or non-branch offices, and details regarding any proposed changes to the current business plan or strategic direction;
    - A discussion of compliance with the financial condition, management, and capital requirements applicable to the resulting bank, as referenced in Section 5(i)(5)(B)(i) of the HOLA, and if

[5] An FSA converting to a state chartered bank is required to submit a notice of intent to convert to the OCC. Notifications must demonstrate compliance with laws of the applicable jurisdictions regarding the permissibility, requirements, and procedures for conversions, including any applicable stockholder or account holder approval requirements. See 12 CFR 5.25.

[6] Case Managers are to follow the general instructions for all applications regarding receipt and acceptance, recordkeeping responsibilities, Legal and Division of Depositor and Consumer Protection (DCP) notifications, Washington Office action or input, delegations, and other applicable instructions, in *Applications Overview*, Section 1.1 of these Procedures.

[7] Case Managers should follow the general instructions and 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.

more than one Federally chartered or state-chartered bank results from a conversion, note the status of any deposit insurance application(s) filed for multiple resulting banks, if applicable (See Section 5(i)(5)(B)(ii) of the HOLA);

- A description of the supervisory status, including any presence of a recent, outstanding or contemplated enforcement action (See Section 5(i)(6) of the HOLA);
- A summary of the views and recommendations provided by the state authority and the PFR;
- Any recommended non-standard conditions to be imposed; and
- A statement regarding whether the statutory factors have been fully considered and favorably resolved, including the RO's recommended action.

5. If approval is being recommended, the Case Manager should prepare a draft approval letter. The letter should request that the applicant notify the appropriate RO of the consummation date and should include all applicable standard conditions and any recommended non-standard conditions.

   At a minimum, non-standard conditions should require that the bank's parent company has obtained all necessary and final approvals from the appropriate Federal Reserve Bank to convert to a bank holding company. The Case Manager should also consider the following condition when material changes in business strategies are proposed:

   For the three years following consummation, the bank shall operate within the parameters of the business plan as submitted to the FDIC, and shall notify the Regional Director of any proposed major deviation or material change from the submitted plan no less than 60 days prior to consummation of the deviation or change.

6. The Case Manager should obtain the applicant's written agreement to any non-standard conditions. See *Standard and Non-standard Conditions,* Section 1.11 of these Procedures, for additional instructions regarding the imposition of conditions.

7. If the application presents deficiencies that may result in a denial action, the Case Manager should consult with RO management, and the Washington Office, if appropriate. The applicant should be advised regarding the specifics of the deficiencies and provided with an opportunity to submit additional information. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further guidance.

8. Update the application tracking record with the action and date, hours devoted to the application, and other required information.

V. ANALYSIS OF STATUTORY FACTORS AND OTHER CONSIDERATIONS

When evaluating the statutory factors, the Case Manager should consider the institution's current and prospective management, financial history and performance, capital resources, and condition. The FDIC normally will not approve a proposed conversion if the institution would fail to meet existing capital standards; would have weak or unsatisfactory management; or would have a weak financial condition, including earnings, both in terms of quantity and quality. In assessing capital adequacy and financial condition, attention should also be paid to the adequacy of the allowance for loan and lease losses or allowance for credit losses, as applicable.

In evaluating management, the FDIC will rely, to a great extent, on the supervisory history of the applicant institution, unless the proposed conversion is occurring as a result of, or in conjunction with, a significant change in executive officers or directors or a significant shift in strategic focus. The evaluation of management should also include an assessment of performance in relation to Compliance, the Community

Reinvestment Act, and specialty examination areas, including Bank Secrecy Act, Information Technology, and Trust. The SOI should discuss any outstanding or proposed supervisory recommendations,[8] board resolutions, or other informal enforcement actions. Discussion of the management factor should also include an analysis of the business plan and financial projections. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional guidance regarding business plans.

If the proposed conversion is part of a significant shift in strategic focus, increased emphasis should be placed on the analysis of the reasonableness of the proposed strategic plan, financial projections, and supporting assumptions in consideration of the statutory factors. Analysis of the management factor should also consider whether the management team has the experience and capacity to effectively execute the proposed plans.

Conversions with Election for Savings Association Treatment

In the event that a conversion application is submitted in conjunction with a request to be treated as a savings association under Section 10(*l*) of the HOLA, the Case Manager may integrate the required analysis and recommendation into one SOI; however, these are two separate application types and each must be comprehensively analyzed, and tracked separately in the appropriate internal database. Refer to *Savings Association Designations*, Section 11.1 of these Procedures for additional information regarding applications to be treated as a savings association.

VI. TIME FRAME FOR PROCESSING

Statutory: None.

RO Processing Guideline: 30 days from receipt of a substantially complete application.

VII. PUBLICATION REQUIREMENT

None.

VIII. DELEGATED AUTHORITY

The Case Manager should refer to the delegations of authority matrices for specific information; additional information is also provided in the *Applications Overview*, Section 1.1 of these Procedures.

IX. REFERENCES

Financial Services Regulatory Relief Act of 2006

Section 5(i)(5)-5(i)(6) of the Home Owners' Loan Act (12 U.S.C. 1464(i)(5)-(6))

Section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)

Organization of State banks as national banking associations (12 U.S.C. 35)

Conversion from a national bank or Federal savings association to a state bank or state savings association (12 CFR 5.25)

[8] In this context, supervisory recommendations are findings issued by other regulators, such as Matters Requiring Attention issued by the OCC.

FFIEC Statement on Regulatory Conversions, dated July 1, 2009

Interagency Statement on Section 612 of the Dodd-Frank Act Restrictions on Conversions of Troubled Banks, *FIL 50-2012*

I. INTRODUCTION

Section 38 of the Federal Deposit Insurance (FDI) Act, 12 U.S.C. 1831*o*, Prompt Corrective Action (PCA), restricts or prohibits certain activities for all insured depository institutions (IDIs) and establishes a framework of supervisory actions for IDIs that are not Adequately Capitalized. The restrictions and prohibitions become more severe as an institution's capital category declines. The purpose of Section 38 is to resolve the problems of IDIs at the least possible long-term loss to the Deposit Insurance Fund (DIF). Section 38 also requires Undercapitalized IDIs to submit a capital restoration plan to the appropriate federal banking agency.

Part 303, Subpart K, and Part 390, Subpart F of the FDIC Rules and Regulations implement Section 38 of the FDI Act. Section 303.200(a)(1) requires IDIs that are not Adequately Capitalized to obtain regulatory approval prior to engaging in certain activities.

Definitions of the capital categories referenced in Part 303, Subpart K of the FDIC Rules and Regulations are located in the following sections of the FDIC Rules and Regulations: Section 324.403(b) for state nonmember banks and Section 324.403(c) for insured branches of foreign banks. Definitions of the capital categories for state savings associations related to the referenced sections of Part 390, Subpart F of the FDIC Rules and Regulations are also located in Section 324.403(b).

Restrictions and prohibitions are addressed in the PCA section of Part 324, Subpart H (e.g., Section 324.405) of the FDIC Rules and Regulations, which applies primarily to insured state nonmember banks, state savings associations, and insured branches of foreign banks, as well as to directors and senior executive officers of those institutions.

The purpose of this Section of these Procedures is to describe the restrictions (and possible exceptions to those restrictions) contained in the FDIC's regulations; the related application process; and capital restoration plans. There are other restrictions included in the referenced regulations, which Case Managers should review.

Note: *Refer to Part 324, Subpart H for PCA rules applicable to state nonmember banks, state savings associations, and insured branches of foreign banks. The Regional Office (RO) Capital Markets Specialist may provide assistance in interpreting these standards. RO staff should also consult with Washington Office (WO) staff (Risk Management and Applications Section (RMAS) and Legal), as needed, regarding these standards. Related application and enforcement rules and regulations for state nonmember banks and insured branches of foreign banks are found in Parts 303 and 308 of the FDIC Rules and Regulations and for state savings associations in Part 390. Parts 303 and 308 are expected to be revised to include references to state savings associations.*

II. FORM OF APPLICATION

Five types of applications are described in Part 303, Subpart K of the FDIC Rules and Regulations. These include (1) capital distributions; (2) acquisitions, branching, and new business lines; (3) bonuses and increased compensation for senior executive officers; (4) payment of principal or interest on subordinated debt; and (5) engaging in restricted activities for Critically Undercapitalized institutions. The filing requirements for each type of application are discussed below.

Pursuant to Section 303.201 of the FDIC Rules and Regulations, applicants will submit either a letter application or an electronic application via the secure information exchange system to the

appropriate RO. Refer to *Applications Overview*, Section 1.1 of these Procedures, for further information regarding applications filed through the FDIC's secure information exchange system. Case managers should ensure that filings address the information specific to the type of application. The letter should be signed by the president, senior officer, or a duly authorized agent of the IDI and be accompanied by a certified copy of a resolution adopted by the institution's board of directors or trustees authorizing the application. Additional information may be requested by the FDIC.

Capital Distributions (§303.203) and (§390.345)

Any insured state nonmember bank, state savings association, or insured branch of a foreign bank must submit an application for a capital distribution if, after having made a capital distribution, the institution would be Undercapitalized, Significantly Undercapitalized, or Critically Undercapitalized. Regarding applications for a capital distribution under any of the cited PCA categories, state savings associations will be processed pursuant to Part 390, Subpart F. Case Managers are to ensure that an application to repurchase, redeem, retire, or otherwise acquire shares or ownership interests of the IDI[1]:

- Describes the proposal;
- Describes the shares or obligations that are the subject thereof;
- Describes the additional shares or obligations of the institution that will be issued in at least an amount equivalent to the distribution; and
- Explains how the proposal will reduce the institution's financial obligations or otherwise improve its financial condition.

If the proposed action also requires an application under Section 18(i) of the FDI Act, as implemented by Sections 303.241 and 390.345 of the FDIC Rules and Regulations regarding prior consent to retire capital, the application should be filed concurrently with, or made part of, the application filed pursuant to Section 38 of the FDI Act. See also *Reduce or Retire Capital*, Section 14 of these Procedures.

Acquisitions, Branching, and New Business Lines (§303.204) and (§390.100)

Any insured state nonmember bank, state savings association, or any insured branch of a foreign bank that is Undercapitalized or Significantly Undercapitalized, and any IDI that is Critically Undercapitalized, must submit an application to engage in acquisitions, branching, or new lines of business. (The authority addressing such applications involving state savings associations is Part 390, Subpart F (Application Processing Procedures)). A new line of business includes any new activity which, although permissible, has not been exercised previously by the institution. Case Managers are to ensure that the application[2]:

- Describes the proposal;
- States the date the institution's capital restoration plan was accepted by its primary federal regulator (PFR);
- Describes the institution's progress toward implementing the capital restoration plan;
- Explains how the proposed action is consistent with and will further the achievement of the capital restoration plan, or otherwise furthers the purposes of Section 38 of the FDI Act;

[1] Information necessary for a capital distribution application for SSAs is contained in Section 390.346.

[2] The requirements contained in Section 303.204 do not apply to SSAs, except for SSAs that are in the critically undercapitalized category. For applications by SSAs under Subpart F of Part 390, sections 390.105 and 390.106 address information required for acquisitions, branching, and new business lines.

and,

- States whether approval has been requested from the applicant's PFR, the date of such request, and the disposition of such request, if the FDIC is not the applicant's PFR and these requests are applicable.

If the proposed action also requires applications pursuant to Section 18(c) or (d) of the FDI Act (mergers and branches), Section 24 of the FDI Act (insured state bank activities), Section 28 of the FDI Act (state savings association activities), or Section 5 of the Home Owners Loan Act (HOLA) (exemption from certain sanctions regarding capital standards), such applications should be filed concurrently with, or made a part of, the application filed pursuant to Section 38 of the FDI Act.

Bonuses and Increased Compensation for Senior Executive Officers (§303.205) and (§390.100)

Any insured state nonmember bank, state savings association, or insured branch of a foreign bank that is Significantly or Critically Undercapitalized, or any insured state nonmember bank, state savings association, or insured branch of a foreign bank that is Undercapitalized and has failed to submit or implement, in any material respect, an acceptable capital restoration plan, must submit an application to pay a bonus or increase compensation for any senior executive officer[3].

Case Managers are to ensure the application:

- Lists each proposed bonus or increase in compensation and, for the latter, identifies compensation for each of the 12 calendar months preceding the calendar month in which the institution became Undercapitalized;
- States the date the institution's capital restoration plan was accepted by the FDIC; and
- Describes any progress made in implementing the capital restoration plan.

Payment of Principal or Interest on Subordinated Debt (§303.206)

Any Critically Undercapitalized IDI, regardless of charter, must submit an application to pay principal or interest on subordinated debt. Case Managers are to ensure the application:

- Describes the proposed payment;
- Provides an explanation of action taken under Section 38(h)(3)(A)(ii) of the FDI Act (action other than receivership or conservatorship); and
- Explains how such payments would further the purposes of Section 38 of the FDI Act.

Existing approvals pursuant to requests filed under Section 18(i)(1) of the FDI Act (e.g., capital-stock reductions or retirements) should not be deemed to be the permission needed pursuant to Section 38 of the FDI Act.

Restricted Activities for Critically Undercapitalized Institutions (§303.207)

Any Critically Undercapitalized IDI, regardless of charter, shall submit an application to engage in certain restricted activities.

Case Managers are to ensure that applications to engage in activities set forth in Sections 38(i)(2)(A) through (G) of the FDI Act and Section 303.207 of the FDIC Rules and Regulations,

[3] The authority for such applications involving state savings associations is Part 390, Subpart F. Both sections 390.105 and 390.106 address the information required for such applications.

describe the proposed activity and explain how the activity would further the purposes of Section 38 of the FDI Act. These activities are described below.

- Enter into any material transaction other than in the usual course of business, including any action with respect to which the institution is required to provide notice to the appropriate federal banking agency. Materiality will be determined on a case-by-case basis;
- Extend credit for any highly leveraged transaction (as defined in Section 303.207(b)(2) of the FDIC Rules and Regulations);
- Amend the institution's charter or bylaws, except to the extent necessary to carry out any other requirement of any law, regulation, or order;
- Make any material change in accounting methods;
- Engage in any covered transaction (as defined in Section 23A(b) of the Federal Reserve Act);
- Pay excessive compensation or bonuses. (Part 364 of the FDIC Rules and Regulations implements Section 39 of the FDI Act and provides the regulatory framework for safety and soundness principles. Appendix A to Part 364 provides guidance for determining excessive compensation. The FDIC will consider the current compensation of an institution's executive officers, directors, and principal shareholders on a case-by-case basis and will require prior written approval for any proposed change in their compensation levels, if such levels are determined to be excessive (i.e., unreasonable and disproportionate to the services provided or likely to result in a material financial loss to the institution); or
- Pay interest on new or renewed liabilities at a rate that would increase the institution's weighted average cost of funds to a level significantly exceeding the prevailing rates of interest on insured deposits in the institution's normal market area. Section 337.6 of the FDIC Rules and Regulations provides guidance for defining the relevant terms of this provision; however, this provision does not supersede the general prohibitions contained in Section 337.6[4].

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers are to process applications described in this Section following the steps below, as well as the instructions contained in *Applications Overview*, Section 1.1 of these Procedures[5] that pertain to all application types. Additional information is located in Part 303, Subpart K and in Part 390, Subpart F of the FDIC Rules and Regulations.

1. All applications should be entered into 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.

2. An application should be reviewed upon receipt, or as close to receipt as possible, to determine whether it is substantially complete.

3. Although the Regional Director has delegated authority to act on these applications, such authority can only be exercised after consultation with the WO on all relevant issues. Depending on the specific circumstances, the WO may determine that authority should be

[4] On September 4, 2019, the FDIC published a proposal to update the rate restrictions applicable to less than well-capitalized institutions. When finalized, this rulemaking will move rate restrictions from section 337.6 to 337.7.

[5] Case Managers are to follow the general instructions and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, etc., in *Applications Overview*, Section 1.1 of these Procedures.

exercised at the WO level. Therefore, the RO should consult with the WO RMAS before accepting the application. If the WO decides to act on the application, advise the applicant that the application will be forwarded to the WO for action.

4. Provide a copy of the application materials to RO Legal to determine whether there are any legal issues that should be considered.

5. Thoroughly analyze the application and any supporting exhibits and materials. As necessary, communicate any follow-up questions, issues, and/or information needs to the applicant. Any other applications that were filed concurrently with the PCA application should be processed concurrently, pursuant to the procedures and processing timeframes applicable for those filings.

6. Complete the appropriate Summary of Investigation (SOI) form.[6] The SOI Comments should:

   - Describe the proposed action requiring the application;
   - Identify the applicant's PCA capital category;
   - Describe the institution's financial condition;
   - Discuss the status of and compliance with the institution's capital restoration plan;
   - Evaluate the effect of the proposal on the institution's condition;
   - Include an analysis of, with a conclusion of favorable/unfavorable for, the applicable requirements in Section 38 of the FDI Act and Part 303, Subpart K or Part 390, Subpart F of the FDIC Rules and Regulations;
   - Consider whether changes to the application or appropriate non-standard conditions should be sought prior to approving an application;
   - Discuss the attitude of the state authority and, if applicable, the PFR;
   - Discuss the applicant's compliance with BSA/AML as needed;
   - Identify the applicant or bank representative, including name, title, mailing address, telephone number, and e-mail address; and
   - Include the recommended action.

   Retrieve the Application Summary Statement from the system of record and attach it to the SOI.

7. If approval is being recommended, prepare an approval letter, which should include the standard conditions set forth in Section 303.2(dd) of the FDIC Rules and Regulations, as well as any non-standard conditions deemed necessary. The Case Manager should obtain the applicant's written commitment to adhere to the 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 instruction. If the RO has delegated authority, issue the approval letter to the applicant, with copies to the appropriate regulatory agencies.

8. If consideration of the application may result in a denial, the RO should advise the applicant of the problem areas to ensure that all relevant facts are obtained prior to making a decision. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for additional information.

9. If the application is denied, the letter should state the reasons for the denial. If the RO has delegated authority, issue the denial letter to the applicant, with copies to the appropriate

[6] Case Managers are to follow the instructions and SOI requirements for all types of filings found in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instructions in this Section.

regulatory agencies.

10. For applications that cannot be acted on in the RO, forward the SOI, the draft letter, and all relevant documentation to the WO for final action. Documentation for applications requiring WO approval or denial should be more comprehensive and should describe the reasons why action cannot be taken by the Regional Director. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.

11. Update the appropriate internal database to reflect the date forwarded to the WO, if applicable, the final action, the date of the action, expiration date, hours spent processing the application, and any other required information.

IV. CAPITAL RESTORATION PLANS

Pursuant to Section 324.404 of the FDIC Rules and Regulations, an FDIC-supervised institution must file a written capital restoration plan (Plan) with the appropriate FDIC Regional Director within 45 days of the date that the institution receives notice or is deemed to have notice that the institution is Undercapitalized, Significantly Undercapitalized, or Critically Undercapitalized, unless the FDIC notifies the institution in writing that the plan is to be filed within a different period. Undercapitalized institutions that fail to submit a written Plan within 45 days, or subsequently fail to implement a Plan, are subject to the restrictions applicable to Significantly Undercapitalized institutions. Under Section 324.402 and 324.403(d) of the FDIC Rules and Regulations, an IDI is deemed to have been notified of its capital level and its capital category as of the most recent date:

- A Call Report is required to be filed with the FDIC;
- A final report of examination is delivered to the FDIC-supervised institution;
- Written notice is provided by the FDIC to the FDIC-supervised institution of its capital category for purposes of Section 38 of the FDI Act; or
- The FDIC-supervised institution's capital category has been reclassified based upon supervisory criteria other than capital, as provided in Section 324.403(d) of the FDIC Rules and Regulations.

An Adequately Capitalized institution that has been reclassified pursuant to Sections 324.403(d) of the FDIC Rules and Regulations as Undercapitalized is not required to submit a Plan solely by virtue of the reclassification.

Section 38(e)(2)(C)(ii) of the FDI Act provides that the appropriate federal banking agency shall not accept a Plan unless each company that controls the institution has: (1) guaranteed that the institution will comply with the Plan until the institution has been Adequately Capitalized on average during each of four consecutive calendar quarters; and (2) provided appropriate assurances of performance. See Section 324.404(h) of the FDIC Rules and Regulations.

Note: Records are not required for capital restoration plans.

Filing a Capital Restoration Plan

Case Managers are to ensure that plans filed under Section 324.404 of the FDIC Rules and Regulations include all of the information required to be filed under Section 38(e)(2)(B) of the FDI Act, 12 U.S.C. 1831*o*(e)(2)(B), which requires the Plan to specify:

- The steps the institution will take to become at least Adequately Capitalized;
- The levels of capital to be attained during each year in which the Plan will be in effect;
- How the institution will comply with the restrictions or requirements in effect under Section 38;
- The types and levels of activities in which the institution will engage; and
- Other such information as the appropriate federal banking agency may require.

All financial data submitted in connection with a Plan shall be prepared in accordance with the instructions provided in the Call Report, unless the FDIC instructs otherwise. An FDIC-supervised institution that is required to submit a Plan as a result of its reclassification pursuant to Sections 324.402(c) or 324.403(d) of the FDIC Rules and Regulations shall include a description of the steps the institution will take to correct the unsafe or unsound condition or practice.

Criteria for Accepting the Capital Restoration Plan

The FDIC may not accept a Plan unless the FDIC determines that:

- The Plan includes all the requirements set forth in Section 38(e)(2)(B) of the FDI Act;
- The Plan is based on realistic assumptions and is likely to succeed in restoring the institution's capital;
- The Plan would not appreciably increase the risk (e.g., credit risk, interest-rate risk, and other types of risk) to which the institution is exposed; and
- Each company having control of the institution has guaranteed that the institution will comply with the Plan until the institution has been at least Adequately Capitalized, on average, during each of the four consecutive calendar quarters and has provided appropriate assurances of performance.

Processing Capital Restoration Plans

1. Review the Plan promptly to determine whether all information and other elements required by regulation have been submitted. There may be circumstances where the Regional Director grants an opportunity for an institution to revise an inadequate Plan or provide additional information. In such cases, a letter should be sent to the institution that specifies the weaknesses and establishes a specific due date for submission of a revised Plan or additional information. The Regional Director may inform the institution that parts of the Plan are acceptable and should be implemented while the remainder of the Plan is still under consideration; however, approving partial implementation of a Plan is uncommon, since only significant shortcomings are expected to preclude approval of a Plan. Plans should generally:

   - Reflect a return to at least Adequately Capitalized within a reasonable time period;
   - Contain reasonable and supported financial projections, including pro-forma statements and an explanation of any assumptions used (e.g., interest rate projections and growth rates);
   - Contain interim target capital levels to facilitate monitoring progress towards meeting the goals of the Plan; and
   - Include detailed information regarding any potential capital sources or injections that are included in the Plan.

2. The Case Manager should prepare a memorandum to the file that documents the analysis of the Plan. The memorandum should include an explicit discussion of each criterion established in Section 38(e)(2)(C) of the FDI Act for accepting a Plan and provide sufficient data to support

the action taken on the Plan. The memorandum should also:

- Include an assessment of the feasibility of the Plan and, to the extent possible, a discussion of contingency sources for capital; and
- Include an analysis of the effect of the Plan on the institution's risk profile, particularly in light of any planned sale of liquid assets, branch offices, or other asset dispositions.

3. The Case Manager should prepare and provide written notice to the institution advising of the approval or disapproval of the Plan. The letter should:

   - Include language reminding the institution's directors of the restrictions to which the institution is subject under Section 38 of the FDI Act and Section 324.405 of the FDIC Rules and Regulations;
   - For an approval letter, indicate that approval of the Plan does not represent approval of any actions included in the Plan that are subject to prior regulatory approval or notification; and
   - For a disapproval letter, include the requirement to submit a revised Plan by a specific due date and, if the institution is Undercapitalized, indicate that upon receiving notice that its Plan has not been approved, the institution shall be subject to all of the restrictions applicable to Significantly Undercapitalized institutions until such time as a new or revised Plan has been approved by the FDIC.

Capital Restoration Plans Approved by Other Agencies

Section 38(e)(2)(D)(iii) of the FDI Act requires the other federal banking agencies to submit a copy of any Plan approved by the agency to the FDIC within 45 days from the date such approval is granted. The Case Manager should review plans immediately upon receipt. Any questions or concerns should be discussed with the PFR either verbally or through written correspondence. All verbal discussions should be documented in a memorandum to the file and should include the contact's name and position at the other agency. All written exchanges and memorandums to the file should be maintained in the appropriate internal database. Any unresolved questions or concerns should be raised to RO management and, as appropriate, to WO.

PCA Report and Capital Restoration Plan Periodic Review

The Case Manager should evaluate an institution's compliance with its approved Plan at least quarterly and document the review in the PCA Form, located in the PCA Report Section of the supervisory database.[7] The Case Manager should review the Plan, restrictions, and requirements applicable to any Undercapitalized institution at least quarterly to determine whether those measures are achieving the purpose of Section 38 of the FDI Act, or whether some other supervisory action may be more effective. The applicable review dates should be recorded in the PCA Form.

V. TIME FRAME FOR PROCESSING

There are no statutory requirements regarding the review and processing of the applications discussed in this Section, except Plans. The FDIC will provide the applicant with a written notification of the final action taken as soon as the decision is rendered.

[7] Institutions are automatically added to the database when capital is deemed to be at or below Adequately Capitalized levels.

Regarding the review and processing of Capital Restoration Plans, Section 38(e)(2)(D) of the FDI Act and Section 324.404 of the FDIC Rules and Regulations set forth the following:

1. An FDIC-supervised institution shall file a written Plan with the appropriate RO within 45 days of receiving notice or being deemed to have notice that the institution is Undercapitalized, Significantly Undercapitalized, or Critically Undercapitalized, unless the FDIC notifies the institution in writing that the Plan is to be filed within a different period;
2. Within 60 days after receiving a Plan, the FDIC shall provide written notice to the institution of whether the Plan has been approved. The FDIC may extend this timeframe; and
3. The PFR for non FDIC-supervised institutions shall submit to the RO a copy of any Plan approved by the PFR within 45 days of the approval date.

VI. PUBLICATION REQUIREMENT

None.

VII. DELEGATED AUTHORITY

FDIC RMS and RO delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

VIII. REFERENCES

Sections 38 and 18(i) of the FDI Act

Part 303, Subpart K; Part 324,Subpart H; and Part 390, Subpart F of the FDIC Rules and Regulations

Risk Management Manual of Examination Policies - Formal Administrative Actions - Capital Plans

I. INTRODUCTION

Pursuant to Section 333.3 of the FDIC Rules and Regulations, except under limited circumstances as set forth in Section 303.242(a) and discussed below, a state nonmember bank or state savings association seeking to exercise trust powers must obtain prior written consent from the FDIC.

The FDIC does not grant trust powers, rather the FDIC grants consent to exercise trust powers authorized or approved by the state authority. State law governs whether an activity constitutes a fiduciary relationship requiring trust powers. Some relationships, such as trustee, guardian, and executor/administrator of a deceased person's estate, are generally recognized to be fiduciary relationships requiring trust powers. Other relationships, such as various types of custodian or agent, may or may not be fiduciary relationships requiring trust powers, depending on each state's laws.

Prior Consent Not Required

Section 333.101(b) of the FDIC Rules and Regulations states that an insured state nonmember bank or state savings association, not exercising trust powers, may act as trustee or custodian for Individual Retirement Accounts (IRA), Self-Employed Retirement Plans, Roth IRAs, Coverdell Education Savings Accounts, Health Savings Accounts, and other similar accounts without the prior written consent of the FDIC provided:

- The bank's or state savings association's duties as trustee or custodian are essentially custodial or ministerial in nature;

- The bank or state savings association is required to invest the funds received from such plans only in the bank's own time or savings deposits, or in any other assets at the direction of the customer provided that the bank or state savings association does not exercise any investment discretion or provide any investment advice with respect to such account assets; and,

- The bank's or state savings association's acceptance of such accounts without trust powers is not contrary to applicable state law.

Section 303.242 of the FDIC Rules and Regulations states that the FDIC's prior consent to exercise trust powers is not required in the following circumstances:

- Where a state nonmember bank or state savings association received authority to exercise trust powers from its chartering authority prior to December 1, 1950[1]; or,

- Where an insured depository institution continues to conduct trust activities pursuant to authority granted by its chartering authority subsequent to a charter conversion or withdrawal from membership in the Federal Reserve System.

[1] State nonmember banks approved for federal deposit insurance after December 1, 1950, are required to file an application for consent to exercise trust powers, which may be done separately from, or simultaneously with, the application for deposit insurance or other application types.

The FDIC will accept trust powers granted by the Federal Reserve, former Office of Thrift Supervision, and the Office of the Comptroller of the Currency to an institution or state savings association that subsequently becomes a state nonmember bank or state savings association. In such cases, no application to the FDIC for consent to exercise trust powers is required, but the bank or state savings association must comply with any requirements its state banking authority imposes concerning the exercise of trust powers. Generally, the state banking authority will require that a state chartered institution has state-granted trust powers.

If a state nonmember bank or state savings association owns a non-deposit, non-FDIC-insured trust company subsidiary, the FDIC's consent is not required to exercise trust powers if the trust company is a separately chartered and separately capitalized legal entity. This is true whether the bank creates a new trust company subsidiary or acquires a trust company subsidiary by purchase or merger. In all such cases, the FDIC will look to whatever requirements the chartering authority imposes on the trust company itself.

II. FORM OF APPLICATION

Section 303.242 of the FDIC Rules and Regulations sets forth procedures to be followed by a state nonmember bank or state savings association that seeks to obtain the FDIC's prior written consent to exercise trust powers. Under Section 303.242, applicants shall submit to the appropriate Regional Office (RO) a completed, *Application for Consent to Exercise Trust Powers*, FDIC Form 6200/09. Applicants may submit the application electronically via the FDIC's secure electronic delivery system or in hardcopy. For more information on the electronic delivery of applications, refer to *Applications Overview,* Section 20.1 of these Procedures. The FDIC may request additional information at any time during processing of the filing.

Applicants may seek full or limited trust powers. The application should provide sufficient details regarding the types of powers sought, the specific trust activities that will be conducted, and any proposed servicing arrangements. In addition, the application should identify the proposed primary trust officer. Case Managers should ensure that relevant background information is provided regarding the proposed primary trust officer and any other individuals that are expected to be involved in managing the trust department.

As instructed in the application form, if the applicant is not an "eligible depository institution," as defined in Section 303.2(r) of the FDIC Rules and Regulations, the application should also provide the composition of the trust committee and relevant background information on the members, information regarding the trust counsel, and projections of trust accounts, assets, and profitability for the first three calendar years after the trust department begins operations.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers are to review and process these applications following the steps below and refer to *Applications Overview,* Section 1.1 of these Procedures, for general processing guidance for all application types.[2]

[2] Case Managers should follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other instructions as applicable, in *Applications Overview*, Section 1.1 of these Procedures.

1. These applications are to be reviewed upon receipt, or as promptly as possible, to determine whether expedited processing applies or there are issues that would justify removal of the application from expedited processing pursuant to Section 303.11(c)(2) of the FDIC Rules and Regulations. Applications processed under expedited procedures will be deemed approved 30 days after receipt of a substantially complete application.

   Note: Matters that may cause concern and possibly justify removing an application from expedited treatment may include the existence of a 3-rated management component or a relatively new institution with which the FDIC has had little experience with the institution or management team.

2. Establish the system record under Trust in the appropriate system of record – Consent to Exercise Trust Powers. All applications should be entered into the system within three days of receipt. In all cases, dates and comments in the record should be updated regularly to reflect the current status of the application.

3. Initially review all materials for completeness, and request additional information if necessary. The Case Manager should ensure that the applicant's board of directors has formally adopted the FDIC's Statement of Principles of Trust Department Management in accordance with the application form instructions. If the application is deemed substantially complete, an acceptance letter may be prepared and sent to the applicant. If related filings are involved, the Case Manager should coordinate with the applicant and the applicable state and federal regulatory agencies to ensure that all information submissions are promptly provided to the FDIC.

4. Analyze the application and complete the appropriate Summary of Investigation (SOI) form.[3] Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI. Refer below to *Areas of Consideration*, Part IV of this Section, for guidance concerning the analysis of the proposal and the comments to be included in the SOI.

5. If approval is being recommended, prepare a draft approval letter. The letter should specify whether consent is being granted to exercise full or limited trust powers. If consent to exercise limited trust powers is being granted, specify exactly which limited trust powers the consent covers. When consent applies to a limited trust power capacity that appears in more than one general line of trust business (such as trustee, agent, or custodian), it is important to state which type(s) of specific powers (*e.g.*, trustee) the consent covers - personal trust, employee benefit trust, or corporate trust. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written commitment to adhere to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions,* Section 1.11 of these Procedures, for additional guidance regarding the imposition of conditions.

6. If deficiencies may result in denial of the application, the RO should advise the applicant of the deficiencies to ensure that all necessary facts are obtained prior to making a decision. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further guidance.

[3] Case Managers should follow the general instructions and SOI requirements for all types of applications located in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instruction in this Section.

7. For applications that cannot be acted on under delegated authority, forward the SOI and the draft letter 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.

8. Once approved, email a copy of the letter to the WO Trust Examination Specialist.

9. Update the system of record to reflect the date forwarded to the WO, if applicable, the action, the date of the action, the expiration date, the hours devoted to the application, and any other required information.

10. Once consummated, ensure that the trust powers information is entered into both the structure database and the Specialty Examination Structure – Trust module in the system of record.

IV. AREAS OF CONSIDERATION

Risk exposure in fiduciary activities may vary significantly with the type of accounts accepted and the extent of discretionary powers exercised. In general, for trust departments that propose to offer more complex account types (*e.g.*, corporate trust accounts or employee benefit accounts) or exercise full discretionary powers over any type of account, Case Managers are to consult with RO or WO trust specialists to ensure all key aspects of the proposal and underlying risks are fully understood. As necessary, the Case Manager should also refer to the FDIC's Trust Examination Manual and other applicable resources. Additional information regarding the analysis of applications for consent to exercise trust powers is also contained in *Applications,* Section 12.1 of the Risk Management Manual of Examination Policies.

SOI Comments

Each SOI should include a description of the proposal that provides appropriate contextual information, identifies the type of trust powers being sought, and describes the proposed trust activities. The SOI should discuss the extent that any third-party service providers (whether affiliated or non-affiliated) will be used to administer trust accounts and/or manage trust investments. The SOI comments should also address any recommended non-standard conditions to be imposed, any other significant matters, and the RO recommendation.

The Case Manager should consider the following items when evaluating the application for the FDIC's consent for the institution to exercise trust powers, and, as warranted, address these matters in the SOI comments.

Business Planning – Case Managers should assess the level of planning and due diligence performed by the institution prior to filing an application for consent to exercise trust powers. If the offering of trust services is expected to become a material source of revenue (relative to revenue from other business lines) or a significant area of the institution's operations, the Case Manager should consider requesting the applicant's business plan or strategic plan for the trust activities or an institution-wide plan that incorporates the trust activities. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional guidance regarding business plans.

Capital - If trust activity is expected to become a material activity of the applicant, traditional measures of capital adequacy (such as leverage and risk-based capital ratios) may be less relevant because the primary risk activities take place off-balance sheet. In such cases, a more in-depth analysis is required to understand whether the applicant will maintain sufficient capital for its anticipated risk profile. The capital adequacy analysis should focus on the size, type, and complexity of projected trust activities and the degree of investment and administrative discretion. The Case Manager should also consider the volume and types of projected trust assets; and the proportion of revenue, operating expenses, and net income projected to be derived from trust activities.

The WO is available to assist in determining the most appropriate capital methodology and the Case Manager should consult with the WO regarding proposed capital levels if the trust activity is expected to represent a material portion of an applicant's overall business activities.

Competition and Source/Type of Potential Business - To determine the need and projected market for the proposed trust powers, applicants typically analyze the need for trust services within the anticipated market area, including the location, size, and types of trust services provided by other financial services companies and the expected sources of new business (*e.g.* existing customers or new customers).

Community Reinvestment Act (CRA) - Although an applicant must have a satisfactory or better CRA rating to qualify for expedited processing for any filing, the CRA performance of an applicant will not serve as a basis for denial in this type of application, as set forth in Section 345.29 of the FDIC Rules and Regulations.

Trust Profitability – Determine whether the trust activity will be operated as a profit center or as an accommodation to customers. As required by the application, the applicant should provide written estimates of profitability based on projections of the number of accounts and related fee income. The impact of any continuing trust operating losses should be analyzed with a view toward materiality and impact on the overall condition of the institution. Many small banks may offer trust services at a loss to obtain or retain deposit or loan relationships, or as a community service. In such cases, typically management (1) has a reasonable method for measuring income and expenses, (2) reports trust profitability to the board of directors at least annually, and (3) obtains approval from the board of directors for the operation of an unprofitable line of business.

Trust Recordkeeping - Trust recordkeeping is different from all other types of records maintained by a bank for its deposit and lending functions. Determine whether the applicant will establish an adequate recordkeeping system for the type and volume of business projected.

Deposit Structure - Core deposits may be generated as a result of trust activities and, if projected, should be analyzed to determine the overall impact on the institution.

Premises and Fixed Assets - Determine whether the new department will require a substantial new investment in premises and fixed assets.

Outsourcing of Trust Activities - Trustees are permitted to outsource trust account management and/or trust investment functions, if prudent and cost effective. In delegating such responsibilities, a trustee should: 1) exercise reasonable care, skill, and caution in selecting the service provider; 2) establish the scope and terms of the delegation, consistent with the purposes of the trust; and, 3) monitor the service provider's performance. Case Managers should obtain adequate information so the FDIC can determine whether decisions to outsource an activity and the selection of service providers meet fiduciary standards, and that the requisite oversight, controls, and contractual provisions are in place for any third-party servicer relationships. Additional information is included in *Outside Contracting for Fiduciary Services*, Section 10(G) of the Trust Examination Manual.

V. TIME FRAMES FOR PROCESSING

Expedited Processing for Eligible Depository Institutions

An application processed under expedited procedures will be deemed approved 30 days after the FDIC's receipt of a substantially complete application.

Standard Processing

RO Processing Guideline: 30 days from receipt of a substantially complete application.

WO Processing Guideline: 30 days from receipt from RO.

VI. PUBLICATION REQUIREMENT

None.

VII. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

VIII. REFERENCES

Sections 303.242, 333.3, and 333.101 of the FDIC Rules and Regulations

The Statement of Principles of Trust Department Management

Trust Examination Manual

RMS Risk Management Manual of Examination Policies, Section 12.1, Applications

I. INTRODUCTION

Section 18(i)(1) of the Federal Deposit Insurance (FDI) Act requires an insured state nonmember bank to seek the prior consent of the FDIC before it reduces the amount or retires any part of its common or preferred capital stock, or retires any part of its capital notes or debentures.

Consistent with the statute, there are two major classes of applications, each of which is treated separately:

- Reduction in the amount of common or preferred stock; and,
- Retirement of capital notes and debentures.

In the case of retirement of capital notes and debentures, there are two main types:

- Prior consent to retire; and,
- Consent to prepay all or part of an existing note.

The FDIC has applied Section 18(i) to the following transactions, thus requiring an application to the FDIC:

- Repurchase and retention by a bank of its own common or preferred stock, even if the purchase is part of a stock option plan;
- Prepayment by a bank of all or part of an existing note;
- Final payment on an existing note that has reached the note's stated maturity, provided the bank has not received pre-approval from the FDIC when the note was issued;
- A dividend payment that exceeds a bank's retained earnings;
- A dividend payment that is paid from the surplus account of common or preferred stock;
- Retirement or a reduction in capital that is part of another proposal for which a current application has been filed for FDIC approval;
- Conversion of capital notes or debentures to an equivalent amount of common or preferred stock;
- Exchange of one class of common stock for another class with differing par values; or
- Conversion of preferred stock to an equivalent amount of common stock.

In some cases, a large dividend that has a liquidating or capital-reducing effect and results in a return of capital to the holding company or shareholders may also require the prior consent of the FDIC. In reviewing cases involving large dividends, Case Managers should consult with the Regional Accountant, Legal Division, and Washington Office in determining whether a capital retirement application is required.

Exceptions

When replacement of capital issuances does not effectively reduce the amount of the bank's capital, and there is no change to the governing terms and conditions of the instruments themselves, the replacement issuance is not subject to the provisions of Section 18(i)(1) and no filing is required.

Capital

If a bank reduces the amount or retires any part of its common or preferred capital stock or retires any part of its capital notes or debentures, the bank's capital ratios under Part 324 of the FDIC

Rules and Regulations may be impacted negatively. While any negative impact on regulatory capital should be closely analyzed, an application under Section 18(i)(1) may be required even if there is no impact on a bank's regulatory capital.

For an instrument to qualify as regulatory capital under Part 324 of the FDIC Rules and Regulations, it must receive the FDIC's prior approval before it is redeemed. See Section 324.20(b)(1)(iii) for Common Equity Tier 1 Capital, (c)(1)(v) and (vi) for additional Tier 1 Capital, and (d)(1)(v) and (x) for Tier 2 Capital. While these are separate requirements, an application under Section 18(i)(1) satisfies the bank's requirement for FDIC prior approval under Part 324.

State Savings Associations

According to Sections 390.342 through 390.348 of the FDIC Rules and Regulations, if a proposed capital distribution falls within certain described criteria, a state savings association may be required to file an application or notice with the FDIC. The filing must be made at least 30 days before the proposed declaration of dividend or approval of the proposed capital distribution by the state savings association's board of directors. Not all capital distributions by state savings associations require a filing to the FDIC. See Section 390.345 to determine whether an application or notice must be filed.

Section 390.343 generally defines a capital distribution as a distribution of cash or other property to the state savings association's owners made on account of their ownership other than a dividend payment consisting only of shares or rights to purchase shares of a state savings association or payments that a mutual state savings association is required to make under the terms of a deposit instrument and any other amount paid on deposits that the FDIC determines is not a distribution. Regulations applicable to state savings associations note that a capital distribution also includes:

(1) any payment to acquire any of the state savings association's shares or other ownership interests through repurchase, redemption, or retirement;
(2) any payment to acquire debt instruments included in the state savings association's total capital through repurchase, redemption, or retirement;
(3) Any extension of credit to finance an affiliate's acquisition of the state savings association's shares or interests;
(4) any direct or indirect payment of cash or other property to owners or affiliates made in connection with a corporate restructuring;
(5) any other distribution charged against a state savings association's capital accounts, if the association would not be Well Capitalized following the distribution; and
(6) any transaction that the FDIC determines, by order or regulation, to be in substance a distribution of capital.

A state savings association may combine a required notice or application relating to capital distributions with other required filings, if the capital distribution is a part of, or is related to the other filing. If the state savings association submits a combined filing, it must state that the related notice or application is intended to serve as a notice or application under Sections 390.342 through 390.348, and must submit the notice or application in a timely manner.

Case Managers must consult with the WO on any application or notice 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 information regarding filings involving state savings associations.

II. ADVANCE APPROVALS

Although Section 18(i) of the FDI Act requires insured state nonmember banks to obtain the FDIC's prior approval to retire capital notes, there is no requirement to seek approval to issue capital notes. However, to facilitate the sale of capital notes, many institutions seek advance approval for the eventual retirement of the capital notes prior to issuance. Such filings may raise concern due to the potentially extended timeframe until the retirement of the capital notes. As such, filings requesting advance approval to retire capital notes must be closely reviewed, and approval letters must include the following conditions (in addition any other non-standard conditions deemed appropriate):

1. That the applicant has obtained all necessary and final approvals from the appropriate federal, state, or other authorities.

2. That if the transaction does not take effect [within a specified time period] and a request for an extension of time has not been approved by the FDIC, the consent granted shall expire [at the end of the specified time period].

3. That until the retirement of the capital notes has been completed, the FDIC retains the right to alter, suspend, or withdraw its commitment should any interim development be deemed to warrant such action.

4. That following retirement of the capital notes the institution shall meet all applicable capital requirements imposed by statute, regulation, agency action, or other means, and will satisfy all requirements to qualify as Well Capitalized pursuant to the applicable capital statutes and regulations.

5. That at the time of retirement of the capital notes the institution is not subject to any formal or informal actions addressing the institution's capital or overall safety and soundness, and has not been notified by any relevant regulatory agency of the agency's intent to issue a formal or informal action addressing the institution's capital or overall safety and soundness.

6. That the institution must submit no later than 60 days prior to retirement of the capital notes, a plan that includes:

    (a) Details regarding the change to the institution's capital levels and structure as a result of the retirement of the capital notes;
    (b) Details regarding any related or pending capital raise and the expected impact on the institution's capital levels and structure;
    (c) If the proposal involves the repurchase of capital instruments, the repurchase price and the basis for establishing the fair market value of the repurchase price;
    (d) A statement that the proposal will be available to all holders of a particular class of outstanding capital instruments on an equal basis, and if not, the details of any restrictions; and,
    (e) The date that the applicant's board of directors approved the proposed retirement.

III. FORM OF APPLICATION

Pursuant to Section 303.241(c) of the FDIC Rules and Regulations, applicants are to submit either a letter application or an electronic application via the FDIC's secure, communication channel to the appropriate Regional Office (RO). Refer to *Applications Overview*, Section 1.1 of these

Procedures, for information regarding applications filed through the secure, internet-based communication channel. Under Section 303.241(c), the application should include the following information:

1. The type and amount of the proposed change to the capital structure and the reason for the change;

2. A schedule detailing the present and proposed capital structure;

3. The time period that the proposal will encompass;

4. If the proposal involves a series of transactions affecting Tier 1 capital components that will be consummated over a period of time not exceeding 12 months, the application must certify that the bank will maintain Well Capitalized status per Prompt Corrective Action (PCA) guidelines, as defined in Part 324, both before and after each of the proposed transactions;

5. If the proposal involves the repurchase of capital instruments, the repurchase price and the basis for establishing the fair market value of the repurchase price;

6. A statement that the proposal will be available to all holders of a particular class of outstanding capital instruments on an equal basis, and if not, the details of any restrictions; and

7. The date that the applicant's board of directors approved the proposal.

The FDIC may request additional information at any time while processing the application.

For state savings associations, the notice or application must:

1. Be in narrative form;

2. Include all relevant information concerning the proposed capital distribution, including the amount, timing, and type of distribution; and,

3. Demonstrate compliance with Section 390.348 of the FDIC Rules and Regulations.

The notice or application may include a schedule proposing the state savings association's capital distributions over a specified period, not to exceed 12 months.

Procedures regarding applications by an undercapitalized insured state nonmember bank and insured branch of a foreign bank to retire capital stock or capital debt instruments pursuant to Section 38 of the FDI Act are set forth in Section 303.203 of the FDIC Rules and Regulations. Applications pursuant to Section 38 and 18(i) may be filed concurrently or as a single application.

IV. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process the application following the steps below and should refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding

receipt and acceptance of applications.[1]

1. These applications should be reviewed upon receipt, or soon thereafter, to determine if expedited processing is available, or if there are issues that would justify invoking removal of 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. Absent such removal, an application filed under this section by an eligible depository institution will be deemed approved 20 days after the FDIC's receipt of a substantially complete application, as described in *Time Frame for Processing*, Part VI of this Section. If the filing is removed from expedited processing, the RO must notify the bank of such decision prior to the deemed approved date. Refer to *Applications Overview,* Section 1.1 of these Procedures, for information regarding expedited processing**.**

3. All applications should be entered into the appropriate system of record 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. When pre-approving retirement of capital in conjunction with its issuance, the Case Manager should maintain relevant, related information as a permanent record in the appropriate internal database.

4. Applications filed under this Section can be technical in nature. Therefore, Case Managers should consult with accounting specialists, capital markets specialists, and Legal, as appropriate, before determining completeness of the filing or developing a review strategy.

5. If the proposal involves the purchase of treasury stock, contact the Legal Division to ensure the purchase complies with Part 362 of the FDIC Rules and Regulations, particularly in the case of state savings associations. Part 362 implements the applicable provisions of Section 24 of the FDI Act. These provisions restrict and prohibit insured state banks and their subsidiaries from engaging in activities and investments that are not permissible for national banks and their subsidiaries. Consider the following when reviewing a proposal involving the purchase of treasury stock:

    - Generally, insured state banks may acquire or hold treasury stock without applying under Part 362, if the acquisition or holding of the stock is for a legitimate corporate purpose. The acquisition or holding of treasury stock for speculative purposes is prohibited under Part 362. (National banks may purchase treasury stock only to fulfill a legitimate corporate purpose. See OCC, Activities Permissible for National Banks and Federal Savings Associations, Cumulative (October 2017)).
    - Examples of legitimate corporate purposes include: holding shares in connection with an officer or employee stock option or bonus plan; holding shares to sell to a potential director, if directors are obligated to own qualifying shares; or purchasing a director's qualifying shares upon death or resignation,

[1] Case Managers should follow the general instruction and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, etc., in Applications Overview, Section 1.1 of these Procedures.

if there is no ready market for the shares.

- Transactions that involve an insured state bank acquiring its own stock and cancelling or restoring the shares to authorized but unissued status do not require consideration under Part 362 because these transactions are permitted for a national bank.

6. Contact the state authority to determine its opinion on the proposal. State authorities generally require prior approval for a retirement or reduction of capital.

7. Complete the appropriate Summary of Investigation (SOI) form.[2] The narrative should include a discussion of the statutory factors set forth in Section 18(i)(4) of the FDI Act. Also, include in the SOI pro forma capital ratios for the Tier 1 Leverage, Common Equity Tier 1, and Total Capital subsequent to the capital distribution[3]. For state savings associations, the narrative should include a discussion of the factors required by Section 390.348 of the FDIC Rules and Regulations. Comments should also include the attitude of the state authority and the Board of Governors of the Federal Reserve Board System (FRB) regarding the application, where appropriate. Refer to the *Areas of Consideration*, Part V of this Section, for specific instructions in drafting the SOI. Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI.

8. If the application is approved, an approval letter should be sent to the institution, with a copy sent to the state authority and to the FRB, if the bank is controlled by a holding company. The approval letter should set a timeframe consistent with the proposal during which the transaction must be completed; state that no other consent to retirement or reduction of capital is granted; state that changes to the terms disclosed in the application will require prior written consent by the FDIC; and, request notification of the consummation date. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written commitment to adhere to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions,* Section 1.11 of these Procedures, for additional instructionsregarding the imposition of conditions.

9. If consideration of the statutory factors may result in a denial of the application, the RO should advise the applicant of the problem areas to ensure that all relevant facts are obtained prior to making a decision. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for further instruction.

10. If the application is denied, a denial letter should be sent to the applicant, stating the reasons for the denial. A copy of the denial letter should be sent to the state authority and to the FRB, if the bank is controlled by a holding company.

11. Update the appropriate internal database with the action date, expiration date, hours devoted to the application, and other required information.

V. AREAS OF CONSIDERATION

The adequacy of remaining capital is the chief statutory factor to consider for retirement or

[2] Case Managers should follow the general instructions and detailed discussion of SOI requirements for all types of applications located in Summary of Investigation, Section 1.2 of these Procedures, as well as the specific instructions in this Section.

[3] Case Managers should include pro forma ratios of the Community Bank Leverage Ratio in the SOI once applicable to banks submitting applications to reduce or retire capital.

reduction of capital applications. However, the narrative portion of the SOI should include a discussion of all of the following statutory factors set forth in Section 18(i)(4) of the FDI Act.

- Financial History and Condition;
- Adequacy of Capital Structure;
- Future Earnings Prospects;
- General Character and Fitness of Management;
- Convenience and Needs of the Community to be Served; and,
- Consistency of Corporate Powers with the Purposes of the FDI Act.

The comments should assess the reasons for the proposed transaction, the effect on capital adequacy, and the overall effect on the safety and soundness of the bank, both immediately and on a prospective basis. The capital adequacy discussion must include the Basel III capital ratios. Expanded analysis and comments are required if CAMELS, SCOR, Compliance or CRA ratings are less than satisfactory. Comments should also include the attitude of the state authority and the FRB concerning the application, where appropriate.

Applications submitted by troubled, problem, or deteriorating institutions must be closely reviewed to assess the full impact of the proposed transaction(s), even if the proposed redemption is at less than the face value of the debt issued. Though redemptions may result in an increase in capital ratios, other impacts are distinctly negative, including with respect to the statutory factors pertaining to the adequacy of capital and the institution's financial condition as a result of the more limited resources available to absorb losses and possible strain on liquidity from the redemption, which may also lead to increased funding costs. In addition, depending on the facts and circumstances, the redemption may raise concerns regarding management to the extent that insiders or existing shareholders may benefit from the transaction, which may contribute to negative impacts on the ability to attract new investors to participate in a capital raise or the ability to market the institution to possible acquirers. Further, redemptions may also be viewed negatively by the courts in the event of a parent company bankruptcy. Most of these possible negative impacts may result regardless of whether the proposal involves a cash redemption or a transaction in which the existing debt is exchanged for newly issued debt. Negative impacts may also result regardless of whether the proposed transaction is a redemption of debt or a retirement of capital.

For filings by troubled, problem, or deteriorating institutions one must assess not only the immediate, direct impacts, but also the indirect impacts that may only be evident by assessing the longer-term consequences. This more comprehensive and prospective analysis has frequently resulted in unfavorable findings with respect to one or more of the applicable statutory factors, and applications overall.

Although an institution must have a Satisfactory or better CRA rating to qualify for expedited processing for any filing, the CRA performance of an institution does not serve as a basis for denial of this type of application. See Section 345.29 of the FDIC Rules and Regulations. While this type of application is not a "CRA-covered application," an unsatisfactory CRA or Compliance rating may reflect unfavorably on the general character and fitness of management.

For state savings associations, the FDIC may disapprove a notice or deny an application, in whole or in part, if the FDIC makes any of the following determinations pursuant to Section 390.348 of the FDIC Rules and Regulations:

- The state savings association will be Undercapitalized, Significantly Undercapitalized, or

Critically Undercapitalized following the capital distribution. If so, the FDIC will determine if the capital distribution is permitted under PCA;

- The proposed capital distribution raises safety or soundness concerns; or,
- The proposed capital distribution violates a prohibition contained in any statute, regulation, agreement between the state savings association and the FDIC, or a condition imposed on the state savings association in an FDIC–approved application or notice. If so, the FDIC will determine whether it may permit the capital distribution notwithstanding the prohibition or condition.

Depending on the institution's capital category for PCA purposes, an additional application may be necessary. PCA restricts capital distributions and payments on subordinated debt. Refer to *Prompt Corrective Action,* Section 12 of these Procedures, for further instruction.

Conversion terms or other financial arrangements in the proposal that involve the applicant's directors, officers, principal shareholders, affiliates, subsidiaries, or their interests should be fair and reasonable compared to conversion terms or other financial arrangements involving the applicant's minority shareholders.

VI. TIME FRAME FOR PROCESSING

Expedited Processing for Eligible Institutions:

An application processed under expedited processing will be deemed approved 20 days after the FDIC's receipt of a substantially complete application.

Standard Processing:

Statutory: None.

RO Processing Guideline: 30 days from receipt of a substantially complete application.

VII. PUBLICATION REQUIREMENT

None.

VIII. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices and other filings are discussed in *Applications Overview,* Section 1.1 of these Procedures.

IX. REFERENCES

Sections 18(i), 24, 28, and 38 of the FDI Act

Parts 324 and 362 and Sections 303.241, 390.342-348 of the FDIC Rules and Regulations

Risk Management Manual of Examination Policies

OCC, Activities Permissible for National Banks and Federal Savings Associations, Cumulative (October 2017)

I. INTRODUCTION

Pursuant to Section 5(e) of the Federal Deposit Insurance (FDI) Act, any insured depository institution (IDI) shall be liable for any loss incurred by the deposit insurance fund (DIF), or for any loss that the FDIC reasonably anticipates incurring, in connection with:

(i) The default[1] of a commonly controlled IDI; or,
(ii) Any assistance provided by the FDIC to any commonly controlled IDI in danger of default.

For purposes of Section 5(e), IDIs are commonly controlled if such institutions are controlled by the same company or if one IDI is controlled by another IDI.[2]

The principal objective of the cross-guarantee statute is to maximize the recovery to the DIF when the DIF has incurred a loss due to the default of a commonly controlled IDI. It is very important to ensure that the assets of any healthy, commonly controlled institution(s) will be available to the FDIC to help offset the costs to the DIF of resolving the failed institution(s). The cross-guarantee provision provides an incentive to the holding company or affiliated institution(s) to effect a transaction that will generate funds to recapitalize the failing IDI prior to default.

Waiver Authority: In addition to certain statutory exceptions and exclusions contained in Sections 5(e)(6) and (7) of the FDI Act, the FDI Act also permits the FDIC, in its discretion, to exempt any IDI from cross-guarantee liability if it determines that such exemption is in the best interests of the DIF. Procedures for requesting a conditional waiver of liability pursuant to Section 5(e)(5)(A) of the FDI Act are described below. Conditional waiver of liability refers to an exemption from liability pursuant to Section 5(e) subject to terms and conditions. The FDIC must carefully analyze the amount of any proposed assessment or settlement to avoid jeopardizing the safety and soundness of the surviving institution and increasing the risk of loss to the DIF. The determination of whether an exemption is in the best interests of the DIF rests solely with the FDIC Board.

During the term of an exemption granted under Section 5(e)(5) of the FDI Act, the IDI and all of its IDI affiliates must comply fully with the restrictions of Sections 23A and 23B of the Federal Reserve Act without regard to Section 23A(d)(1) of the Federal Reserve Act.

Regardless of whether an application requesting a waiver has been received, it is necessary in all failing IDI situations to determine whether and when to assess a cross-guarantee liability, as well as the amount of liability. Determinations of whether or not a cross-guarantee relationship exists must be made in consultation with the Legal Division at the time an institution is downgraded to problem status.[3] Such determinations may occur significantly prior to the receipt of a request for a waiver.

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[1] Section 3(x) of the FDI Act defines "Default" and "In Danger of Default." Cross-guarantee liability is normally considered and/or assessed in situations where IDIs have failed or are in danger of failing and a loss to the DIF has been identified or can reasonably be estimated.

[2] Section 3(w)(5) of the FDI Act states that the term, "Control," has the meaning given to such term in Section 2 of the Bank Holding Company Act of 1956.

[3] A problem financial institution is defined as any IDI which has been assigned a composite rating of "4" or "5" under the Uniform Financial Institutions Rating System by its primary federal regulator (PFR) or by the FDIC, if it disagrees with the PFR's rating.

Decisions regarding the appropriateness and timing of any cross-guarantee assessment are based on several factors, including any potential recovery to the DIF by virtue of settlement or ultimate sale of the commonly controlled institution(s). An acceptable settlement proposal will generally provide for a substantial portion of proceeds from any sale or settlement to be paid to the FDIC or to prudently recapitalize the surviving commonly controlled institution(s) that might otherwise fail. Generally, the FDIC will assess cross-guarantee liability in all instances **except**:

(i) When an assessment will cause an increased loss to the DIF and the loss to the DIF would not otherwise occur; or,
(ii) When the commonly controlled institution(s) is acquired by an unaffiliated party.

In the latter case, a conditional waiver and partial payment from the sales proceeds is likely to be considered. For additional information, Case Managers should refer to the FDIC *Statement of Policy Regarding Liability of Commonly Controlled Depository Institutions*, dated October 1, 1998.

The FDIC may entertain requests for waivers of cross-guarantee liability from affiliated or unaffiliated parties of an IDI in default or in danger of default.

- Conditional waivers of liability will be considered in those cases where the waiver facilitates an alternative that would be in the best interests of the DIF. In addition to partial payment, conditional waivers may include other conditions, such as provision of requisite capital and managerial resources that substantially lessen the exposure to the DIF. A conditional waiver granted to an unaffiliated acquirer of an IDI in default or in danger of default will be granted for a fixed period, generally not to exceed a period of time reasonably required to identify and resolve existing problems.

- If one or more IDIs in a commonly controlled relationship is otherwise solvent, well managed and viable, it may be in the FDIC's best interest to waive or reduce claims against such entities. In determining whether a conditional waiver is appropriate, consideration will be given to actions of a holding company that may contribute to or diminish FDIC losses as well as proposals to strengthen any other weakened IDIs.

- When an IDI is sold to an acquirer with no financial interest, directly or indirectly, in the IDI prior to the acquisition, it is the general policy of the FDIC to forego issuance of a notice of assessment to the acquirer and its affiliate institutions in the event of a default of an IDI formerly affiliated with the acquired IDI. The FDIC will review all such transactions prior to making a final decision.

Requests for a waiver of cross-guarantee liability may also be submitted in non-failure situations by holding companies or institutions that have acquired another institution. If such a request is received, the Regional Office (RO) should contact the appropriate Associate Director (Risk Management Applications Section (RMAS), Large Bank Supervision Branch (LBS), or Division of Complex Institution Supervision & Resolution (CISR) for guidance.

The FDIC's general practice is not to grant a cross-guarantee waiver to an institution for which the directors and/or executive officers who materially contributed to the failing institution's problems remain involved in any capacity with the institution seeking the waiver.

II. FORM OF APPLICATION

Section 303.245 of the FDIC Rules and Regulations outlines the filing procedures for waiver applications. Applicants should submit a letter application to the appropriate Regional Director in accordance with Section 303.245(c). The application should contain the following information:

1. The basis for the waiver request;

2. Discussion of any significant events (e.g., change of control, capital injection, etc.) that may have an impact on the applicant and/or any potentially liable institution(s);

3. Current, and, if applicable, pro forma financial information regarding the applicant and potentially liable institution(s); and,

4. An explanation of the benefits to the DIF resulting from the waiver and any related events.

The FDIC may request additional information at any time during the processing of the filing. For example, since the applicant, in most cases, will be a bank holding company, a certified copy of a resolution adopted by the company's board of directors authorizing this transaction should be requested.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers are to review and process the application following the steps below and should refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.

1. Upon receipt of an application, the RO must promptly notify the RMAS Associate Director; the Division of Resolutions and Receiverships (DRR) Resolution Strategy Associate Director; and, the appropriate Legal Division Deputy General Counsel; or, their designees. In the case of institutions with total assets greater than $10 billion, notify the appropriate LBS or CISR Associate Director. Refer to *Applications Overview,* Section 1.1 of these Procedures, for instructions regarding filings requiring WO action or input.

2. All applications are to be entered into 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.

3. Prepare a memorandum for submission to the Washington Office (WO) recommending whether demand for payment should be (a) immediate; (b) in the future; or (c) part of a negotiated settlement with the surviving commonly controlled institution(s); or whether an assessment should not be made. In developing the recommendation, the Case Manager is to consult with Legal staff, DRR, and appropriate WO RMS staff. The memorandum should be from the RMS Regional Director, the DRR Regional Manager, and the Regional Counsel, to the RMS Director. A copy needs to also be sent to the appropriate Legal Division Deputy General Counsel, and the DRR Resolutions Strategy Associate Director.

The memorandum should address the following, as applicable and available:

- The basis for the waiver request and the projected benefits;
- The effect of the waiver on the DIF;
- The current condition/viability of the liable institution(s), including the earnings, capital and liquidity positions absent any cross-guarantee assessment;
- Any interdependence among the commonly controlled institutions (*e.g.* operations, management, loan participations, etc.);
- The effect of the failure on the commonly controlled institution(s);
- Other operational issues affecting the commonly controlled institutions;
- Marketing efforts being undertaken to sell the liable institution(s);
- The proposed distribution of the sale proceeds, if the application was prompted by the potential sale of a surviving affiliate;
- Any known individuals or groups interested in the acquisition of the failing IDI and whether there is potential for an open bank sale;
- The views of the state authority and/or other federal regulatory agency involved regarding a cross-guarantee assessment;
- A DRR cost/benefit analysis, including the presence of synergies from marketing the institutions together;
- Any legal or policy issues, including a discussion of any similar situations in which the FDIC has taken a different approach than the one recommended by staff in the present matter; and,
- The RO's recommended action on the requested waiver.

If it appears inevitable that a commonly controlled IDI will fail if the FDIC has sought, or would normally seek, cross-guarantee assessment, the general policy of the FDIC is to forego actual assessment against that IDI. Otherwise, the FDIC expects to receive compensation of some type in settlement of cross-guarantee claims; however, not all such settlements will result in the immediate receipt of a cash payment and, in some cases, acceptance of another payment method may be appropriate, such as warrants, preferred stock, or other long-term obligation. After deliberations of the settlement negotiation team (comprised of representatives from RMS, DRR, and Legal Division) and prior to finalizing such settlement options with interested parties, the RMS Regional Director, or designee, shall contact the appropriate Associate Director (RMAS, LBS, or CISR) with the proposed recommendation.

4. Complete the appropriate Summary of Investigation (SOI) form[4]. Retrieve the Application Summary Statement from the system of record and attach it to the SOI. SOI comments should reference the above noted memorandum.

5. Submit the SOI, the recommendation memorandum, and other relevant documentation including a draft approval or denial letter to the WO for action by the FDIC Board. Refer to *Applications Overview,* Section 1.1 of these Procedures, for procedures on forwarding applications to the WO.

[4] Case Managers are to follow the general instructions and detailed discussion of SOI requirements for all types of applications located in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instruction in this Section.

6. The FDIC Board will provide the applicant with written notification of the final action immediately after the decision is rendered.

7. Update the appropriate internal database with the action date, the expiration date, the hours devoted to the application, and other required information.

8. To the extent a pending filing (such as a merger or a change in control) may be impacted by the decision, notify relevant FDIC staff reviewing the other filing of the outcome.

IV. TIME FRAME FOR PROCESSING

Statutory: A statutory processing timeline is provided for requests by limited partnerships and certain affiliates of limited partnerships that filed registration statements with the Securities and Exchange Commission on or before April 10, 1989, showing intent to acquire one or more IDIs. Within 10 business days after the date of submission of such a request together with such information as reasonably requested by the FDIC, the statute provides that the FDIC shall make a determination on the request and shall so advise the applicant. See Section 5(e)(C) of the FDI Act.

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

WO Processing Guideline: 75 days.

V. PUBLICATION REQUIREMENT

No requirement.

VI. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices and other filings are discussed in *Applications Overview,* Section 1.1 of these Procedures.

VII. REFERENCES

Section 5(e) of the FDI Act

Section 303.245 of the FDIC Rules and Regulations

FDIC Statement of Policy Regarding Liability of Commonly Controlled Depository Institutions, dated October 1, 1998 (63 Fed. Reg.44765 (1998))

I. INTRODUCTION

Section 203 of the Depository Institutions Management Interlocks Act (Interlocks Act) fosters competition by generally prohibiting a management official from serving with two nonaffiliated depository organizations when the management interlock would likely have an anticompetitive effect. Part 348 of the FDIC Rules and Regulations, issued pursuant to the Interlocks Act, as amended, applies to management officials of FDIC-supervised institutions and their affiliates. The following describes the prohibitions and exemptions set forth in Part 348.

Prohibitions - Section 348.3 of the FDIC Rules and Regulations

- Community - A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same community.

- Relevant Metropolitan Statistical Area (RMSA) - A management official of a depository organization may not serve at the same time as a management official of an unaffiliated depository organization if the depository organizations in question (or a depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $50 million or more.

- Major Assets - A management official of a depository organization (or any affiliate of such an organization) with total assets exceeding $10 billion may not serve at the same time as a management official of an unaffiliated depository organization (or any affiliate of such an organization) with total assets exceeding $10 billion, regardless of the location of the two depository organizations.

Permitted Interlock Relationships - Section 348.4 of the FDIC Rules and Regulations

The prohibitions of Section 348.3 do not apply in the case of any one or more of the following organizations or to a subsidiary thereof:

- A depository organization that has been placed formally in liquidation, or which is in the hands of a receiver, conservator, or other official exercising a similar function;

- A corporation operating under Section 25 or Section 25A of the Federal Reserve Act (Edge Corporations and Agreement Corporations);

- A state-chartered savings and loan guaranty corporation;

- A depository organization that is closed or is in danger of closing, as determined by the appropriate federal depository institutions regulatory agency, and is acquired by another depository organization. This exemption extends for five years, beginning on the date the depository organization is acquired;

- A savings association whose acquisition has been authorized on an emergency basis in accordance with Section 13(k) Emergency Acquisitions Involving Savings Associations of the FDI Act, with resulting dual service by a management official that would otherwise be prohibited under the Interlocks Act. This exemption may continue for up to 10 years from the

date of the acquisition, provided the FDIC has given its approval for the continuation of such service; and,

- A diversified savings and loan holding company (as defined in section 10(a)(1)(F) of the Home Owners' Loan Act (HOLA)) with respect to the service of a director of such company who is also a director of an unaffiliated depository organization if:

  (i) Both the diversified savings and loan holding company and the unaffiliated depository organization notify their appropriate federal depository institutions regulatory agency at least 60 days before the dual service is proposed to begin; and,
  (ii) The appropriate regulatory agency does not disapprove the dual service before the end of the 60-day period.

  However, the FDIC may disapprove a notice of proposed service, if it finds that:

  (i) The service cannot be structured or limited so as to preclude an anti-competitive effect in financial services in any part of the United States;
  (ii) The service would lead to substantial conflicts of interest or unsafe or unsound practices; or,
  (iii) The notificant failed to furnish all the information required by the FDIC.

  The FDIC may require that any permitted interlock for a diversified savings and loan holding company be terminated if a change in circumstances occurs with respect to one of the interlocked depository organizations that would have provided a basis for disapproval of the interlock during the notice period.

- Any state savings association that has issued stock in connection with a qualified stock issuance pursuant to section 10(q) of the HOLA. This exception shall apply only with regard to service as a single management official of such state savings association or any subsidiary of such state savings association by a single management official of a savings and loan holding company which purchased the stock issued in connection with such qualified stock issuance, and shall apply only when the FDIC has determined that such service is consistent with the purposes of the Interlocks Act and the HOLA.

Small Market Share Exemption - Section 348.5 of the FDIC Rules and Regulations

A management interlock that is prohibited by Section 348.3 is permissible if the interlock is not prohibited by Section 348.3(c) (Major Assets) and the depository organizations (and their depository institution affiliates) hold, in the aggregate, no more than 20 percent of the deposits in each RMSA or community in which both depository organizations (or their depository institution affiliates) have offices. The amount of deposits shall be determined by reference to the most recent annual Summary of Deposits published by the FDIC. Each institution is responsible for maintaining records sufficient to support its determination of eligibility for this exemption and must reconfirm that determination on an annual basis. No prior FDIC approval is required to claim the proposed small market share exemption.

General Exemption - Section 348.6 of the FDIC Rules and Regulations

The FDIC may by agency order exempt an interlock from the prohibitions in Section 348.3, if the FDIC finds that the interlock would not result in a monopoly or substantial lessening of competition

and would not present safety and soundness concerns. This exemption may continue so long as it does not result in a monopoly or substantial lessening of competition, or is unsafe or unsound, unless a shorter expiration period is provided for in the FDIC approval.

In reviewing an application for an exemption under Section 348.6, the FDIC will apply a rebuttable presumption that an interlock will not result in a monopoly or substantial lessening of competition, if the depository organization seeking to add a management official:

- Primarily serves low- and moderate-income areas;
- Is controlled or managed by persons who are members of a minority group, or women;
- Is a depository institution that has been chartered for less than two years; or,
- Is deemed to be in "troubled condition" as defined in Section 303.101(c) of the FDIC Rules and Regulations.

If the FDIC grants an interlock exemption in reliance upon one of these presumptions, the interlock may continue for three years, unless otherwise provided by the FDIC in writing, unless a shorter period is otherwise established.

Change in Circumstances - Section 348.7 of the FDIC Rules and Regulations

A management official shall terminate his or her service or apply for an exemption if a change in circumstances causes the service to become prohibited. A change in circumstances may include an increase in asset size; a change in the delineation of the RMSA or community; the establishment of an office; an increase in the aggregate deposits of the depository organization; or an acquisition, merger, consolidation, or reorganization of the ownership structure of a depository organization that causes a previously permissible interlock to become prohibited.

A management official described in the previous paragraph may continue to serve the FDIC-supervised institution involved in the interlock for 15 months following the date of the change in circumstances. The FDIC may shorten this period under appropriate circumstances.

Enforcement - Section 348.8 of the FDIC Rules and Regulations

The FDIC administers and enforces the Interlocks Act with respect to FDIC-supervised institutions and their affiliates and may refer any case of a prohibited interlocking relationship to the Attorney General of the United States to enforce compliance. If an affiliate of an FDIC-supervised institution is subject to the primary regulation of another federal supervisory agency, then the FDIC does not administer and enforce the Interlocks Act with respect to that affiliate.

State Savings Associations

Case Managers must consult with the Washington Office (WO) on any 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 filings involving state savings associations.

II. FORM OF APPLICATION

With respect to the general exemption under Section 348.6 of the FDIC Rules and Regulations, applicants should submit a letter application to the appropriate Regional Director in accordance

with Section 303.249 of the FDIC Rules and Regulations.[1] The application should include the following information:

- A description of the proposed interlock;
- A statement of the reasons as to why the interlock will not result in a monopoly or a substantial lessening of competition; and,
- If the applicant is seeking to invoke any of the presumptions set forth in Section 348.6 of the FDIC Rules and Regulations, a description of the particular presumption which is being requested and a statement of reasons why the presumption is applicable.

The FDIC may request additional information at any time during processing of the filing.

III. ACCEPTING AND PROCESSING THE APPLICATION

The following steps are specific to processing interlock applications. Case Managers should also refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.[2]

1. All applications are to be entered into 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. The application should be forwarded to Legal for review.

2. Assess the application and complete the appropriate Summary of Investigation (SOI) form.[3] Retrieve the Application Summary Statement from the appropriate internal databaseand attach to the SOI. The SOI narrative should address:

    - The nature of the interlock;
    - The circumstances necessitating the request for an exemption;
    - An assessment of whether the circumstances comply with the criteria for granting an exemption;
    - Regional Counsel's opinion (on a case by case basis, as necessary); and,
    - Recommendation for approval or denial.

3. If an application has deficiencies that may result in a denial, the Regional Office (RO) should advise the applicant of the deficiencies to ensure that all relevant facts are obtained

[1] Section 303.249(c)(3) of the FDIC Rules and Regulations was previously in error with respect to an application being required for the small market share exemption. Because Section 348.5 of the FDIC Rules and Regulations is self-executing, there is no need to file an application with the FDIC. Instead, each depository organization is responsible for complying with the terms of the exemption and must maintain records sufficient to support its determination of eligibility for the exemption and reconfirm that determination on an annual basis. On February 8, 2019, an FDIC final rule was published that corrected the erroneous statement in Section 303.249(c)(3). 84 Federal Register 2705. The final rule also corrected an erroneous citation in Section 348.4(i). Both changes were made by means of technical amendments without notice and comment and were effective immediately upon publication.

[2] Case Managers should follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other applicable instructions in *Applications Overview*, Section 1.1 of these Procedures.

[3] Case Managers are to 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.

prior to making a final decision. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further instruction.

4. Prepare a draft transmittal letter (for approval or denial, as appropriate).

5. If denial is recommended or the application cannot be acted on under delegated authority, submit the SOI and the draft transmittal letter to the WO for final processing. Refer to *Applications Overview*, Section 1.1 of these Procedures, for instruction regarding applications that require WO action or input.

6. Update the system of record to reflect the date of final action, the date forwarded to the WO, if applicable, hours devoted to the application, and any other required information.

IV. TIME FRAME FOR PROCESSING

Statutory: None.

RO Processing Guideline: 20 days after receipt of a substantially complete application.

V. PUBLICATION REQUIREMENT

No requirement.

VI. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

VII. REFERENCES

Section 203 of the Depository Institutions Management Interlocks Act (12 U.S.C. § 3202)

Section 303.249 and Part 348 of the FDIC Rules and Regulations

There are numerous FDIC Advisory Opinions regarding management official interlocks. See "FDIC Advisory Opinions Subject Index" for a complete list of outstanding opinions.

I. INTRODUCTION

Section 19 of the Federal Deposit Insurance (FDI) Act applies to all FDIC-insured depository institutions. Section 19 provides that, except with the prior written consent of the FDIC, any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering (in aggregate, "covered offenses"), or has agreed to enter into a pretrial diversion or similar program (program entry) in connection with a prosecution for any such offense, may not[1]:

1. Become, or continue as, an institution-affiliated party (as defined in Section 3(u) of the FDI Act) with respect to any insured depository institution (IDI);

2. Own or control, directly or indirectly, any IDI; or,

3. Otherwise participate, directly or indirectly, in the conduct of the affairs of any IDI.

Further, Section 19 provides that for certain enumerated violations of Title 18 of the U.S.C. pertaining to financial institution-related crimes, the FDIC is precluded from approving an application filed by a person, or by an IDI on behalf of such a person, convicted of such an offense or program entry for ten years from the date of the offense or program entry. However, the FDIC may motion a court of jurisdiction for an exception to the prohibition period when the interest of justice would be served. Refer to *Requests to File Motions For Exceptions to 10-Year Prohibition,* Part VIII of this Section, and to Section 19(a)(2)(B) of the FDI Act for more information.

Section 19 also applies to any company (other than a foreign bank) that is a bank holding company or a savings and loan holding company as if such holding company were an IDI, except that the authority for granting exceptions is reserved to the Board of Governors of the Federal Reserve System instead of the FDIC.

Definitions of Covered Offenses

Dishonesty means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and may include crimes which federal, state or local laws define as dishonest.

Breach of trust means a wrongful act, use, misappropriation or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission. Whether a crime involves dishonesty or a breach of trust will be determined from the statutory elements of the crime itself.

Money laundering means a financial transaction designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of unlawful activity or to avoid a transaction reporting requirement under state or federal law. Money laundering includes the knowing use of property in a financial transaction that represents the proceeds of some form of unlawful activity, if the intent is to promote the carrying on of specified unlawful

[1] Any IDI may not permit any person to engage in any conduct or continue any relationship prohibited under this section.

activity. For federal law, see Title 18 U.S.C. Section 1956, "Laundering of Monetary Instruments" and 18 U.S.C. Section 1957 "Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity." The Case Manager should consult with Regional Legal counsel if there is uncertainty as to whether a particular offense should be considered a crime of money laundering under federal or state law.

II. PARTIES SUBJECT TO SECTION 19

For purposes of Section 19, "person" means an individual and does not include a corporation, firm, or other business entity. Refer to the FDIC Statement of Policy for Section 19 of the FDI Act (SOP) for additional information. In summary, the following persons fall within the scope of Section 19:

Institution-Affiliated Party (IAP), as defined in Section 3(u) of the FDI Act, includes any director, officer, employee, controlling stockholder (other than a bank holding company or savings and loan holding company) of, or agent for, an IDI; any other person who has filed or is required to file a change-in-control notice with the appropriate Federal banking agency under section 7(j); any shareholder, consultant, joint venture partner, and any other person as determined by the appropriate PFR who participates in the conduct of the affairs of an IDI; and, independent contractors under certain circumstances, as described below.

The FDIC may determine any other person to be an IAP or to be a person who participates, directly or indirectly, in the conduct of the affairs of any IDI. In making such a determination, the FDIC will consider the person's degree of influence over the management or affairs of the IDI. Those who exercise major policymaking functions or have the power to define and direct the management or affairs of an IDI would be deemed participants in the affairs of that IDI and covered by Section 19. For example, it may include directors or officers of affiliates, subsidiaries, or joint ventures of an IDI or its holding company.

Independent Contractors, including any attorney, appraiser, or accountant, would be covered by Section 19 if they influence or control the management or affairs of the IDI.

Controlling Shareholder or Control Group Member. For the purposes of defining control and ownership under Section 19, the FDIC has adopted the definition of control set forth in the Change in Bank Control Act of 1978 (CBC Act). A person will be deemed to exercise control if that person has the power, directly or indirectly, to direct the management or policies of a covered institution or to vote 25 percent or more of the voting shares of an IDI (or 10 percent of the voting shares if no other person has more shares). Under the same standards, a person will be deemed to own an IDI if that person owns 25 percent or more of the IDI's voting stock, or 10 percent of the voting shares if no other person owns more. These standards also apply to an individual acting in concert with others in order to have such ownership or control. Section 19 also specifically applies to persons with indirect control over any IDI. Absent the FDIC's consent, persons subject to the prohibitions of Section 19 will be required to divest their ownership of shares above the aforementioned limits.

III. APPLICATION TYPES

The SOP clarifies that the application must be filed by an IDI on behalf of a person (Sponsorship) unless the FDIC grants a waiver of that requirement (Individual Waiver). Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown.

The requirements of each application type are described in further detail below.

Sponsorship

Sponsorship approvals are not transferable. If an individual completed the Sponsorship process at one IDI, the approval is not valid for any other IDI. If an individual seeks to be employed or affiliated with another IDI, a new Section 19 application must be processed, unless an exception is specifically granted in writing by the FDIC. If, while at the IDI where a Sponsorship was previously approved, the sponsored individual's duties and responsibilities change and/or the level of oversight by the IDI over the individual changes, a new review from the IDI is necessary to consider the impact of these changes. This review may result in the requirement to file a new Section 19 application if it is determined that the individual's job duties, areas of responsibility, and the level of oversight of that individual have materially changed. Similarly, if an application was approved for an IDI that is subsequently merged into another IDI, a new application is required because there is no assurance that the sponsored individual's job duties, areas of responsibility, and the level of oversight remained the same as those approved under the original bank-sponsored application.

Individual Waiver

For individual waivers, the FDIC's approval results in the issuance of a public order and allows an individual to participate in the affairs of any IDI in any capacity, subject to the FDIC's conditions of approval. The covered individual need not reapply to the FDIC to participate in the affairs of an IDI, unless specifically required to do so. However, if a covered individual is convicted of a subsequent crime subject to Section 19, he or she would again be prohibited from participating in the affairs of an IDI.

Other Situations

If an individual is working for an IDI at the time the IDI becomes aware that the individual is covered by Section 19, the individual's continued participation in the affairs of the IDI violates Section 19. Under Section 19, an individual in this situation cannot remain as an employee, or otherwise be an IAP of the IDI, and the relationship must be terminated.

The FDIC may take action under its authority in Section 8 of the FDI Act, including assessing civil monetary penalties, against an FDIC-supervised IDI or an individual who is subject to FDIC jurisdiction for violations of Section 19. The FDIC should refer such violations to the FDIC Office of Inspector General and the Department of Justice. If the FDIC becomes aware of a potential violation of Section 19 in an IDI not supervised by the FDIC, such potential violation should be referred to the appropriate PFR.

IV. DETERMINING WHETHER AN APPLICATION FOR CONSENT IS REQUIRED

There are certain situations that require a Section 19 application and others that do not, including those that meet the *de minimis* criteria and may qualify for automatic approval. Refer to the *De Minimis* Convictions subsection below for additional information. The Case Manager should consult with Regional Legal if it is unclear as to whether the statutory elements of dishonesty or breach of trust are present in the crime, or if it is unclear whether a Section 19 application is necessary.

Situations Requiring a Section 19 Application

- A conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or where such person has entered a pretrial diversion or similar program regarding that offense.
- A covered offense that is being appealed will require an application until or unless it is reversed.
- A conviction for a covered offense for which a pardon has been granted requires an application.
- A program entry for a covered offense, which is often characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution or other noncriminal or non-punitive alternatives, is subject to Section 19. Such programs may be formal or informal in nature and federal, state, or local law determines entry into such programs. Program entries prior to the enactment of the Crime Control Act of 1990 (November 29, 1990) are not covered by Section 19.
- All convictions or program entries for offenses concerning the illegal manufacture, sale, distribution of or trafficking in controlled substances (covered drug offenses) shall require an application and are subject to the same provisions of criminal offenses involving dishonesty and breach of trust unless they fall within the provisions for de minimis offenses. An application is not required if the individual can qualify under the de minimis exceptions to filing.

Situations Not Requiring a Section 19 Application

- Arrests, pending cases not brought to trial, acquittals, or any conviction that has been reversed on appeal are not offenses covered by Section 19, unless it is determined that the individual has a program entry for the offense.
- A conviction that has been completely expunged is not considered a conviction of record and will not require an application. If an order of expungement has been issued in regard to a conviction or program entry and is intended by the language in the order itself, or in the legislative provisions under which the order was issued, to be a complete expungement, then the jurisdiction, either in the order or the underlying legislative provisions, will not allow the conviction or program entry to be used for any subsequent purpose including, but not limited to, an evaluation of a person's fitness or character. The failure to destroy or seal the records will not prevent the expungement from being considered complete for the purposes of Section 19 in such a case. Expungements of pretrial diversion or similar program entries will be treated the same as those for convictions. Most states do not offer “full expungement” or provide for a variation thereof. To ascertain the nature of an expungement and the resultant Section 19 coverage, the Case Manager should seek an opinion from Regional Legal counsel.
- A judgment by a court against a person as a youthful offender under any youth offender law or a matter adjudged as a juvenile delinquent by any court having jurisdiction over minors as defined by state law does not require an application. Such adjudication is not considered a conviction for a criminal offense.
- Convictions or program entries for possession of a controlled substance do not require an application.

De Minimis Convictions

Approval is automatically granted and an application will not be required where the covered offense is considered de minimis, because it meets all of the following criteria:

- There is only one conviction or program entry of record for a covered offense;

- The offense was punishable by imprisonment for a term of one year or less and/or a fine of $2,500 or less, and the individual served three (3) days or less of jail time. The FDIC considers jail time to include any significant restraint on an individual's freedom of movement which includes, as part of the restriction, confinement to a specific facility or building on a continuous basis where the person may leave temporarily only to perform specific functions or during specified times periods or both. The definition is not intended to include those on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or to a specified location.
- The conviction or program was entered at least five years prior to the date an application would otherwise be required; and
- The offense did not involve an insured depository institution or insured credit union.

Additional Applications of the De Minimis Offenses Exception to Filing

- Age at time of covered offense

    - If the actions that resulted in a covered conviction or program entry of record all occur when the individual was 21 years of age or younger, then the subsequent conviction or program entry, that otherwise meets the general de minimis criteria, will be considered de minimis if the conviction or program entry was entered at least 30 months prior to the date an application would otherwise be required and all sentencing or program requirements have been met.

- Convictions or program entries for insufficient funds checks

    - Convictions or program entries of record based on the writing of "bad" or insufficient funds check(s) shall be considered a de minimis offense and will not be considered as having involved an insured depository institution if the following applies:
    - There is no other conviction or program entry subject to Section 19, and the aggregate total face value of all "bad" or insufficient funds check(s) cited across all the conviction(s) or program entry(ies) for bad or insufficient funds checks is $1,000 or less; and
    - No insured depository institution or insured credit union was a payee on any of the "bad" or insufficient funds checks that were the basis of the conviction(s) or program entry(ies).

- Convictions or program entries for small-dollar, simple theft

    - A conviction or program entry based on a simple theft of goods, services and/or currency (or other monetary instrument) where the aggregate value of the currency, goods and/or services taken was $500 or less at the time of conviction or program entry, where the person has no other conviction or program entry under Section 19, where it has been five years since the conviction or program entry (30 months in the case of a person 21 or younger as described above) and which does not involve an insured financial institution or insured credit union is considered de minimis. Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

- Convictions or program entries for the use of a fake, false or altered identification card

    - The use of a fake, false or altered identification card used by person under the legal age for the purpose of obtaining or purchasing alcohol, or used for the purpose of entering a premise where alcohol is served but for which age appropriate identification is required,

provided that there is no other conviction or program entry for a covered offense, will be considered de minimis.

Any person who meets the de minimis criteria above shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction or program entry to all insured institutions in the affairs of which he or she intends to participate. Further, no conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. § 1829(a)(2) can qualify under any of the de minimis exceptions.

V. FORM OF APPLICATION

Sections 303.221 and 308.158 of the FDIC Rules and Regulations directs a potential applicant to submit the Section 19 application to the appropriate Regional Office (RO). A request for an Individual Waiver should be made to the appropriate Regional Director that coincides with the individual's residence. The *FDIC Application Pursuant to Section 19 of the Federal Deposit Insurance Act* (FDIC Form 6710/07) is used for all Section 19 applications. The form is available at: https://www.fdic.gov/regulations/applications/resources/section19.html. The RO responsible for processing the Section 19 application will send the applicant the application form along with other forms that will need to be completed and submitted and a list of any additional information that the applicant will need to submit. In addition to the completed application form, required information may include a Consent for Release of Information Form.

VI. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should process all Section 19 applications using the steps below. Refer to *Applications Overview*, Section 1.1 of these Procedures, for general guidelines regarding applications.[2]

1. Establish the system record under SEC19 – Section 19 or SEC19I – Section 19 (Individual), as applicable. All applications are to be entered into the appropriate system of record 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.

2. Consult with RO Legal and follow the RO's procedures for coordinating the Section 19 review.

3. Prepare and submit the applicable requests to the WO by creating a record and entering the required information into the appropriate internal database. Background checks should be performed in accordance with *Background Investigations,* Section 1.5 of these Procedures. The FDIC routinely requests FBI fingerprint identification and name check background investigations for Section 19 applications. However, ICE background checks should only be requested when there is reason to do so. For example, an ICE background check will be required if the individual was not born in the United States or its territories. Similarly, a credit bureau report will only be obtained when there is a need to confirm information relevant to the application. Special Background Investigations are also only requested if a clear reason is presented, such as foreign citizenship or work history.

[2] Case Managers are to follow the general guidance and expectations for applications regarding receipt and acceptance, recordkeeping responsibilities, WO action or input, delegations, and other applicable instructions in *Applications Overview,* Section 1.1 of these Procedures. Case Managers can send acknowledgement letters for these applications.

Contact the appropriate WO officials to discuss any additional law enforcement or credit checks that are deemed necessary.

4. Initially review all materials for completeness, and request additional information if necessary.

   Note: The RO cannot accept a Section 19 application as substantially complete prior to receipt and review of the background investigation results from the applicable law enforcement agencies.

5. Request written comments from the appropriate federal and/or state regulatory authorities.

6. Thoroughly analyze the application, background check results and any other relevant information. As necessary, communicate any follow-up questions, issues, and information requests to the applicant. Refer to *Evaluating the Application*, Part VII of this Section, for specific guidance.

7. Complete the appropriate Summary of Investigation (SOI) form.[3] Refer to *Evaluating the Application*, Part VII of this Section, for specific guidance.

8. **Sponsorship Applications** – Prepare the approval or denial letter. The approval letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written commitment to adhere 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 furtherinstruction.

   For requests that are denied, the denial letter should: inform the applicant that a written request for a hearing may be filed with the Executive Secretary within 60 days after the denial and summarize or cite the relevant considerations specified in Part 308, Subpart M, of the FDIC Rules and Regulations, which are discussed further in *Appeal and Requests for Hearing*, Part IX of this Section.

   If the Regional Director has delegated authority, distribute the letter to the applicant. If the primary federal regulator (PFR) objects to approval of the application, the SOI and the draft letter should be forwarded to the WO for final action.

9. **Individual Waiver Applications** - Prepare a draft approval or denial letter. The Regional Director does not have delegated authority to act on Individual Waiver applications. The draft letter and the SOI should be forwarded to the WO for final action. The WO will review the application package and the SOI, and will prepare and distribute the final documents.

   For requests that are denied, the draft denial letter should inform the applicant that a written request for a hearing may be filed with the Executive Secretary within 60 days after the denial and summarize or cite the relevant considerations specified in Part 308, Subpart M, of the FDIC Rules and Regulations, which are discussed further in *Appeal and Requests for Hearing*, Part IX of this Section.

[3] Case Managers are to follow the general instructions and SOI requirements for all types of applications located in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instructions in this Section.

Approval action on Individual Waivers will result in the issuance of one of two possible Orders: an Order Granting Permission to File Application and Approving Application for Consent to Participate in the Affairs of Any Insured Depository Institution; or, an Order Denying Application for a Waiver of the Depository Institution Filing Requirement. The Order will also be published on the FDIC's external website.

An Order that approves an Individual Waiver application will include non-standard conditions requiring the individual applicant to be covered by fidelity bond to the same extent as others in similar positions at an IDI and to disclose the FDIC's approval of the Individual Waiver to all IDIs in whose affairs the applicant seeks to participate. The Case Manager should obtain the applicant's written commitment to adhere to these and any other non-standard conditions, agreed upon in consultation with the WO, prior to submitting the approval documents for signature. Refer to *Standard and Non-standard Conditions*, Section 1.11 of these Procedures, for further instruction.

10. Update the appropriate internal database to reflect the date forwarded to the WO, if applicable, the final action, the date of the action, hours devoted to the application, and any other required information.

VII. EVALUATING THE APPLICATION

When evaluating any Section 19 application, Section 308.157(a) of the FDIC Rules and Regulations requires the FDIC to consider the following:

1. Whether the conviction or program entry is for a covered offense;

2. Whether participation directly or indirectly by the person in any manner in the conduct of the affairs of the IDI constitutes a threat to the safety and soundness of the IDI or the interests of its depositors, or threatens to impair public confidence in the IDI;

3. Evidence of the person's rehabilitation;

4. The position to be held by the person;

5. The amount of influence and control the person will be able to exercise over the affairs and operations of the IDI;

6. The ability of the management at the IDI to supervise and control the activities of the applicant;

7. The level of ownership the applicant will have at the IDI;

8. Applicable fidelity bond coverage for applicant; and,

9. Any additional factors in the specific case that appear relevant.

Note: The question of whether a person who was convicted of a crime or who entered a pretrial diversion, or similar, program was guilty of that crime is not an issue in the evaluation process. In addition to the considerations required by regulation, the Case Manager should consider the

following when evaluating Sponsorship and Individual Waiver applications, respectively:

Sponsorship

Sponsorship applications differ from Individual Waiver applications in several areas. First, the sponsoring IDI is aware of the covered person's conviction and rehabilitation history and is willing to sponsor that individual for participation in its affairs. Second, the IDI, in applying on behalf of a covered person, has agreed to manage the covered person for a specific duty or job range, and must ensure that the person is covered by a fidelity bond to the same extent as others in similar positions. Therefore, the rehabilitation threshold for a sponsored covered person may not be as critical, given the IDI's commitment to manage that person, versus rehabilitation thresholds for Individual Waivers.

The degree of scrutiny accorded a Section 19 application should be directly proportional to the individual's proposed position. For instance, applications involving proposed senior officers and directors should receive closer scrutiny than clerical employees. The focus when assessing these applications is to determine whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an IDI, and whether the affiliation, employment, ownership, control or participation by the person in the conduct of the affairs of the IDI may constitute a threat to the safety and soundness of the IDI or the interests of its depositors or threaten to impair public confidence in the IDI. If such risk is not evident, FDIC policy is to approve the application.

The SOI narrative should include a summary of why the application is needed, the nature and circumstances of the covered offense, employment history, and qualifications for the position being sought. The SOI should note the court of conviction (federal or state), include any comments from federal and/or state authorities, and discuss the results of the federal law enforcement background investigation(s). Comments should also summarize the IDI's condition, if this has an impact on the application. The SOI should include the opinion of the IDI's PFR and/or state regulatory authority as to the person's fitness to participate in the affairs of the IDI, and a closing summary with the RO recommendation of approval or denial. In the event of a denial recommendation, the narrative should fully cover why the individual is considered to pose a threat to the safety or soundness of the IDI or the interests of its depositors, or may threaten to impair public confidence in the IDI.

Note: Documentation of fidelity bond coverage on the covered person should be obtained prior to approval, otherwise, the Case Manager should include the requirement to obtain such coverage as a non-standard condition in the approval letter.

Individual Waiver

Individual Waiver applicants are seeking a waiver of the depository institution filing requirement of Section 19, and generally are requesting approval to participate in the affairs of any IDI in any capacity. Granting or denying an Individual Waiver application results in the issuance of an Order. Therefore, during the application process, the RO should advise the applicant of the public nature of the FDIC's final action. Furthermore, the Case Manager should consult with the WO (RMAS, LBS, CISR) and RO Legal throughout this process.

The key criteria in assessing an Individual Waiver application are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an IDI in any capacity, and whether the affiliation, ownership, control or participation by the person in the conduct of the affairs of any IDI may constitute a threat to the safety and soundness of the IDI or the interests of

its depositors or threaten to impair public confidence in the IDI.

Evidence of rehabilitation, including the person's activities since the occurrence of the covered offense, must be provided to support approval of a Section 19 Individual Waiver application. What constitutes an adequate record of rehabilitation is subjective. However, for meritorious consideration, the record of rehabilitation must offset the covered offense. A record clear of any subsequent convictions or arrests of any nature, in and of itself, does not prove rehabilitation. For more serious convictions, the record of rehabilitation must be detailed and demonstrate that the individual is fit to participate in the conduct of the affairs of any IDI in any capacity. While not all inclusive, the following list can assist in determining the record of rehabilitation for the individual.

- Legal record since the covered offense, including non-covered offenses.
- Resume or other information that details the individual's employment history since the occurrence of the covered offense. Jobs in which the individual has demonstrated fiduciary responsibility should be highlighted.
- Details of any community service.
- Letter(s) of recommendation. A recommendation letter wherein the author states that he or she has knowledge of the individual's covered offense should be given substantial weight. The need to obtain recommendation letters should be gauged by the individual's circumstances (e.g., nature of covered offense, length of time since the occurrence of the covered offense). Such letters may be obtained from:
    - An employer (recent ones should be given more weight);
    - If the applicant attended or is attending college or adult education program(s), a professor, dean, or school official;
    - An influential person in his or her community; or,
    - An assigned parole officer.

Given that these applications are for a blanket approval to participate in the affairs of any IDI in any capacity, the SOI narrative should thoroughly discuss the nature and circumstances of the covered offense and the applicant's subsequent rehabilitation. The SOI should describe the evidence of rehabilitation provided, the person's proven track record since the occurrence of the covered offense, the person's age at the time of the covered offense, the amount of time that has elapsed since the occurrence of the covered offense, and the person's full legal history including non- Section 19 covered arrests and offenses. The SOI should describe the individual's qualifications as well as types of positions currently being sought. The SOI should note the court of conviction (federal or state), discuss the results of the federal law enforcement background investigation(s), and include any comments from federal and/or state law enforcement or regulatory authorities. The SOI should include a closing summary and disclose the RO recommendation of approval or denial. In the event of a denial recommendation, the narrative should fully cover why the individual is considered to pose a threat to the safety or soundness of any IDI or the interests of its depositors, or may threaten to impair public confidence in any IDI.

VIII. REQUESTS TO FILE MOTIONS FOR EXCEPTIONS TO 10-YEAR PROHIBITION

Section 19(a)(2)(A) of the FDI Act imposes upon the FDIC a general prohibition for 10 years against approving the direct or indirect participation in the affairs of an IDI of any individual who has been convicted of, or has a program entry for, certain enumerated crimes of Title 18 U.S.C. pertaining to financial institution-related crimes. In instances where the interest of justice would be served, Section 19(a)(2)(B) of the FDI Act provides that the FDIC may motion the court in which the conviction or the agreement was entered to grant an exception to the restriction. A

person convicted of, or who has a program entry for, one of the relevant offenses seeking an exception to the 10-year prohibition period should be advised to present his or her position in writing along with supporting evidence and the application forms described above in *Form of Application*, Part V of this Section. Such person will be offered an opportunity to meet with the appropriate RO officials to present his or her position orally. This process allows the applicant sufficient opportunity to show that the interest of justice would be served by filing a motion for an exception to the 10-year prohibition, and provide information for the FDIC to determine whether a Section 19 application would likely be approved if the 10-year prohibition were not in place. Refer to the considerations required by Section 308.157(a) described under *Evaluating the Application*, Part VII of this Section, in evaluating such a request. It is generally assumed that the FDIC would file such a motion only if approval of a subsequent Section 19 application would be likely.

Appropriate RO RMS and Legal staff should attend all meetings held with individuals and their representatives who implore the FDIC to file a motion for an exception of the 10-year prohibition on the individual's behalf.

If it is determined that a motion for an exception is warranted, a draft response letter should be prepared in consultation with RO Legal counsel and forwarded to the WO for final action. If the RO determines that such a motion is not warranted, the Case Manager should draft a denial letter in consultation with RO Legal counsel. The Regional Director may act on denials of such requests consistent with delegated authority.

IX. APPEAL AND REQUESTS FOR HEARING

Appeal procedures, the hearing process, and timeframes regarding denial of an application pursuant to Section 19 of the FDI Act are contained in Part 308, Subpart M, of the FDIC Rules and Regulations. A denial of an application pursuant to Section 19 shall inform the applicant that a written request for a hearing, stating the relief desired and the grounds therefore and any supporting evidence, may be filed with the Executive Secretary within 60 days after the denial and shall summarize or cite the relevant considerations specified in Section 308.157 of the FDIC Rules and Regulations.

The Executive Secretary will order a hearing to be commenced within 60 days after receipt of a request for hearing. The burden of going forward with a *prima facie* case shall be upon the FDIC, which means the FDIC must go first and provide sufficient evidence to support the denial. The ultimate burden of proof that a denial is not warranted is on the person proposing to serve as an IAP.

X. TIME FRAME FOR PROCESSING

Statutory: None.

RO Processing Guidelines:

Sponsorship: 30 days after receipt of a substantially complete application, including receipt of all required background investigation results. The processing timeframe will be affected by receipt of background investigation results from federal law enforcement agencies.

Individual Waiver: The SOI and draft letter should be forwarded to the WO within 30 days of receipt of a substantially complete application, including receipt of all required background investigation results.

XI. PUBLICATION REQUIREMENT

None.

XII. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures. In general, Regional Directors have delegated authority to act on Sponsorship applications, unless objected to by the PFR, but do not have delegated authority to act on Individual Waiver applications. RMS should seek an opinion and/or concurrence from RO Legal counsel when processing any Section 19 application.

XIII. REFERENCES

Section 19 of the FDI Act

FDIC Statement of Policy for Section 19 of the FDI Act

Part 303 (Subpart L) and Part 308 (Subpart M) of the FDIC Rules and Regulations

Modifications to the Statement of Policy for Section 19 of the Federal Deposit Insurance Act, FIL 3-2013, dated February 8, 2013 and FIL-68-2018, dated November 1, 2018.

Clarifications to the FDIC's Statement of Policy for Section 19 of the FDI Act, FIL 57-2011, dated August 8, 2011

I. INTRODUCTION

Section 303.250 of the FDIC Rules and Regulations sets forth the procedures to be followed by an insured depository institution (IDI) to seek the prior consent of the FDIC to modify conditions or requirements associated with a prior approval or non-objection of a filing issued by the FDIC.

An application to modify conditions must be approved at the same level of delegated authority as the original approval. In addition, the Legal Division must be consulted to the same extent as was required for approval of the original filing.

Case Managers must consult with the Washington Office (WO) Risk Management and Applications Section (RMAS) on any 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.

II. FORM OF APPLICATION

Applicants should submit a letter application to the appropriate Regional Director in accordance with Section 303.250 of the FDIC Rules and Regulations. The application should contain the following information:

1. A description of the original approved application;

2. A description of the modification(s) requested; and,

3. The reason for the request.

The FDIC may request additional information at any time during processing of the filing.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process modification applications following the steps below and should refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.[1]

1. Establish the modification record in the appropriate internal database using the original application tracking information. The application should be entered into the system of record 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.

2. If the original filing was acted on at the WO level, contact appropriate WO staff (RMAS, Large Bank Supervision Branch (LBS), Complex Institution Supervision and Resolution (CISR) regarding processing.

3. Requests to modify conditions should be analyzed in relation to the applicable statutory factors of the original underlying filing, and in relation to the reasons for imposing the original conditions. Any additional risks to the IDI's safety and soundness or overall risk profile should be considered. Depending on the circumstances, it may be appropriate to

[1] Case Managers should follow the general guidance and expectations for all applications regarding recordkeeping responsibilities, DCP notifications, WO action or input, delegations, etc., in *Applications Overview*, Section 1.1 of these Procedures.

consider the imposition of new or alternative conditions.

4. Complete the appropriate Summary of Investigation (SOI) form. SOI comments should describe the original approval/non-objection, the modification request, and the Regional Office (RO) recommendation. Retrieve the Application Summary Statement from the system of record and attach it to the SOI.

5. If approval is being recommended, prepare an approval letter that includes all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written commitment to adhere to the 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 instruction.

6. For an application that presents deficiencies that may result in a denial action, the RO should advise the applicant of the deficiencies to ensure that all necessary facts are obtained prior to making a final determination. If denial of the application appears warranted, the Case Manager should prepare a disapproval letter. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for further instruction.

7. For applications that cannot be acted on under delegated authority, forward a copy of the SOI, the draft approval or denial letter, and, if applicable, 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.

8. Update the appropriate internal database to reflect the date forwarded to the WO, if applicable, the action, the date of the action, the expiration date, hours spent processing the application, and any other required information.

IV. AREAS OF CONSIDERATION

In addition to considering the impact on any areas addressed by statutory factors in the original underlying filing, the Case Manager should consider the following:

1. The reasons for imposing the original conditions that are the subject of the pending request.

2. Any material changes that have occurred since the approval of the underlying filing that could negatively impact the original determinations regarding any statutory or regulatory factor. Such changes could include the organizational structure (*e.g.*, parent company or key affiliates), the institution's operations, variances from the business plan or commitments submitted with the original filing, or changes to applicable regulatory guidance.

3. Any additional risks identified and any supervisory developments since the underlying approval, including with respect to the institution's overall safety and soundness, as well as any specialty examination programs, including the Community Reinvestment Act and consumer compliance.

4. Any financial arrangements that were made in connection with the original proposal or that are contemplated in conjunction with the modification request, and involve the applicant's

directors, officers, or major shareholders or their interests. Such transactions should be fair and reasonable in comparison to similar arrangements that could have been made with independent third parties.

Developments that negatively impact the original resolution of any statutory or regulatory factor, or that impacts consideration of the condition that is the subject of the pending request, may serve as the basis for denying the request.

V. TIME FRAME FOR PROCESSING

Statutory: None.

RO Processing Guideline: 30 days from receipt of a substantially complete application.

VI. PUBLICATION REQUIREMENT

None.

VII. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices and other filings are discussed in *Applications Overview,* Section 1.1 of these Procedures.

VIII. REFERENCES

Section 303.250 of the FDIC Rules and Regulations

I. INTRODUCTION

The procedures set forth in Section 303.11(f) of the FDIC Rules and Regulations shall apply to filings for which no appeal procedures are provided by regulation or other written instruction.[1]

Case Managers must consult with the Regional Office management and Legal and appropriate Washington Office (WO) Section (RMAS, LBS) on any such request for reconsideration to ensure that the appropriate procedures and timelines are followed. Refer to Applications Overview, Section 1.1 of these Procedures, for information regarding filings involving state savings associations.

II. CONTENT OF A REQUEST FOR RECONSIDERATION

Any applicant may file a request for reconsideration (Request) with the appropriate Regional Director within 15 days of receiving notice from the FDIC that a filing has been denied. As required in Section 303.11(f) of the FDIC Rules and Regulations, a Request must contain the following information:

1. A resolution of the applicant's board of directors authorizing filing of the Request, or a letter signed by the individual(s) filing the Request if the applicant is not a corporation;

2. Relevant, substantive information that for good cause was not previously set forth in the filing; and,

3. Specific reasons why the FDIC should reconsider its prior decision.

III. RECEIVING AND PROCESSING THE REQUEST

Processing a Request can be a two-step process. First, the FDIC must review the Request and determine whether reconsideration will be granted. The FDIC must then notify the applicant of the FDIC's determination whether reconsideration will be granted or denied within 15 days of receipt of the Request. Second, if reconsideration is granted, the FDIC will reconsider its determination on the original filing and must notify the applicant of the final agency decision on the filing within 60 days of receipt of the Request.

Case Managers are to review and process requests following the steps below and included in *Applications Overview,* Section 1.1 of these Procedures.[2] Case Managers should note that the procedures that follow assume the Request pertains to a denial issued by the respective Regional Office (RO) under delegated authority. Cases involving a denial issued by the WO require significant and timely coordination between the RO and WO, and heightened attention to the applicable timeframes.

[1] Appeal procedures for a denial of a change in bank control notice, notice of a change in senior executive officer or board of directors, or an application pursuant to Section 19 of the FDI Act are contained in Part 308 of the FDIC Rules and Regulations, Subparts D, L, and M, respectively. For further guidance on appeal procedures for these types of filings, refer to Sections 5, 6 and 17 of these Procedures, respectively.

[2] Case Managers are to read and follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other instructions as applicable, in *Applications Overview*, Section 1.1 of these Procedures.

Determination on the Request

1. Establish the system record. The Request is to be entered into the appropriate internal database within three days of receipt. In all cases, dates and comments in the record should be updated regularly to reflect the current status of the application.

2. Forward a copy of the Request to the WO (*i.e.,* appropriate Section Chief for the Risk Management and Applications Section (RMAS) or the Large Bank Supervision Branch (LBS)). The WO must be involved early in the process due to the timeframes for the FDIC to respond to the applicant.

3. Requests should be reviewed immediately upon receipt to determine whether the Request is complete. Requests that do not comprehensively address and support each of the filing requirements should be deemed substantially incomplete after consulting with RO management and Legal, as well as WO (RMS and Legal), if appropriate. Deficiencies should be promptly communicated to the applicant orally and in writing to enable the applicant to supplement the Request within the 15-day period. Further, the applicant should be notified that failure to submit the necessary information may result in the request being returned or denied. However, Case Managers are cautioned that requests for information should be limited to the information necessary to fairly evaluate the Request.

4. Analyze the Request and complete the appropriate Summary of Investigation (SOI) form.[3] Retrieve the Application Summary Statement from the system of record and attach it to the SOI. The SOI should address:

   - Receipt of a board resolution authorizing filing of the Request, or a letter signed by the individual(s) filing the Request if the applicant is not a corporation;

   - Summary of relevant, substantive information that for good cause was not previously set forth in the filing;

     Note that changes to the underlying application are more appropriately addressed through a new filing rather than a request for reconsideration.

   - Specific reasons why the FDIC should or should not reconsider its prior decision; and,

   - The RO recommendation.

5. If the RO intends to grant the Request, following consultation with the WO, prepare a letter to notify the applicant of the FDIC's decision to grant the Request. The letter should indicate that the FDIC is not approving the original filing; rather, the FDIC will reevaluate its previous determination.

6. If the RO intends to recommend denial of the Request, WO and RO Legal should be consulted. If deficiencies in the content of the Request could result in a return or denial

[3] Case Managers are to follow the general instructions and detailed discussion of SOI requirements for all types of applications located in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instruction in this Section.

of the Request, the RO should advise the applicant of the deficiencies. This includes the applicant's failure to provide relevant, substantive information that for good cause was not previously set forth in the filing and/or the failure to provide specific reasons why the FDIC should reconsider its prior determination. Refer to *Denials and Disapprovals,* Section 1.2 of these Procedures, for further instruction

7. If the RO recommends denying the Request, forward a draft denial letter, the SOI, and any other pertinent information to the WO for final processing and action. The draft denial letter should set forth the specific reason(s) for the denial. The bases for a denial will generally center on the applicant's failure to provide relevant, substantive information that for good cause was not previously set forth in the filing, and/or the failure to provide specific reasons why the FDIC should reconsider the prior decision.

8. Update the appropriate internal database to reflect the FDIC's action on the Request, the date of the action, the date forwarded to the WO, if applicable, hours spent processing the application, and any other required information.

Reconsideration

1. If the RO grants reconsideration, notify by email the appropriate Section Chief (RMAS or LBS) and WO Legal that a letter was issued granting reconsideration, and noting the specific date (not later than 60 days from receiving the substantially complete Request) by which the FDIC's final decision on the Request must be issued. Attach the letter sent to the applicant.

2. Obtain and analyze the SOI for the original filing and assess the impact the information provided in the Request, if known and available at the time of the denial, would have had on the original filing. Each relevant statutory factor evaluated under the original filing must be re-evaluated in light of the new information, particularly those factors the RO originally found unfavorable.

3. Comments should describe the information provided, explain why the information was not previously set forth in the filing, and address the impact of the information on the evaluation of the original filing and the relevant statutory factors. The memorandum should provide the RO's recommendation.

   If the RO determines that the information provided in the Request would not have resulted in a different determination (*i.e.*, the prior denial determination remains well supported after considering the information provided in the Request), prepare a draft letter to notify the applicant that the FDIC has reconsidered the filing and affirms the prior determination. The letter should explicitly state that the affirmation of the prior determination is a final agency determination.

   If the RO determines that the information provided in the Request supports a different decision (*i.e.*, an approval of, or non-objection to, the original filing), prepare a draft letter to notify the applicant that the FDIC has reconsidered the filing and, based on the information provided in the Request, approves or does not object to the original filing. As appropriate, the approval or non-objection may be subject to conditions.[4] The RO

[4] Any non-standard conditions must be agreed to in writing by the applicant before approval. Refer to *Standard and Non-standard Conditions* in Section 1.11 of these Procedures.

should not contact the applicant regarding any possible conditions, however, as authority to reconsider rests with the Division Director, Supervisory Appeals Review Committee, or FDIC Board.

4. Forward the SOI, the draft letter, the original SOI, and any other pertinent information to the WO (RMAS or LBS Section Chief) for final processing and action. RMAS will consult with WO Legal prior to finalizing a recommendation, and the WO will advise the RO when final action has been taken. The WO will advise the applicant of the FDIC's decision.

IV. TIME FRAME FOR PROCESSING

Request for Review:

Regulatory: Within 15 days of receipt of a Request, the FDIC will notify the applicant whether reconsideration will be granted or denied.

RO Processing Guidelines: If granting, 15 days from receipt. If recommending denial, forward the RO recommendation to the WO within 10 days from receipt of the Request.

Reconsideration:

Regulatory: The FDIC will notify the applicant of its final decision within 60 days of receipt of the Request.

RO Processing Guidelines: 30 days from receipt (this includes the 15 days to grant the Request) to forward RO recommendation to the WO.

RO Guidelines for Mutual to-Stock Conversion Reconsiderations: 20 days from receipt (this includes the 15 days to grant the Request) to forward RO recommendation to the WO.

V. PUBLICATION REQUIREMENT

None.

VI. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

VII. REFERENCES

Section 303.11(f) of the FDIC Rules and Regulations, 12 CFR § 303.11(f)

I. INTRODUCTION

Section 303.251 of the FDIC Rules and Regulations sets forth the procedures to be followed by an insured depository institution (IDI) to seek the prior consent of the FDIC for additional time to fulfill a condition contained in an approval of a filing issued by the FDIC or to consummate a transaction that was the subject of an approval by the FDIC.

Extension of time applications most commonly relate to the following types of applications: establishment of a domestic branch, mergers, retirement of capital, and deposit insurance.

An extension of time approval should be commensurate with the reasonable period of time needed to consummate the transaction. As a matter of policy, an extension will not be granted for a period exceeding one year.

Case Managers must consult with the Washington Office (WO) on any filing 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 information regarding filings involving state savings associations.

II. FORM OF APPLICATION

Applicants should submit a letter application to the appropriate Regional Office (RO) in accordance with Section 303.251 of the FDIC Rules and Regulations. Extension of time applications can also be filed electronically through the FDIC's secure, internet-based communication channel. Refer to *Applications Overview,* Section 1.1 of these Procedures for more information regarding applications filed through electronic communication channel.

The application should contain the following information:

1. A description of the original approved application;

2. Identification of the original time limitation;

3. The additional time period requested; and,

4. The reason for the request.

The FDIC may request additional information at any time during processing of the filing.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process extension of time applications following the steps below and refer to *Applications Overview,* Section 1.1 of these Procedures, for general processing guidance for all application types.[1]

Under no circumstances should an extension request be granted subsequent to expiration of

[1] Case Managers are to follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other applicable instructions in *Applications Overview*, Section 1.1 of these Procedures.

the approval action. In such a case, since the underlying approval has expired, Case Managers should inform the institution that a new application for the underlying transaction or activity is necessary.

A request to extend the time to either comply with conditions imposed through the approval of the underlying application or to consummate the proposed transaction also requires Case Managers to consider whether the facts and circumstances warrant exercising the FDIC's right to alter, suspend or withdraw the prior approval pursuant to the standard conditions. The request may result in the FDIC modifying conditions imposed, adding appropriate conditions, or suspending or withdrawing the approval.

1. Establish the record in the appropriate internal database. All applications are to be entered into the system of record within three days of receipt. The record number of the original application is required to establish the extension record. If the original application has been extended, use the record number of the most recent extension. In all cases, dates and comments in the record should be updated regularly to reflect the current status of the application.

2. Complete the appropriate Summary of Investigation (SOI) form. Retrieve the Application Summary Statement from the appropriate internal database and attach it to the SOI.

   The SOI comments should address the specifics of the request, including the date of the original approval, the expiration of the approval period per the original approval and the timeframe in which the applicant expects to achieve compliance with the condition in question or to consummate the approved transaction. The comments should briefly describe the IDI's current condition and supervisory status, and address the reasons why the condition was not met or the proposal was not consummated as originally expected. The SOI should also state the RO recommendation.

   In analyzing the request for extension, consideration should be given to any changes that have occurred since approval of the underlying application that could negatively impact the original resolution of any statutory factor for the initial approval or other regulatory requirements. Case Managers are also to consider (as applicable) any other supervisory developments, including with respect to the institution's overall safety and soundness, the institution's Community Reinvestment Act and consumer protection performance, and any specialty examination programs. Material developments that negatively impact the original resolution of any statutory factor or regulatory requirement may serve as the basis for exercising the FDIC's right to alter, suspend, or withdraw its prior approval pursuant to the standard conditions, or denying the extension request.

3. If approval is being recommended, prepare a draft approval letter. Consider whether the existing conditions should be reiterated or referenced in the subject approval letter.

4. If the applicant's request for an extension provides insufficient bases for approval, a recommendation to deny the request may be appropriate. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further instruction.

5. If the original application was acted on by the WO and authority has not been otherwise delegated, forward a copy of the SOI, the draft letter, and any other pertinent information to the WO for final processing and action. Refer to *Applications Overview*, Section 1.1 of

these Procedures for additional instructions regarding applications that require WO action or input. Otherwise, the application may be acted on at the RO level, so long as the delegate would have had authority to act on the original application.

6. Update the appropriate internal data base to reflect the date forwarded to the WO, if applicable, the final action, the date of the action, the expiration date, the hours devoted to the application, and any other required information.

IV. EXPIRATION TRACKING AND SHORT TERM EXTENSIONS

Approvals for many application types expire, unless consummated within a fixed period. Each RO is required to establish a system for tracking the status of approvals that are subject to expiration. The tracking procedures should ensure that RO staff is provided at least 60 days advance notice of approval expirations, allowing sufficient time to contact the applicant to determine whether a request for an extension of time is necessary. Case Managers can also track expiring applications in the Active Tasks menu option of the appropriate internal database.

If an applicant submits an extension request prior to the approval expiration, but RO staff cannot make a determination on the request prior to the expiration date, then, after consultation with the WO, an extension of time may be granted for the purpose of finalizing the review. Comments in the system of record should note specific reasons for such extensions.

V. TIME FRAME FOR PROCESSING

Statutory: None.

RO Processing Guideline: 30 days from receipt of a substantially complete application.

VI. PUBLICATION REQUIREMENT

None.

VII. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

VIII. REFERENCES

Section 303.251 of the FDIC Rules and Regulations

I. INTRODUCTION

Pursuant to Section 333.2 of the FDIC Rules and Regulations, no state nonmember insured bank (except a District bank[1]) or branch thereof shall cause or permit any change to be made in the general character or type of business exercised by it without the prior written consent of the FDIC. Section 333.1 sets forth the following five categories into which state nonmember insured banks are divided for the purpose of classifying the general character or type of business:

- Commercial banks;
- Banks and trust companies;
- Savings banks (including mutual and stock);
- Industrial banks; and,
- Cash depositories.

Pursuant to the interpretation provided in Section 333.101(a) of the FDIC Rules and Regulations, the extension by any state nonmember bank of its business to include personal, character or installment loans, or the extension by an industrial bank of its business to include the business of a commercial bank, is not a change in the general character or type of business requiring the prior written consent of the FDIC.

Additionally, the following are not changes in the general character of business and have their own application process. Applications requesting FDIC consent to exercise trust powers are separately discussed under *Consent to Exercise Trust Powers*, Section 13 of these Procedures. Applications requesting FDIC consent to approve conversion from mutual form to a stock form of ownership is discussed under *Mutual-to-Stock Conversions*, Section 10 of these procedures. Applications requesting FDIC consent to approve a new permissible activity is addressed under Section 28 of these procedures related to Part 362 of the FDIC rules and regulations.

Given the relative infrequency of requests pursuant to Section 333.2, the Case Manager should consult with Regional Office (RO) management, RO Legal counsel, and the appropriate Washington Office (WO) Risk Management and Applications Section (RMAS), Large Bank Supervision Group (LBS), or Complex Institution Supervision and Resolution (CISR) Section Chief upon receipt of these filings.

II. FORM OF APPLICATION

Applicants should submit a letter application to the appropriate RO. The application should contain the following information:

1. The general character or type of business change being requested;

2. The reason for the requested change;

3. A summary of future business plans; and,

4. A discussion of members of management capable of prudently exercising the change.

The FDIC may request additional information at any time during processing of the filing.

[1] Bank chartered in the District of Columbia.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process these letter applications following the steps below and refer to *Applications Overview,* Section 1.1 of these Procedures, for general processing guidance for all application types.[2]

1. Establish the record under Other – Miscellaneous - Anything Else in the appropriate internal database. All applications are to be recorded 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.

2. Initially review all materials for completeness and request additional information, if necessary.

3. Request comments from the state regulatory authority.

4. Complete the appropriate Summary of Investigation (SOI) form.[3] Retrieve the Application Summary Statement from the system of record and attach to the SOI. The SOI should address the following:

   - The general character or type of business change being requested;
   - The reason for the requested change;
   - Future business plans/changes to the current business plan;
   - Analysis of the potential effect of the proposed change;
   - The historic compliance and CRA performance of the organization, if applicable;
   - Comments from the state regulatory authority; and,
   - A discussion of whether members of management are capable of managing and implementing the new power(s) to be exercised.

   The narrative portion of the SOI should include a discussion of the effect of the proposed change on the institution overall, with focus on the impact of the change on the current general character or type of business. For applications requiring WO action, SOI comments should address the reasons why action cannot be taken by the RO.

5. If approval is being recommended, prepare a draft approval letter. The letter should request that the applicant notify the appropriate RO of the consummation date and should state that the approval will expire if not consummated within 12 months. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should 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 instruction.

6. If the application presents significant concerns or deficiencies that may result in a denial, the RO shall advise the applicant of the concerns and deficiencies to ensure that all necessary facts are obtained prior to making a final determination. If denial of the application appears warranted, the Case Manager should prepare a disapproval letter. Refer to *Denials and*

[2] Case Managers are to follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other applicable instructions in *Applications Overview*, Section 1.1 of these Procedures.

[3] Case Managers should follow the general instructions and SOI requirements for all types of applications located in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instructions in this Section.

Disapprovals, Section 1.3 of these Procedures, for additional information.

7. Generally, the RO has not been delegated authority to act on these types of applications. The Case Manager should forward a copy of the SOI, the draft letter, and the applicant's written agreement 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.

8. Update the system of record to reflect the date forwarded to the WO, if applicable, the final action, the date of the action, expiration date, the hours devoted to processing the application, and any other required information.

IV. TIME FRAME FOR PROCESSING

Statutory: None.

RO Processing Guideline: 45 days from receipt of a substantially complete application.

V. PUBLICATION REQUIREMENT

None.

VI. DELEGATIONS OF AUTHORITY

Delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

Authority to act on applications submitted pursuant to Section 333.2 has not been explicitly delegated by the FDIC Board. Therefore, Case Managers should consult with the WO upon receiving such a request.

VII. REFERENCES

Section 333.2 of the FDIC Rules and Regulations

I. INTRODUCTION

Section 303.247 of the FDIC Rules and Regulations sets forth the application requirements for a depository institution to request permission to continue or resume its status as an insured depository institution (IDI) after its insured status has been terminated under Section 8 of the Federal Deposit Insurance (FDI) Act. For example, an institution that has had its insured status involuntarily terminated pursuant to Section 8(a) of the FDI Act could have taken corrective action to address the conditions giving rise to the involuntary termination and could seek permission to continue or resume its insured status. This Section covers institutions whose deposit insurance continues in effect for any purpose or for any length of time under the terms of an FDIC Order terminating deposit insurance.[1] This Section does not cover operating non-insured depository institutions that were previously insured by the FDIC, or any non-insured, non-operating depository institution whose charter has not been surrendered or revoked.

Case Managers must consult with the Washington Office (WO) Risk Management and Applications Section (RMAS) on any application related to a state savings association to ensure that 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.

II. FORM OF APPLICATION

Applicants should submit a letter application to the appropriate Regional Office (RO) pursuant to Section 303.247 of the FDIC Rules and Regulations. Case Managers should ensure that the application contains:

1. A complete statement of the action requested, all relevant facts, and the reason for the requested action; and,

2. A certified copy of the resolution of the depository institution's board of directors authorizing submission of the filing.

The FDIC may request additional information at any time during processing of the application.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process applications following the steps below. Refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding receipt and acceptance of applications.[2] The WO Risk Management and Applications Section (RMAS) and Legal, should be notified and consulted immediately upon receipt of this type of application.

1. The application should be entered into the system of record within three business days of receipt. In all cases, dates and comments in the record are to be updated regularly to reflect the current status of the application.

[1] Termination of Insurance Orders are issued pursuant to Sections 8(a), 8(p), and 8(q) of the FDI Act..

[2] Case Managers are to read and follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, and other applicable instructions in in *Applications Overview*, Section 1.1 of these Procedures.

2. Perform an initial review of all materials for completeness, and request additional information if necessary. Other applicable state and federal regulators and the WO should be copied on all pertinent correspondence related to the application.

3. Analyze the application and complete the appropriate Summary of Investigation (SOI) form.[3] Retrieve the Application Summary Statement from the appropriate internal database and attach it to the SOI. SOI comments for applications requiring action by the FDIC Board should it be more comprehensive. Written comments must address each element of the case supporting the 8(a) action and all material changes in circumstances since the 8(a) action. Comments should also address the reasons for the proposed transaction, the effect on capital adequacy, and the overall effect on the safety and soundness of the institution both immediately and on a prospective basis.

4. If approval is recommended, prepare an approval letter. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written agreement to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions*, Section 1.11 of these Procedures, for additional instruction regarding the imposition of conditions.

5. For an application that presents deficiencies or concerns that may result in a denial, the RO should advise the applicant of the deficiencies or concerns to ensure that all necessary facts are obtained prior to making a final determination. In controversial cases, such communication may be withheld until the WO concurs.

6. If denial of the application appears warranted, the Case Manager should prepare a disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further instruction.

7. Forward the SOI, the draft letter, and, if applicable, the applicant's written agreement to any non-standard conditions to the WO for final action by the FDIC Board. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.

8. Update the appropriate internal database to reflect the date forwarded to the WO, the action, the date of the action, the expiration date, the hours devoted to the application, and any other required information.

IV. TIME FRAME FOR PROCESSING

Statutory: None.

The timeframe for processing is dictated by the terms of the termination order with final determination made by WO.

[3] Case Managers should follow the 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.

V. PUBLICATION REQUIREMENT

None.

VI. DELEGATED AUTHORITY

The RO does not have delegated authority to act on these types of applications; the FDIC Board has retained the authority to act. Delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview,* Section 1.1 of these Procedures.

VII. REFERENCES

Section 303.247 of the FDIC Rules and Regulations

Sections 8(a), 8(p), and 8(q) of the FDI Act

I. INTRODUCTION

Section 18(i)(2) of the Federal Deposit Insurance (FDI) Act provides that no insured federal depository institution shall convert into an insured state depository institution if its capital stock or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholder's meeting approving such conversion, without the prior written consent of the FDIC, if the resulting institution is to be a state nonmember insured bank or an insured state savings association.

Case Managers must consult with the Washington Office (WO) on any application related to a state savings association to ensure 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.

II. FORM OF APPLICATION

Section 303.246 of the FDIC Rules and Regulations sets forth the procedures to be followed by an insured federal depository institution seeking the prior written consent of the FDIC for such a conversion. Applicants will submit a letter application to the appropriate Regional Office (RO) that Case Managers are to ensure contains the following information:

1. A description of the proposed transaction;

2. A schedule detailing the present and proposed capital structure; and,

3. A copy of any documents submitted to the state chartering authority with respect to the charter conversion.

The FDIC may request additional information at any time during processing.

III. ACCEPTING AND PROCESSING THE APPLICATION

Case Managers should review and process these applications following the steps below and refer to *Applications Overview*, Section 1.1 of these Procedures, for general processing instruction for all application types.[1]

1. Establish the record under Other – Miscellaneous – Charter Conversion with Diminution of Capital in the appropriate internal database. All applications should be entered in the system of record within three days of receipt. In all cases, dates and comments in the record should be updated regularly to reflect the current status of the application.

2. Initially review all materials for completeness, and request additional information if necessary. If related filings are involved, the Case Manager should coordinate with the applicant and the relevant state and federal regulatory agencies to ensure that all information submissions are promptly provided to the FDIC. The Case Manager should consult with Legal to determine whether a reduction or retirement of capital application is required.
3. Analyze the application and complete the appropriate Summary of Investigation (SOI)

[1] Case Managers are to follow the general guidance and expectations for all applications regarding recordkeeping responsibilities, DCP notifications, WO action or input, delegations, etc., in *Applications Overview*, Section 1.1 of these Procedures.

form.[2] Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI. SOI comments should include:

- A description of the proposed transaction;
- The reason(s) for the proposed transaction;
- The overall effect of the conversion on the institution both immediately and on a prospective basis;
- Analysis of the six statutory factors as required by Section 18(i)(4) of the FDI Act, listed under Statutory Factors, Part IV of this Section;
- A statement regarding whether the statutory factors have been favorably resolved;
- Any recommended non-standard conditions to be imposed; and
- The RO recommendation.

4. If approval is being recommended, prepare a draft approval letter. The letter should request that the applicant notify the appropriate RO of the consummation date and should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should 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 instruction.

5. If the application presents significant concerns or deficiencies that may result in a denial, the RO shall advise the applicant of the concerns and deficiencies to ensure that all necessary facts are obtained prior to making a final determination. If denial of the application appears warranted, the Case Manager should prepare a disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further instruction.

6. For applications that cannot be acted on under delegated authority, forward the SOI, the draft approval or disapproval letter, and, if applicable, 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.

7. Update the appropriate internal database to reflect the date forwarded to the WO, if applicable, the action, the date of the action, the expiration date, hours devoted to the application, and any other required information.

IV. STATUTORY FACTORS

Pursuant to Section 18(i)(4) of the FDI Act, in granting or withholding consent to the proposed transaction, the FDIC must consider the following statutory factors:

- Financial history and condition of the bank;
- Adequacy of the bank's capital structure;
- Future earnings prospects;
- General character and fitness of management;
- Convenience and needs of the community to be served; and,

[2] Case Managers should follow the 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.

- Whether or not the bank's corporate powers are consistent with the purposes of the FDI Act.

Any risks to the Deposit Insurance Fund should be described under one or more of the six applicable statutory factors.

V. TIME FRAME FOR PROCESSING

Statutory: None.

RO Processing Guideline: 30 days from receipt of a substantially complete application.

VI. PUBLICATION REQUIREMENT

None.

VII. DELEGATED AUTHORITY

Delegations of authority regarding applications, notices, and other filings are discussed in *Applications Overview*, Section 1.1 of these Procedures.

VIII. REFERENCES

Section 303.246 of the FDIC Rules and Regulations

Sections 18(i)(2) and 18(i)(4) of the FDI Act

I. INTRODUCTION

Section 347 (Subpart A), issued pursuant to Sections 18(d) and (*l*) of the Federal Deposit Insurance (FDI) Act, and Section 303 (Subpart J) of the FDIC Rules and Regulations establish the FDIC's requirements for insured state nonmember bank investments in foreign organizations; permissible foreign activities; loans or extensions of credit to, or for the account of, foreign organizations;[1] and, the FDIC's recordkeeping, supervision, and approval requirements. The rules also address the permissible activities for foreign branches[2] of insured state nonmember banks, as well as the FDIC's requirements for establishing, operating, relocating, and closing branches in foreign countries. The Case Manager should consult with RMAS, LBS, or CISR as appropriate, regarding applications involving foreign branch or investment activity. The Washington Office (WO) Legal Division should also be consulted to determine whether the subject foreign country limits access to information for supervisory purposes. In addition, the International Affairs Branch of the Division of Insurance and Research is available to assist in the application review, and may assist in facilitating requests for information and communication with foreign regulatory agencies.

Case Managers should review and process the notices and applications discussed in this Section following the steps below, and should refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding filings.[3] In addition, regarding the preparation and content of each Summary of Investigation (SOI) for applications and notices covered in this Section, Case Managers should refer to the guidance contained in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instructions included in *Summary of Investigation Comments,* Part V of this Section.

II. ESTABLISHING, RELOCATING, OR CLOSING A FOREIGN BRANCH

Pursuant to Section 18(d)(2) of the FDI Act, an insured state nonmember bank seeking to establish or operate a foreign branch must receive prior written consent from the FDIC. Section 303, Subpart J, International Banking, of the FDIC Rules and Regulations contains filing procedures and definitions. Sections 347.117 – 119 of the FDIC Rules and Regulations set forth the circumstances under which consent may be obtained through general consent, expedited processing, or specific consent, as described below.

The Case Manager must review upon receipt all notices and applications for establishing, moving, or closing a foreign branch to (1) ensure that the notice or application is substantially complete, (2) determine if general or specific consent applies, (3) determine if expedited processing applies, and (4) determine if WO approval is required or if consultation is necessary.

A. GENERAL CONSENT TO ESTABLISH OR RELOCATE FOREIGN BRANCHES

General consent of the FDIC is granted under Section 347.117(a) of the FDIC Rules and Regulations. General consent applies for an insured state nonmember bank to relocate an existing foreign branch within a foreign country; and for an eligible bank[4] to establish a foreign branch conducting activities authorized by Section 347.115 in any foreign country in which:

- The bank already operates one or more foreign branches or foreign bank subsidiaries;

[1] Case Managers should confirm that the proposed activity is permissible under Part 347 (Subpart A).
[2] Note that Section 3(o) of the FDI Act defines the term "foreign branch" to include any office or place of business located outside of the United States, its territories, Puerto Rico, Guam, America Samoa, or the Virgin Islands, at which banking operations are conducted.
[3] Case Managers should follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, etc. in Applications Overview, Section 1.1 of these Procedures.
[4] Eligible bank means an eligible depository institution as defined in Section 303.2(r) of the FDIC Rules and Regulations, which generally sets forth the eligibility requirements for expedited processing.

- The bank's holding company operates a foreign bank subsidiary; or,

- An affiliated bank or Edge or Agreement corporation[5] operates one or more foreign branches or foreign bank subsidiaries.

The bank is responsible for determining that it meets the criteria for general consent prior to relocating or establishing the foreign branch. General consent is not available if there are limitations on the FDIC's access to supervisory information, even if the bank meets the eligibility requirements of Sections 303.2(r) and 347.117(a) of the FDIC Rules and Regulations.

1. FORM OF GENERAL CONSENT NOTICE

Section 303.182(a) of the FDIC Rules and Regulations requires that an insured state nonmember bank eligible for general consent must provide notice in letter form to the appropriate Regional Office (RO) no later than 30 days after establishing or relocating a foreign branch permitted under general consent.

2. ACCEPTING AND PROCESSING THE GENERAL CONSENT NOTICE

a. Establish the record under Establish a New Foreign Branch in the appropriate internal database. All notices should be entered into the system of record 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. For notices received under general consent, the date a complete notice is received by the RO will be considered the approval date for tracking purposes.

b. Initially review the notice for completeness and request additional information if necessary. Verify that the bank meets the eligible depository institution criteria in Section 303.2(r) of the FDIC Rules and Regulations and that the bank meets the requirements for general consent under Section 347.117(a) of the FDIC Rules and Regulations. If necessary and as appropriate, consult with RMAS, LBS, CISR, and Legal to make a determination regarding eligibility for general consent.

c. If the notice is complete and the bank qualifies for general consent, complete the appropriate SOI form. Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI.

d. Prepare and send a letter acknowledging receipt of the notice to the institution.

e. If the notice is incomplete, or the bank fails to qualify for general consent, coordinate with RMAS, LBS, or CISR to review the notice and facilitate a response to the institution.

f. Update the appropriate internal database to reflect the action, the date of the action, hours devoted to the notice and any other required information.

[5] An Edge Act corporation is a subsidiary of a bank or bank holding company or financial holding company that is chartered by the Federal Reserve under Section 25A of the Federal Reserve Act to engage in foreign banking activities. An Agreement Corporation is a type of bank chartered by a state to engage in international banking. The bank "agrees" with the Federal Reserve Board (FRB) to limit its activities to those allowed for an Edge Act corporation.

B. FOREIGN BRANCH APPLICATIONS – SPECIFIC CONSENT AND EXPEDITED PROCESSING

A bank seeking to establish a foreign branch that does not qualify for general consent is required to submit an application to the appropriate RO. In addition, Section 347.119 of the FDIC Rules and Regulations states that general consent and expedited processing do not apply if applicable law or practice in the foreign country where the foreign branch would be located limits the FDIC's access to information for supervisory purposes. Specific consent is also required when a bank intends to engage in a type or amount of foreign branch activity not permitted by Section 347.115 of the FDIC Rules and Regulations.

1. FORM OF APPLICATION

Section 303.182(b) of the FDIC Rules and Regulations requires a letter application to the appropriate RO, which must include the following information:

a. The exact location of the proposed foreign branch, including the street address;

b. Details concerning any involvement in the proposal by an insider of the applicant, as defined in Section 303.2(u) of the FDIC Rules and Regulations, including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts;

c. A brief description of the applicant's business plan with respect to the foreign branch; and,

d. A brief description of the proposed activities of the branch and, to the extent any of the proposed activities are not authorized by Section 347.115 of the FDIC Rules and Regulations, the applicant's reasons why the proposed activities should be approved.

The FDIC may request additional information to complete processing. In consultation with Legal and RMAS LBS, or CISR, the Case Manager should consider asking the applicant to provide the following information, depending on the specific circumstances of the application and the foreign country.

- The disposition of the application filed with the foreign jurisdiction and a copy of such application;

- The disposition of any related applications filed with the FRB or the state, and a copy of such applications;

- The name, address, phone number, and email address of the foreign regulator/supervisor and licensing authorities with whom the bank has been in contact;

- Any foreign deposit insurance coverage of the proposed foreign branch; and,

- Whether there are any host country legal restrictions (such as privacy, confidentiality, or secrecy laws) or other constraints that will prevent the FDIC from directly or indirectly accessing any information needed to supervise the bank and its foreign activities, preferably expressed in the form of a legal opinion through the engagement of appropriate foreign legal counsel. The legal opinion should disclose and discuss:

- Whether any laws or practices in the host country would prevent the host supervisor from exchanging information with the FDIC concerning the foreign branch;
- Whether the foreign supervisor will allow onsite visits by the FDIC;
- Legal citations to any specific laws in the host country that would expressly permit the sharing of supervisory and customer-related information;
- Legal citations to the specific laws in the host country that limit the sharing of supervisory and customer-related information and describe the measures that the bank will take to overcome these obstacles;
- The extent to which the FDIC can access and review customer-level credit and deposit files and accounts;
- The extent to which the FDIC can access and review local auditor work papers, procedures, and findings;
- The extent to which the host country may permit the branch to alter or expand its activities or product offerings, or operate additional offices beyond those authorized; and,
- Legal citations to Bank Secrecy Act (BSA)/anti-money laundering (AML) and anti-terrorist financing laws and supervisory programs (or equivalents) that will apply to the foreign branch.

2. ACCEPTING AND PROCESSING THE APPLICATION

a. If the application will ultimately be acted upon in the WO, notify RMAS, LBS, CISR, and Legal that a foreign branch application has been received and forward copies of the application and any related materials to the appropriate individuals.

b. Foreign branch applications filed by an eligible depository institution, as defined in Section 303.2(r) of the FDIC Rules and Regulations, will receive expedited processing, unless the applicant is notified in writing that the application is being removed from expedited processing and provided the basis for that decision prior to the deemed approved date. Absent such removal, applications by an eligible depository institution will be deemed approved as described in *Time Frame for Processing*, Part VI of this Section. As such, branch applications should be reviewed upon receipt, or as promptly as possible, to determine if expedited processing applies, or if there are issues that would justify removal of the application from expedited processing pursuant to Section 303.11(c)(2) of the FDIC Rules and Regulations.

c. Consult with RMAS, LBS, CISR, and Legal, as necessary and appropriate, to determine whether the application is eligible for expedited processing or if specific consent applies. Refer to *Modification or Suspension of General Consent or Expedited Processing,* Part IV of this Section, for examples of supervisory concerns that may result in the FDIC removing an application from expedited processing.

d. Establish the record under Establish a New Foreign Branch in the appropriate internal database. All applications should be entered into the system of record within three business days of receipt. In all cases, dates and comments in the database record should be updated regularly to reflect the current status of the application.

e. Analyze the application and complete the appropriate SOI form. Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI. The Case Manager should consult with RMAS (or LBS or CISR, as appropriate) and Legal to discuss and develop any necessary non-standard conditions, such as conditions regarding FDIC access to supervisory information.

f. If approval is being recommended, prepare an approval letter. The letter should request that the applicant notify the appropriate RO of the consummation date. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written agreement to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions,* Section 1.11 of these Procedures, for additional instruction regarding the imposition of conditions.

g. If the application was processed under expedited processing, the approval letter shall state that the filing is deemed approved on a specific future date based on the expedited processing timeframe.

h. If there are deficiencies that may result in denial of the application, the RO should advise the applicant of the deficiencies to ensure that all necessary facts are obtained prior to making a decision. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further instruction.

i. For applications that cannot be acted on under delegated authority, forward the SOI, the draft approval/denial letter, and any other relevant documentation to RMAS, LBS, or CISR for final action. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.

j. Update the appropriate internal database to reflect the date forwarded to the WO, if applicable, the action, the date of the action, the expiration date, hours devoted to the application, and any other required information.

C. BRANCH CLOSING

An insured state nonmember bank must comply with the written notification requirements contained in Section 303.182(d) when it closes a foreign branch. The bank must provide written notice to the appropriate RO within 30 days after it closes a foreign branch. Such notification shall include the name, location, and date of closing of the branch. When a notice is received, the Case Manager should prepare and send an acknowledgment letter, and ensure a structure change form is completed. Notices of foreign branch closings are not entered in the system of record.

III. INVESTMENTS IN FOREIGN ORGANIZATIONS

Pursuant to Section 18(*l*) of the FDI Act, when authorized by State law, a state nonmember insured bank may, with the prior written consent of the FDIC, acquire and hold, directly or indirectly, stock or other evidences of ownership in foreign organizations. Section 303, Subpart J, International Banking, of the FDIC Rules and Regulations contains filing procedures and definitions. The FDIC's consent may be through general consent, expedited processing, or specific consent depending on the circumstances as specified in Part 347.

The Case Manager must review upon receipt all notices and applications regarding direct or indirect investments in a foreign organization to (1) ensure that the notice or application is substantially complete, (2) determine if general or specific consent applies, (3) determine if expedited processing applies, and (4) determine if WO approval is required or if consultation is necessary.

A. GENERAL CONSENT TO INVEST IN A FOREIGN ORGANIZATION

General consent of the FDIC is granted under Section 347.117(b) of the FDIC Rules and Regulations, subject to the written notification requirements contained in Section 303.183(a), for an eligible insured state nonmember bank to make direct or indirect investments in foreign organizations if:

a. The bank operates at least one foreign bank subsidiary or foreign branch, an affiliated bank or Edge or Agreement corporation operates at least one foreign bank subsidiary or foreign branch, or the bank's holding company operates at least one foreign bank subsidiary in the country where the foreign organization will be located;

b. In any instance where the bank and its affiliates will hold 20 percent or more of the foreign organization's voting equity interests or control the foreign organization, at least one state nonmember bank has a foreign bank subsidiary or foreign branch (other than a shell branch[6]) in the country where the foreign organization will be located; and,

c. The investment is within one of the following limits:

    1. The investment is acquired at net asset value from an affiliate;
    2. The investment is a reinvestment of cash dividends received from the same foreign organization during the preceding 12 months; or,
    3. The total investment, directly or indirectly, in a single foreign organization in any transaction or series of transactions during a 12-month period does not exceed 2 percent of the bank's Tier 1 capital and such investments in all foreign organizations in the aggregate do not exceed:

        - 5 percent of the bank's Tier 1 capital during a 12-month period; and
        - Up to an additional 5 percent of the bank's Tier 1 capital if the investments are acquired for trading purposes.

1. FORM OF GENERAL CONSENT NOTICE

As authorized by Section 347.117(b) of the FDIC Rules and Regulations, an eligible institution that has made an investment in a foreign organization pursuant to general consent must provide a letter notice to the appropriate RO within 30 days after taking such action pursuant to Section 303.183(a).

2. ACCEPTING AND PROCESSING THE GENERAL CONSENT NOTICE

a. Establish the record under Foreign Investments in the appropriate internal database. All notices should be entered into the system of record 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 filing. For notices received under general consent, the date a complete notice is received by the RO will be considered the approval date for tracking purposes.

b. Initially review the notice for completeness and request additional information if necessary. Verify that the bank meets the eligible depository institution criteria in Section 303.2(r) of the FDIC Rules and Regulations and that the bank meets the requirements for general consent under Section 347.117(b). If necessary and as appropriate, consult with RMAS and Legal to

[6] The preamble to the final rule regarding Part 347 indicates that the FDIC intends the term "shell branch" to be synonymous with the term "nameplate branch." 70 F.R. 17550, 17552 (April 6, 2005). These terms are frequently used to describe branches established in a foreign country that have no physical presence or operations in that country. For example, frequently when a bank wants to establish a branch in the Cayman Islands, it will obtain a special license to operate a branch from the foreign jurisdiction but the actual banking operations of the branch will take place in the bank's home office in the U.S.

make a determination regarding eligibility for general consent.

c. If the notice is complete and the bank qualifies for general consent, complete the appropriate SOI form. Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI.

d. Send a letter acknowledging receipt of the notice to the institution.

e. If the notice is incomplete, or the bank fails to qualify for general consent, coordinate with RMAS to review the notice and facilitate a response to the institution.

f. Update the appropriate internal database to reflect the final action, the date of the action, hours devoted to the notice, and any other required information.

B. APPLICATIONS FOR INVESTMENT IN FOREIGN ORGANIZATIONS

A bank seeking to make an investment in a foreign organization that does not qualify for general consent is required to submit an application to the appropriate RO. In addition, Section 347.119 of the FDIC Rules and Regulations states that general consent and expedited processing do not apply if applicable law or practice in the foreign country where the foreign organization is located would limit the FDIC's access to information for supervisory purposes and the applicant would hold 20 percent or more of the voting equity interests of a foreign organization or control such organization as a result of a foreign investment.

1. FORM OF APPLICATION

Pursuant to Section 303.183(b) of the FDIC Rules and Regulations, a complete application shall include the following:

a. Basic information about the terms of the proposed transaction, the amount of the investment in the foreign organization, and the proportion of its ownership to be acquired;

b. Basic information about the foreign organization, its financial position and income, including any available balance sheet and income statement for the prior year, or financial projections for a new foreign organization;

c. A listing of all shareholders known to hold ten percent or more of any class of the foreign organization’s stock or other evidence of ownership, and the amount held by each;

d. A brief description of the applicant’s business plan with respect to the foreign organization;

e. A brief description of the foreign organization’s activities, including any business or activities which the foreign organization will conduct directly or indirectly in the U.S., and to the extent such activities are not authorized by Subpart A of Part 347 of the FDIC Rules and Regulations, the applicant’s reasons why the activities should be approved; and,

f. If the applicant seeks approval to engage in securities underwriting or dealing activities, a description of the applicant’s plans and procedures to address all relevant risks.

The FDIC may request additional information to complete processing. In consultation with Legal, RMAS, LBS, and CISR, as appropriate, the Case Manager should consider asking the applicant to provide the following information, depending on the specific circumstances of the application and

the foreign country:

- The disposition of the application filed with the foreign jurisdiction and a copy of such application;

- The disposition of any related applications filed with the FRB or the state, and a copy of such applications;

- Financial projections for each of the three years following consummation of the transaction may be requested, particularly if plans include changes to the business model, expansion into new markets, targeting specific types of customers, or other material growth;

- The name, address, phone number, and email address of the foreign regulator/supervisor and licensing authorities with whom the bank has been in contact;

- The extent to which the foreign branch will be regulated and supervised by any foreign authorities through onsite and offsite monitoring, and a description of the licensing requirements;

- If applicable, any foreign deposit insurance coverage of the subject foreign organization; and,

- Whether any host-country legal restrictions (such as privacy, confidentiality, or secrecy laws) or other constraints will prevent the FDIC from directly or indirectly accessing any information needed to supervise the bank and its foreign activities, preferably expressed in the form of a legal opinion through the engagement of appropriate foreign legal counsel. The legal opinion should disclose and discuss:

    - Whether any laws or practices in the host country would prevent the host supervisor from exchanging information with the FDIC concerning the foreign organization;
    - Whether the foreign supervisor will allow onsite visits by the FDIC;
    - Legal citations to any specific laws in the host country that would expressly permit the sharing of supervisory and customer-related information;
    - Legal citations to the specific laws in the host country that would limit the sharing of supervisory and customer-related information and describe the measures that the institution will take to overcome these obstacles;
    - The extent to which the FDIC can access customer-level credit and deposit files and accounts;
    - The extent to which the FDIC can access and review local auditor work papers, procedures, and findings;
    - The extent to which the host country may permit the foreign organization to alter or expand its activities or product offerings, or operate additional offices beyond what was authorized; and,
    - Legal citations to BSA/AML and anti-terrorist financing laws and supervisory programs, or equivalents that will apply to the foreign organization.

2. ACCEPTING AND PROCESSING THE APPLICATION

a. If the application will ultimately be acted upon in the WO, notify RMAS, LBS, CISR, and Legal, as appropriate, that an application to invest in a foreign organization has been received

and forward copies of the application and any related materials to the appropriate individuals.

b. Applications filed by an eligible depository institution, as defined in Section 303.2(r) of the FDIC Rules and Regulations, will receive expedited processing, unless the applicant is notified in writing that the application is being removed from expedited processing and provided the basis for that decision prior to the deemed approved date. Absent such removal, applications by an eligible depository institution will be deemed approved as described in *Time Frame for Processing*, Part VI of this Section. As such, these applications should be reviewed upon receipt, or as promptly as possible, to determine if expedited processing applies, or if there are issues that would justify removal of the application from expedited processing pursuant to Section 303.11(c)(2) of the FDIC Rules and Regulations.

c. Consult with RMAS, LBS, CISR, and Legal, as necessary and appropriate, to determine whether the application is eligible for expedited processing or if specific consent applies. Refer to *Modification or Suspension of General Consent or Expedited Processing,* Part IV of this Section, for examples of supervisory concerns that may result in the FDIC removing an application from expedited processing.

d. Establish the record under Foreign Investments in the appropriate internal database. All applications should be entered into the system of record 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.

e. Initially review all materials for completeness and request additional information if necessary. The Case Manager should consult with RMAS and Legal, as appropriate, to make a determination regarding whether the application is substantially complete.

f. Analyze the application and complete the appropriate SOI form. Retrieve the Application Summary Statement from the appropriate internal database and attach to the SOI. The Case Manager should consult with RMAS, LBS, CISR, and Legal, as appropriate, to discuss and develop any necessary non-standard conditions, such as conditions regarding FDIC access to supervisory information.

g. If approval is being recommended, prepare an approval letter in consultation with WO RMAS, large bank divisions, and Legal, as appropriate. The letter should remind the applicant to notify the RO of the consummation date. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written agreement to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions*, Section 1.11 of these Procedures, for additional instruction regarding the imposition of conditions.

h. If the application was processed under expedited processing, the approval letter shall state that the filing is deemed approved on a specific future date based on the expedited processing timeframe.

i. If there are deficiencies that may result in denial of the application, the RO should advise the applicant of the deficiencies to ensure that all relevant facts are obtained prior to making a decision. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for further instruction.

j. For applications that cannot be acted on under delegated authority, forward the SOI, the draft letter, and any other relevant documentation 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.

k. Update the appropriate internal database to reflect the date forwarded to the WO, if applicable, the action, the date of the action, the expiration date, hours devoted to the application, and any other required information.

C. DIVESTITURE OF INVESTMENTS IN FOREIGN ORGANIZATIONS

Section 303.183(d) of the FDIC Rules and Regulations states that if an insured state nonmember bank holding 50 percent or more of the voting equity interests in, or otherwise controls a foreign organization divests of such ownership or control, the bank shall file a notice in the form of a letter to the FDIC within 30 days after the divestiture. The notification shall include the name, location, and date of divestiture. The Case Manager should prepare and send an acknowledgement letter to the bank. Notices of divestiture are not entered in the system of record.

IV. MODIFICATION OR SUSPENSION OF GENERAL CONSENT OR EXPEDITED PROCESSING

Under the general consent provisions of Sections 303.182 and 347.117 of the FDIC Rules and Regulations, a state nonmember bank is required to provide the FDIC written notice of actions to establish, move or close a foreign branch, or make investments in foreign organizations within 30 days after taking such action. The FDIC is to provide written acknowledgement of the notice. If the institution seeks to establish, move or close a foreign branch, or make investments in foreign organizations other than as provided for in Section 347.117, the institution must file an appropriate application with the FDIC.

Section 347.119(c) of the FDIC Rules and Regulations provides for the modification or suspension of general consent related to a notice, or removal of an application from expedited processing procedures. While such actions could be taken in situations where the FDIC has supervisory concerns regarding the institution's foreign banking activities, the FDIC has no record of taking such actions to date. Therefore, under Section 347.119(c), modification or suspension of general consent, or removal of an application from expedited processing, would likely be a matter of first impression. Consequently, any such actions must be determined in consultation with WO RMAS, LBS, CISR, and Legal, as appropriate.

V. SUMMARY OF INVESTIGATION COMMENTS

The level of detail included in SOI comments should be commensurate with the volume and nature of the activities proposed by the institution in relation to its existing activities and expertise, the level of projected growth at the foreign branch or the level of projected growth related to the proposed foreign investment, and the financial condition of the applicant.

The SOI comments should include a summary of the notice or application, the legal framework applicable to the notice or application, discussion of foreign activities of the applicant, an assessment of management, a summary of the bank's overall financial condition, host country supervisory issues, a conclusion, and the RO recommendation. If other related applications are pending, the status of these actions should also be discussed.

SUMMARY

The summary of the notice or application should at a minimum:

- Describe the terms of the transaction or activity, including any contingencies related to the proposal

and the expiration date of the agreement;

- Discuss and assess the applicant's due diligence process, results, and findings;
- Describe and assess any insider involvement;
- Describe the major business lines and primary market areas of the proposed foreign branch or foreign organization;
- List the locations of any branches or other offices of the foreign organization;
- Describe any particular risks unique to the proposed activity or investment, address management's plans to control these risks, and how each may impact the institution's overall safety and soundness; and,
- Indicate whether the foreign organization conducts business in the U.S. or with U.S. citizens, and the type of business. Discuss whether such business is incidental to the international or foreign business conducted or proposed pursuant to Section 18(*l*) of the FDI Act.

LEGAL FRAMEWORK

In consultation with Legal, describe the legal framework under which the activity is being proposed. Incorporate any legal opinions obtained from FDIC or bank counsel. Examples of FDIC and state statutes pertinent to the respective application types, are:

- Foreign Branch: Section 18(d) of the FDI Act, and Section 303.182 and Part 347 of the FDIC Rules and Regulations.
- Foreign Organization: Section 18(*l*) of the FDI Act, Section 303.183 and Part 347 of the FDIC Rules and Regulations and specific state statutes.

Comments should also note any indicants of potential noncompliance with any applicable regulations.

APPLICANT'S FOREIGN ACTIVITIES

- Identify and describe the applicant's existing or prior foreign branches, investments in foreign organizations, or any other foreign activities.
- Indicate if the applicant has complied with the approval conditions for prior branches or investments in foreign organizations.
- List the aggregate investment in foreign organizations as a percentage of the applicant's Tier 1 Capital, both currently and prospectively, including the proposed transaction. Include corporations organized under Section 25A of the Federal Reserve Act (Edge Act corporations).
- Indicate if the dollar amount of the proposed foreign organization investment is within supervisory limits and the bank's policy limits.

MANAGEMENT

- Describe and evaluate current and proposed management involved in proposed and existing foreign

activities.

- Discuss ownership and affiliation of the proposed foreign organization.

- Discuss the strategic operating plan and how it relates to the application, as well as the expected benefits and inherent risks related to the proposed transaction.

- Summarize the proposed operational controls, and audit program and standards, for the foreign branch or foreign organization.

- Discuss the compatibility of the applicant's management information systems with those of the foreign branch or foreign organization.

- Describe management's plans to overcome any differences in accounting procedures or language/translation issues.

FINANCIAL CONDITION

- Summarize the applicant's year-end financial performance for the preceding three years and the most recent interim quarter.

- Provide the applicant's CAMELS ratings, SCOR data, and specialty examination ratings.

- Identify any significant prior regulatory criticisms relevant to the proposed activity, including those related to applicable specialty areas, and indicate whether the applicant satisfactorily addressed these issues.

- If the applicant is owned by a holding company, provide the current FRB rating, total assets and capital ratios of the holding company as of the most recent quarter-end.

- Discuss how the foreign branch or investment in the foreign organization will affect the applicant's overall condition, risk profile and future prospects.

- If appropriate, summarize pro-forma financial projections for each of the three years following consummation of the transaction. Financial projections for each of the three years following consummation of the transaction may be requested, particularly if plans include changes to the business model, expansion into new markets, targeting specific types of customers, or other material growth.

HOST COUNTRY SUPERVISORY ISSUES

Identify which foreign authorities, if any, supervise the proposed foreign branch or foreign organization. Consult with WO RMAS, LBS, CISR, and Legal, as necessary, to research and comment on any potential host country supervisory issues or concerns. If the foreign branch or foreign organization is regulated, describe the following items as applicable:

- Supervisory powers of the host country authorities and any onsite examinations and offsite monitoring conducted by foreign supervisory authorities.

- If the application involves a foreign organization or proposed branch that is not subject to foreign supervision, state so and discuss whether this presents a supervisory concern or if the activity

warrants a specialized supervisory strategy.

- Whether the foreign organization is in compliance with established supervisory standards of the host country and if any enforcement actions are outstanding, pending, or recently terminated or otherwise settled.

- Any deposit insurance coverage that exists in the host country and whether such coverage applies to the proposed branch or foreign organization.

CONCLUSION

Discuss whether the proposed transaction poses any undue risk to the Deposit Insurance Fund or to the applicant.

REGIONAL OFFICE RECOMMENDATION

State the RO's recommendation for approval or denial of the application. Indicate if the RO recommends any non-standard conditions. Summarize comments from other applicable supervisory authorities, both foreign and domestic, and state whether these authorities expressed any concerns regarding the application.

VI. TIME FRAME FOR PROCESSING

Expedited Processing for Eligible Institutions:

The RO must take action on a branch application or application for investment in a foreign organization receiving expedited processing prior to the "deemed approved" date. An application submitted by an eligible depository institution will be "deemed approved" 45 days after receipt of a substantially complete application by the FDIC. The FDIC may remove an application from expedited processing prior to the "deemed approved" date for any of the reasons set forth in Section 303.11(c)(2) of the FDIC Rules and Regulations.

Standard Processing:

Statutory: None

RO Processing Guideline:

Within 60 days of receipt of a substantially complete branch application.
Within 75 days of receipt of a substantially complete foreign investment application.

VII. PUBLICATION REQUIREMENT

None.

VIII. DELEGATED AUTHORITY

The Case Manager should refer to the delegations of authority matrices; additional information is provided in *Applications Overview,* Section 1.1 of these Procedures. On a case-by-case basis, the Division of Risk Management Supervision (RMS) Director, Deputy Director, or Associate Director may delegate approval authority for applications to the RMS Regional Director or Deputy Regional Director. This delegated authority may be exercised only after determining, with input from Legal, that any issues related to the foreign operations have been addressed, including the imposition of any necessary non-standard conditions.

IX. REFERENCES

Bank Holding Company Act (FRB Regulation Y)

Section 25A of the Federal Reserve Act

Parts 303 and 347 of the FDIC Rules and Regulations

Sections 18(d)(2) and 18(l) of the FDI Act

I. INTRODUCTION

Section 347 (Subpart B), issued pursuant to Sections 5(c) and 10(b)(4) of the Federal Deposit Insurance (FDI) Act and Sections 6, 7, and 15 of the International Banking Act of 1978, and Section 303 (Subpart J) of the FDIC Rules and Regulations establish the FDIC's requirements for foreign banks with branches in the U.S. The Foreign Bank Supervision Enhancement Act of 1991, Sections 201 through 215 of the Federal Deposit Insurance Corporation Improvement Act (FDICIA), precludes the establishment of new insured branches of foreign banks in the U.S. Foreign banks seeking to engage in insured domestic retail deposit-taking activities must establish a depository institution subsidiary, unless the foreign bank has U.S. branches that were insured prior to December 19, 1991.

This Section of these Procedures discusses applications related to U.S. activities of insured branches of foreign banks. U.S. activities of foreign banks that are subject to application or notification requirements include the following:

- Moving or merging an insured branch;
- Conducting activities not permissible for federal branches; and,
- Divesting an impermissible activity.

Institutions may also seek an exemption from insurance requirements for a state branch of a foreign bank.

The FDIC, the Board of Governors of the Federal Reserve System (FRB), and the Conference of State Bank Supervisors (CSBS) entered into the Nationwide State/Federal Foreign Banking Organization Supervision and Examination Coordination Agreement (State-Federal Agreement) on November 20, 1998. The State-Federal Agreement parallels the Nationwide Foreign Banking Organization Supervision and Examination Coordination Agreement (State Coordination Agreement), which was also executed on November 20, 1998. The Agreements set forth procedures for the coordination of examinations, applications, supervisory actions, and other matters relating to multi-state operations of foreign banking organizations (FBOs). The Agreements provide that all FBOs with operations in multiple states will be assigned a State Coordinator to act as a single point of contact for coordination of the supervision and examination of the particular FBO. Both Agreements are available on the CSBS website at the following link:

CSBS Cooperative Agreements

Case Managers should review and process the notices and applications discussed in this Section following the steps below, and should refer to *Applications Overview*, Section 1.1 of these Procedures, for general information regarding filings.[1] In addition, regarding the preparation and content of the Summary of Investigation (SOI) for applications and notices covered in this Section, Case Managers should refer to the guidance contained in *Summary of Investigation*, Section 1.2 of these Procedures, as well as the specific instruction included within this Section.

II. MOVING AN INSURED BRANCH OF A FOREIGN BANK

Section 18(d)(1) of the FDI Act requires a foreign bank to obtain FDIC consent to move an insured branch from one location to another. Regarding such consent, the FDIC must consider the statutory factors in Section 6 of the FDI Act. Section 303, Subpart J, of the FDIC Rules and Regulations sets forth filing procedures and definitions.

[1] Case Managers should follow the general guidance and expectations for all applications regarding receipt and acceptance, recordkeeping responsibilities, DCP notifications, WO action or input, delegations, etc. in *Applications Overview*, Section 1.1 of these Procedures.

A. FORM OF APPLICATION

Section 303.184 of the FDIC Rules and Regulations requires an application by an insured branch of a foreign bank seeking the FDIC's consent to move from one location to another to be submitted in writing to the appropriate Regional Office (RO) on the date the notice is published, or within five days after the date of the last required publication. If the bank is filing an application with the Office of the Comptroller of the Currency that includes the information described below, the bank may submit a copy to the FDIC in lieu of a separate application. A complete application includes the following information:

1. The exact location of the proposed site, including the street address. If the site does not have a street address, a precise description of its location must be provided. For example, "the east side of U.S. Highway XX, 400 feet south of the intersection of U.S. Highway XX and State Road XX." If the site is at the intersection of two roads, the quadrant in which the site lies will need to be designated. The location of the site must be used for publication purposes. Proposals involving the use of temporary quarters should be considered two moves.

2. Details concerning any involvement in the proposal by an insider (as defined in Section 303.2(u) of the FDIC Rules and Regulations), including any financial arrangements relating to fees, the acquisition of property, leasing of property, and construction contracts. Case Managers are to assess documentation provided by the applicant to ensure that the proposed insider transactions are fair and reasonable in comparison to similar arrangements that could have been made with independent third parties;

3. Details regarding any changes in services to be offered, the community to be served, or any other effect the proposal may have on the applicant's compliance with the Community Reinvestment Act (CRA); and,

4. A copy of the newspaper publication(s), as well as the name and address of the newspaper(s) and the date(s) of the publication(s).

The FDIC may request additional information to complete processing.

B. ACCEPTING AND PROCESSING THE APPLICATION

1. Review the application upon receipt, or as soon as practical, to determine whether expedited processing applies or if there are issues that would justify removal of the application from expedited processing pursuant to Section 303.11(c)(2) of the FDIC Rules and Regulations. An application filed by an eligible insured branch as defined in Section 303.181(c) will receive expedited processing, if the applicant is proposing to move within the same state ("intrastate"), unless the applicant is notified in writing prior to the deemed approved date that the application is being removed from expedited processing and provided with the basis for that decision. Absent such removal, the application will be deemed approved as described under *Time Frame for Processing* below.

2. Establish the record under Other – Miscellaneous in the appropriate internal database, select *Anything Else* as the type. All applications should be entered into the system of record 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.

3. Notify the Division of Depositor and Consumer Protection (DCP) of receipt of the application. Refer to *Applications Subject to CRA and Compliance Examinations*, Section 1.10 of these Procedures, for further instructions.

4. While processing branch applications, the FDIC must comply with the requirements of the NHPA and NEPA. Refer to Sections 1.7 and 1.8 of these Procedures for further discussion of the application processing procedures relative to the NHPA and NEPA, respectively.

5. Initially review all materials for completeness, and request additional information if necessary.

6. Analyze the application and complete the appropriate SOI form. Retrieve the Applications Summary Statement from the appropriate internal database and attach it to the SOI. In order to approve an application to move an insured branch of a foreign bank, the FDIC must evaluate and favorably resolve each requirement for approval set forth in Section 303.184(d) of the FDIC Rules and Regulations. These requirements are:

    a. The statutory factors set forth in Section 6 of the FDI Act have been considered and favorably resolved;[2]
    b. The applicant is at least adequately capitalized as defined in Part 324 of the FDIC Rules and Regulations.
    c. Any financial arrangements with insiders made in connection with the proposed relocation are fair and reasonable in comparison to similar arrangements that could have been made with independent third parties;
    d. Compliance with the CRA, NEPA, NHPA and any applicable related regulations has been considered and favorably resolved;
    e. No CRA protest has been filed which remains unresolved or, if such a protest has been filed that remains unresolved, the Director or designee concurs that approval is consistent with the purposes of the CRA and the applicant agrees in writing to any conditions imposed regarding the CRA; and,
    f. The applicant agrees in writing to any non-standard conditions.

    SOI comments should address each of the above requirements and should include the address and description of the new branch, activities of the branch, the business plan and any changes to the business plan, and any other comments that may be warranted.

    Special Considerations for Interstate Relocations - If the foreign bank proposes to relocate an insured state branch to a state that is outside the state where the branch is presently located, in addition to meeting the criteria for an intrastate relocation, the foreign bank must:

    a. Comply with any applicable state laws or regulations of the states affected by the proposed relocation; and,
    b. Obtain any required regulatory approvals from the appropriate state licensing authority of the state to which the insured branch proposes to relocate before relocating the existing branch operations and surrendering its existing license to the appropriate state licensing authority of the state from which the branch is relocating.

7. If approval is being recommended, prepare an approval letter. The letter should request that the applicant notify the appropriate RO of the consummation date and should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written agreement to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions,* Section 1.11 of these Procedures, for additional guidance regarding the imposition of conditions.

8. If there are deficiencies that may result in denial of the application, the RO should advise the applicant of the deficiencies to ensure that all necessary facts are obtained prior to making a

[2] Refer to *Establish A Domestic Branch*, Section 7 of these Procedures, for additional guidance.

decision. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further guidance.

9. For applications that cannot be acted on under delegated authority, submit the SOI and draft letter to the WO for final processing. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.

10. Update the appropriate internal database to reflect the date forwarded to the WO, if applicable, the action, the date of the action, hours devoted to the application, and any other required information.

C. TIME FRAME FOR PROCESSING

Expedited Processing (Available for Intrastate Branch Relocations Only):

The RO must take action on a branch relocation application receiving expedited processing prior to the "deemed approved" date. The FDIC may remove an application from expedited processing prior to the "deemed approved" date for any of the reasons set forth in Section 303.11(c)(2) of the FDIC Rules and Regulations. An application processed under expedited processing will be deemed approved on the latest of the following:

- The 21st day after the FDIC's receipt of a substantially complete application; or,
- The 5th day after expiration of the comment period.

Standard Processing:

Statutory: None

RO Processing Guideline: 45 days from receipt of a substantially complete application.

WO Processing Guideline: 45 days from receipt from the RO.

D. PUBLICATION REQUIREMENT

The applicant shall publish a notice of its proposal to move from one location to another in a newspaper of general circulation in the community in which the insured branch is located prior to the move, and in the community to which it is to be moved. The notice shall include the insured branch's current and proposed addresses. If the insured branch has a public lobby, a copy of the newspaper publication shall be posted in the public lobby for at least 15 days beginning on the date of the publication.

All public comments must be received by the appropriate RO within 15 days after the date of the last required newspaper publication, unless the comment period has been extended or reopened.

E. DELEGATED AUTHORITY

The Case Manager should refer to the delegations of authority matrices; additional information is provided in *Applications Overview,* Section 1.1 of these Procedures.

III. MERGERS INVOLVING AN INSURED BRANCH OF A FOREIGN BANK

Mergers requiring the FDIC's prior approval, as set forth in Section 303.62 of the FDIC Rules and Regulations, are detailed in *Merge or Consolidate,* Section 4 of these Procedures, and include any merger in which the resulting institution is an insured branch of a foreign bank, or any merger that involves an insured branch and an uninsured institution.

IV. EXEMPTIONS FROM INSURANCE REQUIREMENTS

Pursuant to Section 347.213 of the FDIC Rules and Regulations, a foreign bank may establish and operate a state branch, as provided by state law, without federal deposit insurance whenever (1) the branch only accepts initial deposits in an amount equal to or greater than the Standard Maximum Deposit Insurance Amount (SMDIA) as defined at Section 347.202(v) of the FDIC Rules and Regulations; or (2) the branch meets the criteria set forth in Sections 347.214 and 347.215 of the FDIC Rules and Regulations.

If a foreign bank proposes to accept initial deposits of less than the SMDIA and such deposits are not otherwise exempted under Section 347.215(a) of the FDIC Rules and Regulations, the foreign bank must obtain FDIC consent to operate as a noninsured branch.

The FDIC Board may exempt the state branch from the insurance requirement if the branch is not engaged in domestic retail deposit activities requiring insurance protection. The FDIC Board will consider the size and nature of deposit accounts; the importance of maintaining and improving the availability of credit to all sectors of the U.S. economy, including the international trade finance sector of the U.S. economy; whether the exemption would give the foreign bank an unfair competitive advantage over U.S. banking organizations; and, any other relevant factors.

A. FORM OF APPLICATION

Section 303.186(a) of the FDIC Rules and Regulations requires a foreign bank seeking consent to operate as a noninsured state branch to submit an application in writing to the appropriate RO. Complete applications include:

1. The kinds of deposit activities in which the branch proposes to engage;

2. The expected sources of deposits;

3. The manner in which deposits will be solicited;

4. How the activity will maintain or improve the availability of credit to all sectors of the U.S. economy, including the international trade finance sector;

5. A supported statement that the activity will not give the foreign bank an unfair competitive advantage over U.S. banking organizations; and,

6. A resolution by the applicant's board of directors authorizing the filing of the application; or, if a resolution is not required pursuant to the applicant's organizational documents, evidence of approval by its senior management.

The FDIC may request additional information to complete processing.

B. ACCEPTING AND PROCESSING THE APPLICATION

1. Establish the record under Other – Miscellaneous in the appropriate internal database, and select *Applications to Operate a Noninsured Branch of a Foreign Bank* as the type. All applications should be entered into the system of record 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.

2. Initially review all materials for completeness, and request additional information if necessary.

3. Analyze the application and complete the appropriate SOI form. Retrieve the Applications Summary Statement from the appropriate internal database and attach it to the SOI. SOI comments should address the application requirements described in *Form of Application,* Part IV, Subpart A of this Section.

4. If approval is being recommended, prepare an approval letter. The letter should request that the applicant notify the appropriate RO of the consummation date and should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written agreement to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions,* Section 1.11 of these Procedures for additional guidance regarding the imposition of conditions.

5. If the application presents deficiencies that may result in its denial, the RO should advise the applicant of the concerns and deficiencies and provide the applicant an opportunity to submit additional information or withdraw the application. If denial is being recommended, prepare a disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further guidance.

6. Submit the SOI and draft letter to the WO for final processing. The WO will finalize the review and necessary documents. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.

7. Update the appropriate internal database to reflect the date forwarded to the WO, hours devoted to the application, and any other required information.

C. TIME FRAME FOR PROCESSING

Statutory: None

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

WO Processing Guideline: 60 days from receipt from the RO.

D. PUBLICATION REQUIREMENT

None

E. DELEGATED AUTHORITY

The Case Manager should refer to the delegations of authority matrices; additional information is provided in *Applications Overview,* Section 1.1 of these Procedures.

V. PERMISSION TO ENGAGE IN AN ACTIVITY NOT PERMISSIBLE FOR A FEDERAL BRANCH

Section 347.212 of the FDIC Rules and Regulations requires a foreign bank operating an insured state branch to file a written application with the FDIC for permission to engage in or to continue to engage in any type of activity that is not permissible for a federal branch. However, the foreign bank shall not be required to submit an application if:

(1) The FDIC has already determined that the activity does not present a significant risk to the Deposit Insurance Fund (DIF) pursuant to Part 362 of the FDIC Rules and Regulations; or,

(2) The activity is conducted as agent, the activity is a permissible agency activity for an insured state branch in the state in which the branch is located, the activity is a permissible agency activity for a state-licensed branch of a foreign bank located in that state, and the activity is permissible pursuant to any other applicable federal law or regulation.

A. FORM OF APPLICATION

Section 303.187 of the FDIC Rules and Regulations requires an insured state branch seeking approval to conduct activities not permissible for a federal branch to submit a letter application to the appropriate RO. If the bank has filed an application with the FRB that provides the information described below, the bank may submit a copy to the FDIC in lieu of a separate application. The application shall include the following information:

1. A brief description of the activity, including the manner in which the activity will be conducted and an estimate of the expected dollar volume associated with the activity;

2. An analysis of the impact of the proposed activity on the condition of the U.S. operations of the foreign bank in general, and of the branch in particular, including a copy of the feasibility study, management plan, financial projections, business plan, or similar document concerning the conduct of the activity;

3. A resolution by the applicant's board of directors authorizing the filing of the application or, if a resolution is not required pursuant to the applicant's organizational documents, evidence of approval by its senior management;

4. A statement by the applicant of whether the branch is in compliance with Sections 347.209 and 347.210 of the FDIC Rules and Regulations, titled *Pledge of Assets* and *Asset Maintenance*, respectively;

5. A statement by the applicant that it has complied with all requirements of the FRB concerning applications to conduct the activity in question, and the status of each such application, including a copy of the FRB's disposition of such application, if applicable; and,

6. A supported statement as to why the activity will not pose a significant risk to the DIF.

The FDIC may request additional information to complete processing.

B. ACCEPTING AND PROCESSING THE APPLICATION

1. Establish the record under Other – Miscellaneous in the appropriate internal database and select *Application by Insured State Branch of Foreign Bank to Conduct Activity Not Permissible for Federal Branches* as the type. All applications should be entered into the system of record 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.

2. Initially review all materials for completeness, and request additional information if necessary.

3. Analyze the application and complete the appropriate SOI form. Retrieve the Applications

Summary Statement from the appropriate internal database and attach it to the SOI. SOI comments should address the application requirements described in *Form of Application,* Part V, Subpart A of this Section.

4. If approval is being recommended, prepare an approval letter. The letter should include all applicable standard conditions and any recommended non-standard conditions. The application may be conditioned on the applicant's agreement to conduct the activity subject to specific limitations, such as pledging assets and/or maintaining eligible assets in excess of the requirements of Section 347.209 and Section 347.210 of the FDIC Rules and Regulations, respectively. In the case of an application to initially engage in an activity, as opposed to an application to continue to conduct an activity, the approval letter should indicate that the insured state branch shall not commence the activity until it has been approved in writing by the FDIC and the FRB, and all conditions imposed have been satisfied.

5. The Case Manager should obtain the applicant's written agreement to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions*, Section 1.11 of these Procedures, for additional guidance regarding the imposition of conditions.

6. If the application presents deficiencies that may result in a denial, the RO should advise the applicant of the deficiencies to ensure that all necessary facts are obtained prior to making a decision. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals,* Section 1.3 of these Procedures, for further guidance.

7. Submit the SOI and draft letter to RMAS for final processing. RMAS will finalize the review and the necessary documents. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.

8. Update the appropriate internal database to reflect the date forwarded to RMAS, hours devoted to the application, and any other required information.

C. TIME FRAME FOR PROCESSING

Statutory: None

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

WO Processing Guideline: 60 days from receipt from the RO.

D. DELEGATED AUTHORITY

The Case Manager should refer to the delegations of authority matrices; additional information is provided in *Applications Overview,* Section 1.1 of these Procedures.

VII. DIVESTITURE OR CESSATION

Section 347.212(e) of the FDIC Rules and Regulations requires a foreign bank operating an insured state branch to submit a plan of divestiture or cessation of an activity to the appropriate Regional Director when (1) an application for permission to continue to conduct an activity is not approved by the FDIC or the FRB; or, (2) the foreign bank elects not to apply to the FDIC for permission to continue to conduct an activity that is rendered impermissible by any change in statute, regulation, official bulletin or circular, written order or interpretation, or decision of a court of competent jurisdiction. The divestiture plan should be submitted

to the appropriate RO no later than 60 days after the disapproval or the triggering event. Divestitures or cessations must be completed within one year from the date of the disapproval, or within a shorter period of time as directed by the FDIC.

A. FORM OF APPLICATION

Section 303.187(b) of the FDIC Rules and Regulations states that divestiture plans necessitated by a change in law or other authority shall be submitted in writing to the appropriate RO and shall include the following information:

1. A detailed description of the manner in which the applicant proposes to divest itself of or cease the activity in question; and,

2. A projected timetable describing how long the divestiture or cessation is expected to take.

The FDIC may request additional information to complete processing.

B. ACCEPTING AND PROCESSING THE APPLICATION

1. Establish the record under Other – Miscellaneous in the appropriate internal database and select *Divestiture Plans for Nonpermissible Activities* as the type. All applications should be entered into the system of record 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.

2. Initially review all materials for completeness, and request additional information if necessary.

3. Analyze the divestiture plan and complete the appropriate SOI form. Retrieve the Applications Summary Statement from the system of record and attach it to the SOI. The SOI narrative should include a description of the activity in question, the manner in which the applicant proposes to divest itself of or cease the activity in question, a projected timetable describing the time required to complete the divestiture or cessation, the recommended action, and the analysis that led to the recommended action.

4. If approval is being recommended, prepare an approval letter. The letter should include all applicable standard conditions and any recommended non-standard conditions. The Case Manager should obtain the applicant's written agreement to any non-standard conditions prior to submitting the approval documents for signature. See *Standard and Non-standard Conditions*, Section 1.11 of these Procedures, for additional guidance regarding the imposition of conditions.

5. If there are concerns or deficiencies that may result in denial, the RO should advise the applicant of the deficiencies to ensure that all necessary facts are obtained prior to making a decision. If recommending denial, prepare a draft disapproval letter. Refer to *Denials and Disapprovals*, Section 1.3 of these Procedures, for further guidance.

6. If denial is recommended, coordinate with RMAS and submit the SOI and draft denial letter to RMAS for final processing. RMAS will finalize the review and the necessary documents. Refer to *Applications Overview*, Section 1.1 of these Procedures, for additional instructions regarding applications that require WO action or input.

7. Update the appropriate internal database to reflect the date of final action, the date forwarded to RMAS, if applicable, hours devoted to the application, and any other required information.

C. TIME FRAME FOR PROCESSING

Statutory: None

RO Processing Guideline: 45 days from receipt of a substantially complete application.

WO Processing Guideline: 45 days from receipt from the RO.

D. DELEGATED AUTHORITY

The Case Manager should refer to the delegations of authority matrices; additional information is provided in *Applications Overview,* Section 1.1 of these Procedures.

VIII. PLEDGE AGREEMENTS

A foreign bank that operates an insured branch must pledge assets for the benefit of the FDIC or its designee(s). Whenever the FDIC is obligated under section 11(f) of the FDI Act to pay the insured deposits of an insured branch, the assets pledged under this section must become the property of the FDIC and be used to the extent necessary to protect the DIF.

Section 347.209(d) of the FDIC Rules and Regulations identifies the types of assets that a foreign bank may pledge for the benefit of the FDIC and the standards that must be met.

IX. REFERENCES

Federal Deposit Insurance Act Section 5(b), 11(f), 18(d)(1)

Parts 303 (Subpart J), and 347 of the FDIC Rules and Regulations

Foreign Bank Super Enhancement Act of 1991 (Sections 201-215 of FDICIA)

Nationwide Foreign Banking Organization and Examination Coordination Agreements ("CSBS Coordination Agreement" and "CSBS State/Federal Agreement")