August 5, 2019

MEMORANDUM TO: Board of Directors

FROM: Doreen R. Eberley
Director, Division of Risk Management Supervision

SUBJECT: Final Rule to Increase the Major Assets Threshold Under the Depository Institutions Management Interlocks Act

Summary of Recommendation

Staff recommends that the FDIC's Board of Directors (the Board) approve the attached Final Rule (FR), entitled *Depository Institution Management Interlocks Act (DIMIA) Major Assets Prohibition: Thresholds Adjustment,* for publication in the *Federal Register*. The FR increases the major assets prohibition thresholds of the Depository Institution Management Interlocks Act (DIMIA) pursuant to the statute to account for market change. The increase raises the current major assets prohibition thresholds from $1.5 billion and $2.5 billion in total assets, respectively, to a single threshold amount of $10 billion for both institutions. Adjusting the thresholds will relieve depository organizations with asset levels below the new thresholds from the requirement to seek an exemption to permit a prohibited management interlock.

The FR will be issued jointly by the FDIC, the Board of Governors of the Federal Reserve System (Board) and the Office of the Comptroller of the Currency (OCC) (collectively the agencies).

Background

DIMIA is implemented through the agencies' respective rules at 12 CFR parts 26, 212, 238 subpart J, and 348 and is intended to foster competition by prohibiting a management official from serving at the same time as a management official of an unaffiliated depository organization in situations where the management interlock may have an anticompetitive effect. DIMIA achieves this purpose through three statutory prohibitions, implemented in the agencies' rules.

The first, the community prohibition, precludes a management official of a depository organization from serving at the same time as a management official of an unaffiliated depository organization if the involved depository organizations (or any depository institution affiliate thereof) have offices in the same community. The second, the relevant metropolitan statistical area (RMSA) prohibition, precludes a management official of a depository organization from serving at the same time as a management official of an unaffiliated depository organization if the involved depository organizations (or any depository institution affiliate thereof) have offices in the same RMSA and each depository organization has total assets of $50 million or more.

The third, the major assets prohibition, precludes a management official of a depository organization with total assets exceeding $2.5 billion (or any affiliate of such an organization) from serving at the same time as a management official of an unaffiliated depository organization with total assets exceeding $1.5 billion (or any affiliate of such an organization), regardless of the location of the two depository organizations. While the first two prohibitions capture the risk of anticompetitive effects from management interlocks between depository organizations that operate within overlapping geographical areas, the major assets prohibition addresses management interlocks between depository organizations that are large enough that a management interlock may present anticompetitive concerns despite the fact that the involved organizations may not have offices in the same community or RMSA.

DIMIA allows the agencies to prescribe regulations that permit otherwise prohibited interlocks under certain circumstances. Pursuant to the general exemption provision of the agencies' regulations, the appropriate agency may exempt a prohibited interlock in response to an application by a depository organization if the appropriate agency finds that the interlock would not result in a monopoly or substantial lessening of competition and would not present safety and soundness concerns.

The $1.5 billion and $2.5 billion thresholds in the major assets prohibition were enacted through amendments to DIMIA in the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA). During hearings on EGRPRA, it was noted that the increase of the asset thresholds to $1.5 billion and $2.5 billion was made because the previous asset threshold numbers did not "realistically reflect the size of large institutions in today's market."

DIMIA, as amended, also provides that the agencies may adjust the thresholds as necessary "to allow for inflation or market changes." The major assets prohibition thresholds have not been adjusted since 1996 and do not reflect the growth and consolidation among U.S. depository institutions that have occurred in the intervening years. Moreover, in a March 2017 report to Congress mandated by EGRPRA, the agencies committed to reducing regulatory burden by adjusting the major assets thresholds in the agencies' DIMIA regulations.

Proposed Rule and Comments Received

On January 31, 2019, the agencies published for comment a notice of proposed rulemaking (proposed rule or proposal) to amend the agencies' DIMIA regulations (See 84 *Federal Register* 604). The proposed rule would have increased the major assets prohibition thresholds from $1.5 billion and $2.5 billion, respectively, to $10 billion for each institution. The proposed rule also requested comment on three alternative proposals that would have increased the major assets prohibition thresholds based on market changes or inflation.

In response to the proposed rule, the agencies received six comment letters, five of which were responsive. Four of the five comment letters expressed support for increasing the major assets prohibition thresholds, while the fifth comment letter, without expressing an opinion about the thresholds, suggested that the agencies use clear language and consider "the most recent developments for measuring market change." Two of the five comment letters also included a suggestion that was outside the scope of the proposal, that is, to have the agencies expand the number of exemptions from the definition of "management official."

Summary of Final Rule

After considering the comments received, FDIC staff recommends that the Board vote to approve without change the proposal to increase the major assets prohibition thresholds from \$1.5 billion and \$2.5 billion, respectively, to \$10 billion for each institution. As finalized, the major assets prohibition will prohibit management interlocks between unaffiliated depository organizations with total assets exceeding \$10 billion (or any affiliates of such organizations).

The final rule's increase to the major assets prohibition thresholds, and the application of the major assets prohibition to larger depository organizations rather than small depository organizations (*i.e.*, community banks), are consistent with the purpose of the major assets prohibition of DIMIA. A major assets prohibition with a \$10 billion asset threshold will prohibit interlocks between larger depository organizations, which could present a risk of anticompetitive conduct at the level of the U.S. banking market, while exempting smaller or community-banking-organization-sized depository organizations, which generally operate in regional markets and do not present the same competitive risks to the broader U.S. banking market.

In addition, the final rule is consistent with the current thresholds that Congress and the agencies have used to distinguish between small institutions and larger institutions. For example, sections 201 and 203 of the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 provide certain burden relief for institutions with less than \$10 billion in total consolidated assets. Additionally, the Dodd-Frank Wall Street Reform and Consumer Protection Act uses a \$10 billion threshold to distinguish between large banks subject to supervision by the Consumer Financial Protection Bureau and small banks subject to prudential regulator supervision. A \$10 billion threshold also is consistent with the asset threshold used by the Board to distinguish between community banking organizations and larger banking organizations for supervisory and regulatory purposes, the asset threshold used by the FDIC to distinguish between "small" and "large" institutions for purposes of its deposit insurance assessment regulations, and the asset threshold used by the OCC to distinguish community banks from midsize and large banks for supervisory purposes. Further, having a single, consistent asset threshold will simplify the agencies' DIMIA regulations and enable depository organizations to identify more easily whether they may be subject to the major assets prohibition.

Future Adjustments to the Thresholds

In the proposal, the agencies stated that following adjustment of the thresholds by the proposed rule, if adopted, and consistent with the agencies' current regulations, the agencies would make further adjustments to the thresholds to account for inflation by publishing a final rule without notice and comment. If the agencies determine that further adjustments to the thresholds are warranted for reasons other than inflation, the agencies would propose another adjustment through a notice of proposed rulemaking and seek public comment on the proposal.

Effective Date

The final rule will be issued without the 30-day delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA). Pursuant to 5 U.S.C. § 553(d) of the APA, the required publication of a substantive rule shall be made not less than 30 days before its effective date, except for, among other things, "a substantive rule which grants or recognizes an exemption or relieves a restriction" or "as otherwise provided by the agency for good cause found and published with the rule."

The final rule increases the asset thresholds for the major assets prohibition, which will increase the number of depository organizations that are no longer subject to the prohibition and therefore reduce the number of depository organizations that will need to seek an exemption from the prohibition. The effect of the final rule is to reduce burden on depository organizations subject to the DIMIA major assets prohibition. Accordingly, FDIC staff recommends that the Board find good cause to issue the final rule with an immediate effective date.

Recommendation

Staff recommends that the Board approve the attached Resolution to authorize publication of the attached FR entitled *Depository Institution Management Interlocks Act (DIMIA) Major Assets Prohibition: Thresholds Adjustment* in the *Federal Register*.

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CONCUR:

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Attachments