FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 303

RIN 3064–ZA31

Request for Comment on Proposed Statement of Policy on Bank Merger Transactions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed Policy Statement; Request for Comment.

SUMMARY: The FDIC invites comments on a proposed Statement of Policy (SOP) on Bank Merger Transactions (Proposed SOP) that is relevant to all insured depository institutions (IDIs). The Proposed SOP would replace the FDIC's current SOP on Bank Merger Transactions (Current SOP) and proposes a principles-based overview that describes the FDIC's administration of its responsibilities under the Bank Merger Act (BMA). The Proposed SOP focuses on the scope of transactions subject to FDIC approval, the FDIC's process for evaluating merger applications, and the principles that guide the FDIC's consideration of the applicable statutory factors as set forth in the BMA. The Supplementary Information section below contains explanatory content, including historical data, to provide additional context for the Proposed SOP.

DATES: Comments must be received by June 18, 2024.

ADDRESSES: All comments related to this Proposed SOP must include the agency name and RIN 3064–ZA31. Please send comments by one method only directed to:

- *Agency Website: http://www.fdic.gov/regulations/laws/federal/.* Follow the instructions for submitting comments on the agency's website.
- *Email: Comments@fdic.gov.* Include RIN 3064–ZA31 in the subject line of the message.
- *Mail:* James P. Sheesley, Assistant Executive Secretary, Attention: Comments-RIN: 3064–ZA31, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW, building (located on F Street NW) on business days between 7:00 a.m. and 5:00 p.m. ET.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal/*—including any personal information provided—for public inspection. Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this document will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: George Small, Senior Examination Specialist, Division of Risk Management Supervision, 347–267–2453, *gsmall@fdic.gov;* Annmarie Boyd, Senior Counsel, Legal Division, 202–898–3714, *aboyd@fdic.gov;* Benjamin Klein, Supervisory Counsel, Legal Division, 202–898–7027, *bklein@fdic.gov;* Jessica Thurman, Chief, Division of Depositor and Consumer Protection, 202–898–3579, *jthurman@fdic.gov;* Mark Haley, Chief, Division of Complex Institution Supervision and Regulation, 917–320–2911, *mahaley@fdic.gov;* and Ryan Singer, Chief, Division of Insurance and Research, 202–898–7532, *rsinger@fdic.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Bank Merger Act (BMA), Section 18(c) of the Federal Deposit Insurance Act (FDI Act), prohibits an insured depository institution (IDI) from engaging in a merger transaction without regulatory approval. The FDIC is one of three Federal banking agencies with responsibility for evaluating transactions subject to the BMA. The FDIC has jurisdiction to act on merger applications that involve an IDI and any non-insured entity, notwithstanding the IDI's charter.[1] The FDIC also has jurisdiction to act on merger applications that solely involve IDIs in which the acquiring, assuming, or resulting institution is a state nonmember bank or state savings association (FDIC-supervised institution).[2]

In order to implement its responsibilities under the BMA, the FDIC has codified regulations; issued a Statement of Policy (SOP); and published the Applications Procedures Manual (APM). The FDIC's APM provides application-processing instructions for the FDIC's professional staff assigned to review, evaluate, and process applications, notices, and other requests submitted to the FDIC. The APM includes a section on processing merger applications that provides detailed procedural instructions to staff, as well as information regarding the assessment of each statutory factor. In 2019, the FDIC published the APM to its external website to provide greater transparency regarding the FDIC's internal application processes. In light of prospective changes to the bank merger process, additional revisions are planned for the APM chapter on mergers. Finally, together with the other Federal banking agencies, the FDIC has issued an interagency application form, which includes a supplemental section specific to the FDIC. Concurrent with this Proposed SOP, the FDIC is seeking comment on proposed revisions to its supplemental section to the interagency form.

The current SOP on Bank Merger Transactions (Current SOP), last amended in 2008, addresses the FDIC's process for reviewing proposed merger applications in the context of the applicable statutory factors.[3] Since the Current SOP was last revised, the BMA has been amended and significant changes have occurred in the banking industry and financial system, including continued growth and consolidation. This growth and consolidation, which has been ongoing for the past several decades, has significantly reduced the number of smaller banking organizations, increased the number of large and systemically important banking organizations, and contributed to the need for a review of the regulatory framework that applies to bank merger transactions subject to the BMA.[4]

The number of large IDIs, especially IDIs with total assets of $100 billion or more, has grown considerably over the past few decades. This is due to a combination of factors, including consolidation in the banking sector (fueled in part by mergers and acquisitions), the easing of interstate banking restrictions,[5] and organic

[1] 12 U.S.C. 1828(c)(1).

[2] 12 U.S.C. 1828(c)(2).

[3] FDIC Statement of Policy on Bank Merger Transactions, 73 FR 8870.

[4] 12 U.S.C. 1828(c).

[5] Prior to the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law 103–328, many states did not permit intra-state or interstate branching, and interstate branch

growth. As of December 31, 2004, there were only 12 IDIs with total assets greater than $100 billion; however, that number increased to 33 by December 31, 2023. Of the 33 IDIs with total assets greater than $100 billion, nine were owned by the eight U.S. bank holding companies designated as U.S. Global Systemically Important Banks (GSIBs), and four were owned by foreign banking organizations designated as foreign GSIBs.[6] While IDIs with total assets of more than $100 billion as of December 31, 2023, comprised less than one percent of the total number of IDIs, they held approximately 71 percent of total industry assets and approximately 68 percent of domestic deposits.

The FDIC has a responsibility to promote public confidence in the banking system, maintain financial stability, and resolve failing IDIs. Given the increased number, size, and complexity of large banks, greater attention to the financial stability risks that could arise from a merger involving a large bank is warranted. In particular, the failure of a large IDI could present greater challenges to the FDIC's resolution and receivership functions, and could present a broader financial stability threat. For various reasons, including their size, sources of funding, and other organizational complexities, the resolution of large IDIs can present significant risk to the Deposit Insurance Fund (DIF), as well as material operational risk for the FDIC. In addition, as a practical matter, the size of an IDI may limit the resolution options available to the FDIC in the event of failure.

After the 2008 financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the BMA to include, for the first time, a factor related to the risk to the stability of the United States (U.S.) banking or financial system (financial stability factor). The FDIC is seeking public comment on the SOP's approach to the financial stability factor, which integrates and builds upon the FDIC's existing framework for assessing this factor.

On July 9, 2021, an Executive Order addressed the impact that consolidation may have on maintaining a competitive marketplace. The Executive Order also addressed the impact that consolidation may have on maintaining a fair, open, and competitive marketplace, as well as the impact on the welfare of workers, farmers, small businesses, startups, and consumers. The FDIC continues to coordinate with the Department of Justice (DOJ) and the other Federal banking agencies in modernizing bank merger oversight.[7]

On March 31, 2022, the FDIC published in the **Federal Register** a request for information and comment (RFI) regarding the application of the laws, practices, rules, regulations, guidance, and SOP that apply to merger transactions subject to FDIC approval.[8] The RFI requested comments regarding the effectiveness of the FDIC's existing framework in meeting the requirements of the BMA. After review of the public comments received in response to the RFI, the FDIC determined that it is both timely and appropriate to review its regulatory framework for merger transactions as outlined in the Current SOP. The Proposed SOP was drafted in consideration of the comments received regarding the RFI and is being published in the **Federal Register** to obtain further input from interested parties.

II. Summary of Comments

While not all of the questions described in the RFI are pertinent to the SOP, the FDIC is summarizing the comments received to provide transparency with respect to the overall process for developing updated merger-related policies and procedures. The FDIC received 33 comment letters in response to the RFI.[9] The majority of RFI commenters (25 or 76 percent) were in favor of at least some changes to the FDIC's merger review processes. Six RFI commenters (18 percent) were against changes to the FDIC's merger review processes, and two RFI commenters (6 percent) were neither in favor of, nor against, changes to the FDIC's merger review processes.

Among RFI commenters in favor of updating the FDIC's processes that apply to merger transactions, four common themes for potential changes were observed: (i) amend the calculation of market concentration and the competitive effects analysis; (ii) enhance the analysis of the convenience and needs of the community to be served factor; (iii) establish risk criteria and thresholds for the analysis of the financial stability factor; and (iv) create a *de minimis* exception (or presumption of approval) for mergers involving small and mid-sized IDIs.

Some RFI commenters suggested the need for an interagency approach to the development of any new merger regulations, guidelines, and instructions, and noted that any new elements should be applied prospectively. RFI commenters also suggested enhancing the public's ability to review and comment on proposed mergers, including making the information exchange (questions posed and responses received between the FDIC and applicants) a part of the public record. Finally, RFI commenters requested that the FDIC review, to the extent possible, the effects of past mergers to evaluate the appropriateness of any revised merger guidelines. These RFI commenters requested that the FDIC make the results of the evaluation public and apply the results to future merger decisions.

Six RFI commenters were against updating the FDIC's merger related processes. In general, these RFI commenters argued that the FDIC's current framework for reviewing proposed merger transactions was sound and that revisions might harm the banking sector. More specifically, some RFI commenters argued that any change to the competitive review would make bank mergers more difficult; and such changes risked disproportionately impacting community, mid-size, and regional banks.

Multiple RFI commenters suggested revisions to the receipt and compilation of the FDIC's Summary of Deposits (SOD) data, and amendments to the calculations to improve the quality, accuracy, and consistency of the data used to calculate the Herfindahl–Hirschman Index (HHI).[10] The RFI commenters broadly agreed that the increased presence of non-bank firms, including those specializing in financial technology (fintech), and increased consolidation within the banking industry necessitate revision to the evaluative considerations for competitive effects to reflect the economic realities and the industry's competitive landscape. Some RFI

branching was not federally sanctioned. Following the passage of this law, many multi-bank holding companies with subsidiary IDIs with different home states chose to consolidate existing bank charters.

[6] *See* Financial Stability Board 2022 list of GSIBs available at *https://www.fsb.org/wp-content/uploads/P211122.pdf*

[7] E.O. 14036 ''Promoting Competition in the American Economy'' (July 9, 2021). On December 18, 2023, the DOJ and the Federal Trade Commission (FTC) jointly released the 2023 Merger Guidelines (guidelines). These guidelines build upon, expand, and clarify frameworks set out in previous versions.

[8] 87 FR 18740 (March 31, 2022).

[9] Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions. See 87 FR 18740.

[10] The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI calculation can also be applied to other relevant Consolidated Reports of Condition categories or other appropriate sources of data, aside from deposits. For example, the HHI analysis may also include data relative to commercial and industrial loans.

commenters posited that deposit data for institutions that rely on technology-based delivery channels are not dependent on their branch locations.

Multiple RFI commenters stated that the HHI threshold for prospective competitive effects concerns should be increased from its current limit. These RFI commenters contended that the HHI screens applied to the banking industry were stricter than those that had been applied in any other industry. In the opinion of these RFI commenters, raising the HHI would account for the growing competition that IDIs with physical branches face from competitors with different business models, including fintech firms and digital banks.

Conversely, other RFI commenters suggested the overall HHI threshold should be lowered, and the threshold for a change in HHI should be revised from the current level. These RFI commenters suggested that mergers disproportionally affect low- to moderate-income and/or minority communities, and therefore, the threshold (and any change in it) must be lowered to appropriately capture competitive effects.

Some RFI commenters suggested consideration of alternate measures of concentration and/or evaluating the HHI of other asset or product categories such as business loans or residential lending. In addition, multiple RFI commenters requested that the FDIC revise the SOD data collection and calculation to improve precision. These RFI commenters suggested that the FDIC: (i) differentiate corporate and centrally booked deposits from retail deposits; (ii) amend methods and reporting standards, and provide more guidance on how a reporting entity attributes deposits to branches; (iii) include more data on depositors in certain circumstances in order to increase geographic specificity; and (iv) add data on thrifts, credit unions, fintech firms, farm credit banks, and online entities that serve customers in the relevant market.

Multiple RFI commenters recommended revisions to the analysis of the convenience and needs of the community to be served statutory factor. In general, these RFI commenters recommended that the FDIC focus the analysis on the additive benefits of the merger transaction for consumers, particularly in low- to moderate-income and minority communities; and place higher burden on applicants to demonstrate the public interest benefits of the transaction. Concerns with regard to the impact of branch closings were noted. A few RFI commenters suggested that the applicant should be required to submit a full plan related to branch closings.

Approximately half of the RFI commenters requested that the Federal banking agencies establish specific stability risk considerations (*e.g.* size, substitute providers, interconnectedness, complexity, and cross-border activities) and formalize thresholds (such as total asset metrics) for developing a resolution plan for large bank mergers.

About one quarter of RFI commenters noted a perceived burden on small institutions. These RFI commenters requested that the FDIC create a small bank *de minimis* exception whereby small bank mergers would be presumed not to create monopolies or have anticompetitive effects if they meet certain prudential thresholds that can only be overturned based on other criteria such as the results of the competitive effects analysis.

In general, RFI comments were mixed on the following topics: (i) whether there is a presumption of approval for merger applications; (ii) whether the existing framework considers all aspects of the BMA; and (iii) whether prudential considerations or ''bright lines'' should be developed for any of the statutory factors. Many of the comments, as well as new questions that the FDIC has developed in response to public comments on the RFI, are addressed in this preamble.

III. Description of the Proposed Statement of Policy

Overall Changes in the Proposed SOP

The Proposed SOP reflects regulatory, legislative, and industry changes since the SOP was last published for comment in 1997. Further, the Proposed SOP includes new content to make it more principles based, communicates the FDIC Board's expectations regarding the evaluation of merger applications filed pursuant to the BMA, and describes the types of merger applications for which the FDIC is the responsible agency.

The Proposed SOP does not include the application procedures narrative that is included in the Current SOP. The APM describes procedural matters such as application filing, expedited processing and notification to the Attorney General. The Proposed SOP includes a separate discussion of each statutory factor, including: competitive effects, financial and managerial resources, future prospects, convenience and needs of the community to be served, risk to the stability of the U.S. banking or financial system, and effectiveness in combatting money laundering. In addition, the Proposed SOP includes a declarative statement for each statutory factor to highlight the Board's expectations and accompanying narrative to describe the analytical considerations for the evaluation of each factor. While historical performance provides contextual insight into the evaluation of these factors, the SOP affirms that the evaluations are forward looking. A detailed discussion of each statutory factor follows this section.

The FDIC seeks comment on all aspects of the Proposed SOP.

Question:

1. Does the structure of the Proposed SOP effectively present the FDIC's expectations with regard to review and evaluation of merger applications? If not, please describe how the structure could be improved.

Jurisdiction and Scope

The Proposed SOP clarifies the circumstances in which FDIC approval is required in connection with a proposed merger transaction. The FDIC plays an important role in the administration of the BMA, which is codified in the FDI Act and covers a broad range of transactions.[11] Specifically, Section 18(c)(1) of the BMA requires FDIC approval in connection with transactions in which an IDI: (A) merges or consolidates with any non-insured bank or institution,[12] (B) assumes liability to pay any deposits or similar liabilities in a non-insured bank or institution,[13] or (C) transfers assets to any non-insured bank or institution in consideration of an assumption of deposit liabilities of the IDI.[14] The FDIC's authority extends to a variety of transactions between an IDI and a non-insured entity, which are ''merger transactions'' for the purposes

[11] The broad scope of transactions expressly subject to FDIC approval under the BMA evinces a clear congressional intent for the FDIC to review a wide array of transactions between IDIs and non-insured entities that have the potential to affect the safety and soundness of a resultant IDI or increase the potential liability of the Deposit Insurance Fund.

[12] 12 U.S.C. 1828(c)(1)(A). A non-insured entity refers to any entity that is not FDIC insured. Although there is no definition of the term ''non-insured institution'' in the BMA, it has long been the FDIC's interpretation that the term includes any non-insured entity with which an IDI can legally merge. Notably, although federally insured credit unions are insured by the National Credit Union Administration, such credit unions are not IDIs for the purposes of the FDI Act, see 12 U.S.C. 1813(a)-(c), and any merger transaction between an IDI and a credit union is therefore subject to FDIC approval under the BMA.

[13] 12 U.S.C. 1828(c)(1)(B).

[14] 12 U.S.C. 1828(c)(1)(C). The statutory requirements of 12 U.S.C. 1828(c)(1) originate from the Banking Act of 1935. Sec. 101, Public Law 74–305 (adopting Section 12B(v)(4) of the Federal Reserve Act).

of the BMA, even if the transaction is not legally structured as a merger.[15]

Mergers and Consolidations Involving IDIs and Non-Insured Entities

Section 18(c)(1)(A) of the BMA prohibits an IDI from merging or consolidating with a non-insured entity without the FDIC's approval. Neither the BMA nor the FDIC Rules and Regulations define the terms ''merge'' or ''consolidate.'' [16] The FDIC implements the BMA by emphasizing a transaction's substance over its form and asserting jurisdiction over transactions that substantively result in a merger (merger in substance). The FDIC interprets the term ''merge'' in the BMA to encompass all transactions that result in an IDI substantively and effectively combining with a non-insured entity, regardless of whether the transaction is structured as a merger or asset acquisition.

Although acquisitions of assets are not specifically enumerated as a category of transactions subject to FDIC approval under the BMA, an IDI's acquisition of assets from a non-insured entity could be the substantive equivalent of a transaction legally structured as a merger. For example, this occurs when the acquired assets constitute all, or substantially all, of the non-insured entity's assets or business enterprise and if the non-insured entity dissolves, is rendered a shell, or otherwise substantially ceases its main business operations or enterprise. This applies when there is a transfer of all, or substantially all, of a non-insured entity's assets to an IDI, regardless of whether: (i) such transactions consist of an assumption of identified liabilities, (ii) the assets acquired are tangible or intangible (without regard to whether the assets would be considered assets under generally accepted accounting principles), or (iii) such acquisitions occur as a single transaction or over the course of a series of transactions. Excluding transactions that are mergers in substance involving IDIs and non-insured entities from FDIC review would be inconsistent with the purposes of the BMA by overlooking transactions that could affect the safety and soundness of an IDI and increase the risk to the DIF.

The Proposed SOP clarifies the applicability of Section 18(c)(1)(A) of the BMA by emphasizing that the scope of merger transactions subject to approval encompasses transactions that take other forms, including purchase and assumption transactions that are mergers in substance. The Proposed SOP provides an example of a transaction that is a merger in substance, and is therefore subject to the BMA, such as when an IDI absorbs all (or substantially all) of a target entity's assets and the target entity dissolves or otherwise ceases engaging in the acquired lines of business.

Questions:

2. How can the FDIC increase clarity to interested parties regarding the applicability of the BMA to a merger in substance?

3. What additional clarity should the FDIC provide regarding the circumstances in which a transaction is subject to FDIC approval under the BMA, including transactions involving an IDI and a non-insured entity that is not a traditional financial institution, such as a fintech firm, whose assets may be primarily intangible in nature?

Assumptions of Deposits by IDIs From Non-Insured Entities

Section 18(c)(1)(B) of the BMA prohibits an IDI from assuming liability to pay any deposits made in, or similar liabilities of, any non-insured bank or entity.[17] The scope of this provision depends on the meaning of deposit (or other similar liability) and on the interpretation of what constitutes an IDI's assumption of such a deposit (or other similar liability). Section 3(*l*) of the FDI Act defines ''deposit'' broadly. In addition to the definition generally encompassing unpaid balances of money, the definition expressly includes a variety of other instruments, including trust funds and escrow funds.[18]

In addition to the breadth of the definition of ''deposit,'' the FDIC broadly interprets what it means to assume liability to pay such deposits for the purposes of Section 18(c)(1)(B) of the BMA in order to prevent circumvention of the provision. Specifically, the applicability of Section 18(c)(1)(B) does not depend on the existence of a formal written agreement between an IDI and a non-insured entity to transfer deposit liabilities. In cases where an IDI and a non-insured entity cooperate to arrange a transfer of deposits from a non-insured entity to an IDI, the FDIC will generally consider such an orchestration to constitute an assumption of deposits or other similar liabilities for the purposes of Section 18(c)(1)(B).[19]

Unlike the applicability of Section 18(c)(1)(A) of the BMA to asset acquisitions, which depends in part on the acquisition of ''all or substantially all'' of a non-insured entity's assets, the applicability of Section 18(c)(1)(B) does not depend on a finding that an IDI assumes all, or substantially all, of a non-insured entity's deposits or similar liabilities. The assumption of any deposits or other similar liabilities is sufficient to implicate Section 18(c)(1)(B).

The FDIC takes the view that any expansion of an IDI's deposit base via acquisition would be subject to approval under the BMA. As discussed above, when an IDI assumes liability to pay a deposit or other similar liability from a non-insured entity, FDIC approval is required under Section 18(c)(1)(B). As discussed later in this section, when an FDIC-supervised IDI assumes liability to pay a deposit from another IDI, FDIC approval is required under Section 18(c)(2)(C). The FDIC clarifies that the BMA would not necessarily be implicated by an organic expansion of an IDI's deposit base, such as when a depositor or a nonaffiliated third party that acts as agent, custodian, or trustee for a depositor, elects—at their initiative—to establish a deposit relationship with the IDI or to place deposits with the IDI. However, in cases where the agent, custodian, or trustee itself serves as a depository, a transfer of deposits for which it has liability to pay to an IDI would be subject to FDIC approval under the BMA. Furthermore, if customers are solicited to transfer their deposits to an IDI in connection with, or in relation to, an arrangement or agreement to which that IDI is party, the IDI is expected to seek approval under the BMA in connection with the ultimate transfer of such deposits.

The Proposed SOP seeks to capture and convey the broad applicability of Section 18(c)(1)(B) of the BMA by affirming that an FDIC-supervised IDI's assumption of a deposit from another IDI, or any IDI's assumption of a deposit from a non-FDIC insured entity, is likewise subject to FDIC approval even in the absence of an express agreement for a direct assumption. The Proposed SOP highlights the broad definition of ''deposit'' in Section 3(*l*) of the FDI Act, and notes that the definition extends beyond traditional demand deposits to include, among other things, trust funds, and escrow funds.

[15] 12 U.S.C. 1828(c)(1)–(3).

[16] 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. Although rare, the FDIC would consider two institutions substantively combining with a newly created third institution to be a consolidation in substance.

[17] 12 U.S.C. 1828(c)(1)(B) (emphasis added).

[18] See 12 U.S.C. 1813(*l*). Section 18(c)(1)(B) also includes liabilities that would be deposits except for the provision in Section 3(*l*)(5) of the FDI Act.

[19] See id.

Question:

4. Does the Proposed SOP sufficiently alert interested parties to the range of transactions that could be subject to FDIC approval under Section 18(c)(1)(B) of the BMA? If not, please comment on how the range of transactions could be more clearly articulated.

Asset and Deposit Transfers From IDIs to Non-Insured Entities

Section 18(c)(1)(C) of the BMA prohibits an IDI from transferring assets to any non-insured bank or entity in consideration of the assumption for any portion of the deposits made in such IDI. Generally, when an IDI transfers deposits to a non-insured entity, an application to the FDIC would be necessary under Section 18(c)(1)(C) since such transfers are typically accompanied by a transfer of assets, even if such assets consist only of cash. As with Section 18(c)(1)(B), the applicability of Section 18(c)(1)(C) is broad given the scope of the FDI Act's definition of deposit. Furthermore, similar to the FDIC's approach to Section 18(c)(1)(B), the FDIC generally views an orchestration of a transfer of deposits from an IDI to a non-insured entity to be subject to FDIC approval under Section 18(c)(1)(C), even in the absence of an express agreement.

Although parties seeking to engage in transferring customer accounts that consist of both custodial and deposit relationships may characterize the transaction solely as a transfer of custodial relationships, such transactions implicate the BMA if they also result in a transfer of the deposit relationship. It has therefore been the view of the FDIC that the BMA is implicated if an IDI transfers deposit relationships concurrent with, or subsequent to, a transfer of the custodial relationship. Accordingly, where customers have both a custodial and depository relationship with an IDI, an IDI may not evade the BMA by transferring custodial rights to a third party that, in its newly acquired custodial capacity, causes the customer's depository relationship to be transferred either to itself or to another entity. This is true even if such transfer was ostensibly at the direction of a non-insured entity pursuant to custodial rights acquired from the IDI.

The Proposed SOP communicates the FDIC's policy with regard to transfers of deposits from IDIs to non-insured entities by stating that a transfer of deposits from any IDI to a non-insured entity is subject to FDIC approval.

Question:

5. What additional clarity, if any, is needed to make interested parties aware of the circumstances in which FDIC approval would be required in connection with a transfer of deposits from an IDI to a non-insured entity?

Merger Transactions Solely Involving Insured Depository Institutions

Section 18(c)(2)(C) of the BMA generally prohibits an IDI from merging or consolidating with any other IDI or, either directly or indirectly, acquiring the assets of, or assuming liability to pay any deposits made in, any other IDI except with the prior written approval of the FDIC if the acquiring, assuming, or resulting bank is a state nonmember bank or state savings association.[20] If the acquiring, assuming, or resulting bank is a national bank or Federal savings association, the approval of the Office of the Comptroller of the Currency (OCC) is required, and if it is a state member bank, the approval of the Board of Governors of the Federal Reserve System (FRB) is required.[21]

As with transactions involving IDIs and non-insured entities, the FDIC considers that a transaction in which an IDI absorbs another IDI by acquiring all, or substantially all, of its assets would be subject to FDIC approval under Section 18(c)(2)(C) of the BMA. It is less common for the FDIC to evaluate whether a large-scale transaction exclusively among IDIs constitutes a merger in substance since such transactions typically include an assumption of deposits, which is itself a sufficient basis to implicate Section 18(c)(2). As previously stated, the breadth of the FDIC's definition of ''deposit'' causes Section 18(c)(2) to encompass a wide range of transactions, and the FDIC similarly takes a broad view as to what constitutes a direct or indirect assumption of liability to pay deposits.

The foregoing discussion addresses the FDIC's policy with regard to the applicability of the BMA to a wide variety of transactions. However, the FDIC emphasizes that this is not an exhaustive overview of potential transactions that are subject to FDIC approval under the BMA. Interested parties should be alert to the FDIC's policies of emphasizing a transaction's substance over its form, its interest in preventing evasion of the BMA, and of the scope of the terms used in Sections 18(c)(1) and 18(c)(2) of the BMA.

Overview of the Application Process

The Proposed SOP describes the FDIC's expectations for application processing, emphasizing the utility of the pre-filing process and the importance of filing a substantially complete application. The Proposed SOP alerts applicants to the FDIC's expectation that all submitted materials, including the financial projections and any related analyses, be well supported and sufficiently detailed. In addition, the Proposed SOP emphasizes the importance of the narrative supporting the rationale for the proposed transaction, and communicates the FDIC's expectation that the narrative be supported by studies, surveys, analyses and reports, including those prepared by or for officers, directors, or deal team leads.

Merger Application Adjudication

Generally, if all statutory factors are favorably resolved, and all other regulatory requirements are satisfied, the FDIC will approve the merger application. Approvals will be subject to the standard conditions detailed in 12 CFR 303.2(bb) and any non-standard conditions deemed appropriate by the FDIC. However, the FDIC will not use conditions or written agreements that may be required as part of the conditions, as a means for favorably resolving any statutory factors that otherwise present material concerns. The Order and Basis for Approval (Order) will be posted to the FDIC's Decisions on Bank Applications page.

The Order will address all statutory factors, as well as summarize information regarding any Community Reinvestment Act (CRA) protests. The FDIC will summarize the related analysis and conclusions and include any conditions imposed in conjunction with the approval. Finally, the SOP articulates certain elements that may result in unfavorable findings and would require action by the Board of Directors on the application. This commentary presents a general overview of the potential scenarios and fact patterns that would present significant challenges to favorable findings on the statutory factors. The FDIC may not be able to find favorably on any given statutory factor (or therefore approve the application) if there are unresolved deficiencies, issues, or concerns (including with respect to any public comments), or the lack of sustained performance under corrective programs particularly when the transaction implicates the areas that are the subject of the corrective program.

Merger Application Activity

To provide some perspective on the volume and types of filings subject to FDIC review and action, the tables in

[20] 12 U.S.C. 1828(c)(2)(C).

[21] 12 U.S.C. 1828(c)(2)(A)–(B).

Appendix A to this preamble were developed regarding the volume, disposition, and size of merger transactions processed by the FDIC from January 1, 2004, through December 31, 2023. In total, the FDIC processed 2,497 merger applications that were either ''bank-to-bank'' merger applications solely involving IDIs where the resulting institution was an FDIC-supervised institution or that involved an IDI and a credit union or other non-insured institution.[22] This does not include pending applications or applications for corporate reorganizations or interim mergers.[23]

As shown in Table 1, the volume of bank-to-bank merger applications processed by the FDIC has ranged between 49 and 152 annually from 2004 through 2023. The annual average number of such applications processed during this period was 110. Of the 2,209 bank-to-bank applications processed over the referenced period, 92.9 percent (2,054) were approved, 5.4 percent (116) were withdrawn at the applicant's discretion, 1.7 percent (39) were returned due to insufficient information provided in the application submission, and none were denied. Applicants that choose to withdraw an application frequently do so before receiving a public denial. As described in the APM,[24] when applications are recommended for denial, FDIC staff are directed to contact applicants, describe the concerns, and provide a final opportunity to provide additional information that might influence the decision. The APM also states that at its discretion, the FDIC may offer the applicants the opportunity to withdraw the application. If an applicant withdraws their filing, the FDIC Board of Directors may release a statement regarding the concerns with the transaction if such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants.

Table 2 provides a breakdown of the bank-to-bank merger applications processed during this period by the size of the resulting IDI. Approximately 93.0 percent (2,055) of applications received and acted upon, and 95.0 percent of applications approved, were for IDIs that would be $10 billion or less in asset size following the proposed merger. Of the 2,054 approved applications, approximately 4.4 percent (91) involved resulting IDIs with an asset size between $10 billion and $100 billion in total assets, and 0.3 percent (seven) were in excess of $100 billion.

Statutory Factors

Monopolistic or Anticompetitive Effects

The Federal banking agencies are prohibited from approving a merger that would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in the United States.[25] There is no exception to this prohibition. Furthermore, the Federal banking agencies are prohibited from approving a merger that does not constitute a monopoly or conspiracy to monopolize, but that would nonetheless substantially lessen competition, tend to create a monopoly, or otherwise be in restraint of trade, *unless* the anticompetitive effects of the 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.[26] For example, this public interest exception may apply where a transaction is necessary to prevent the probable failure of an IDI.

The FDIC conducts its own independent analysis to ensure compliance with the BMA's prohibition against the approval of any merger transaction that would result in a monopoly or be in furtherance of an attempt to monopolize the business of banking in any part of the U.S.[27] In situations where a transaction would not result in a monopoly but where anticompetitive effects are nonetheless identified, the FDIC will evaluate whether the applicants have established that the benefits to the convenience and needs of the community will clearly outweigh any anticompetitive effects.

The way in which the convenience and needs of the community to be served is juxtaposed against the antitrust competitive standard is important. A non-monopolistic yet anticompetitive merger can only be approved in situations where the proponents to the transaction can establish that the advantage of the merger for the convenience and needs of the community clearly outweighs the anticompetitive effects. This creates a heavy burden for the proponents of a merger to support that the benefits to the community outweigh identified anticompetitive concerns. A favorable finding on the convenience and needs of the community to be served factor may not support approval of the application when anticompetitive effects are identified.

In addition to its own independent analysis, the BMA requires the FDIC to request a competitive factors report from the Attorney General for any merger between an IDI and a non-affiliated entity, unless the FDIC finds that it must act immediately in order to prevent the probable failure of an IDI involved in the transaction.[28] The FDIC may consult with the DOJ on mergers that may raise competitive concerns. In cases where the FDIC considers proposed divestitures of business lines, branches, or portions thereof to mitigate anticompetitive effects, the FDIC will generally expect such divestitures to be completed before allowing the merger to be consummated. Additionally, to promote the ongoing competitiveness of the divested business lines, branches, or portions thereof, the FDIC will generally require that the selling institution will neither enter into non-compete agreements with any employee of the divested entity nor enforce any existing non-compete agreements with any of those entities.

The Proposed SOP does not include any bright lines or specific metrics for which it is presumed that the transaction would be considered anticompetitive. A few RFI commenters suggested that the FDIC develop a benchmark asset size at or below which there is no presumption of non-competitive effects. The Proposed SOP does not include such metrics or benchmarks, as it is important to

[22] As of December 31, 2023, there were 17 pending bank-to-bank merger applications and ten pending merger applications that involve a credit union or other non-insured institution. Data regarding FDIC-processed merger applications involving credit unions and other non-insured entities is provided as Tables 3–6 in Appendix A to this preamble. Table 7 in Appendix A provides data regarding the number of IDIs acquired by FDIC-supervised banks or savings associations, or by credit unions in purchase and assumption transactions.

[23] A corporate reorganization is a merger transaction that involves solely an IDI and one or more of its affiliates. Corporate reorganizations may include transactions where two IDIs merge immediately following a merger between two bank holding companies. An interim merger transaction is a merger transaction between an IDI and a newly formed IDI that is established solely to facilitate a corporate reorganization. From the beginning of 2004 through December 31, 2023, the FDIC processed 2,008 corporate reorganizations and 483 interim mergers. As of December 31, 2023, there were nine pending corporate reorganization applications and five pending interim merger applications.

[24] See APM, Section 1.3, ''Denials and Disapprovals.''

[25] 12 U.S.C. 1828(c)(5)(A).

[26] 12 U.S.C. 1828(c)(5)(B).

[27] 12 U.S.C. 1828(c)(5)(A). In addition to the BMA's prohibition against approving merger transactions that would result in a monopoly, the BMA generally prohibits the Federal banking agencies from approving an interstate merger that would result in an IDI (together with its affiliates) controlling more than 10 percent of the total amount of deposits of IDIs in the U.S. See 12 U.S.C. 1828(c)(13).

[28] 12 U.S.C. 1828(c)(4).

maintain flexibility to appropriately evaluate the facts and circumstances of each application filed.

The Proposed SOP reaffirms the FDIC's commitment to undertaking a thorough review of the potential competitive effects of a proposed merger transaction. As described in the Proposed SOP, the FDIC will tailor its evaluation of competitive effects to consider all relevant market participants (local, regional, and national). The Proposed SOP establishes the relevant geographic markets as the areas where the merging entities have a physical presence in the form of an office (generally a main office or a branch). It also notes that the market may include areas where the merging entities do not have a physical presence, but may still provide products and services. The Proposed SOP outlines the FDIC's approach to considering product markets. The FDIC uses deposits as an initial proxy for commercial banking products and services, but it will tailor the product market definition to individual products as needed. In its analysis, the FDIC uses proxies that reasonably reflect the competitive dynamics of the market, including deposit and loan activity. However, the Proposed SOP notes that the FDIC will, if appropriate, utilize additional analytical methods, data sources, or geographic or product market definitions in order to assess the competitive effects of a proposed merger when practicable and relevant with consideration given to whether consumers retain meaningful choices.

Consistent with the approach of the DOJ and the other Federal banking agencies, the FDIC uses deposits as reported in the SOD data submitted by IDIs (and compiled by the FDIC), as a general proxy for the product market and then calculates the resulting market concentration and change in market concentration in each relevant geographic market using the HHI calculation. The FDIC initially focuses on the respective shares of total deposits held by the merging IDIs and the various other participants with offices in the relevant geographic market(s) to measure market concentration. Multiple RFI commenters suggested that the analysis of competition should include the influence of thrifts, credit unions, fintech firms, Farm Credit System institutions, and other online entities that offer products and services in the relevant market. The Proposed SOP affirms that the FDIC considers the influence of these entities when evaluating competitive effects. Some RFI commenters suggested alternatives to the HHI calculation such as the Hall-Tideman Index (HTI)[29] or the comprehensive industrial concentration index (CCI).[30] The Proposed SOP indicates that the FDIC will consider other products in its competitive analysis, but does not incorporate any specific alternatives to the HHI calculation.

Several RFI commenters requested changes to how the FDIC compiles SOD data, such as assigning online accounts to the account owner's residence, rather than the main office of the entity receiving the deposit. Additionally, RFI commenters requested that the FDIC amend both the methods and reporting standards for SOD data, and provide more guidance and instruction regarding how a reporting entity attributes deposits to branches to enhance geographic specificity. The Proposed SOP indicates that, as applicable, the FDIC will take into account any additional data sources, appropriate analytical approaches, or additional products beyond deposits to fully assess the competitive effects of the transaction. Further, to the extent that amendments or revisions to the SOD's reporting requirements, standards, and methods are considered, they will be published in a separate request for industry comment and feedback.

The relevant geographic markets are the areas where the merging entities have overlapping branch footprints, and generally correspond with the geographic markets defined by the FRB. The Proposed SOP notes that on a case-by-case basis, the FDIC may consider alternative or additional geographic and product markets. A few RFI commenters suggested that the FDIC should conduct a separate analysis of the competitive impact in rural areas, minority markets, or low- to moderate-income communities when relevant. While the Proposed SOP does not specifically address analytics of rural, minority, or low- to moderate-income communities, it does affirm that the FDIC will use a geographic market with a scope that is suited to the products or services offered or planned.

RFI commenters were split on changes to the HHI; some RFI commenters suggested that the overall threshold should be raised, while others suggested that the overall level should be lowered. Similar differences were also noted with respect to the change in the HHI calculation; some RFI commenters suggested that the current change threshold be increased, while others believed it should be lowered or reflect any point change. Some RFI commenters suggested that the HHI should be calculated for certain types of loans such as residential or small business loans, rather than (or in addition to) deposits. The Proposed SOP does not address the calculation of the HHI or the attendant thresholds. The Proposed SOP notes that the FDIC will consider additional methods of assessing the competitive nature of markets for relevant products or services, as necessary or appropriate. The FDIC plans to coordinate with other appropriate agencies regarding any potential changes to the calculation of, or thresholds for, HHI usage.

Questions:

6. To what extent is the FDIC's approach to analyzing the competitive effects of a proposed merger transaction appropriate?

7. What changes to the current approach should the FDIC consider to better reflect present-day competitive conditions?

8. Should the HHI be a definitive factor in making a determination? In other words, should the FDIC find favorably regarding competitive effects if the proposed merger does not exceed the defined banking-specific HHI thresholds? If not, why not?

9. How should the Proposed SOP specifically address the ways to calculate the competitive effects of mergers of IDIs with non-insured entities, whether credit unions, financial services entities, bank service corporations, or other entities?

10. What additional information should the FDIC provide about the circumstances under which it will consider products other than deposits and loans for transparency and so that filers may provide a more complete initial submission?

11. Is the geographic market definition outdated? If so, why? How should the definition be updated and why?

12. Would it be appropriate to define relevant geographic markets by reference to markets in which the merging institutions have delineated CRA assessment areas, including both facility-based assessment areas and retail lending assessment areas?

13. Would it be appropriate to define relevant geographic markets by reference to markets in which the merging institutions have delineated CRA assessment areas?

[29] The HTI is used to measure the concentration (or unequal distribution) of n market participants, who each have a market share h_i and a rank i (ordered according to decreasing market shares).

[30] The CCI is the sum of the proportional share of the leading IDI and the summation of the squares of the proportional sizes of each IDI, weighted by a multiplier reflecting the proportional size of the rest of the industry.

14. Other than the HHI, what tools could be used to assess market concentration and why would such tools be appropriate?

15. How should the Proposed SOP specifically address analytics for rural, minority, or low- to moderate-income communities? What type of analytical standards or criteria would be appropriate?

16. How can the FDIC's review address competitive effects beyond geographic markets? For example, commenters are invited to provide their views on any concerns that might typically be associated with mergers that result in a large institution of a certain asset size, and are further invited to identify what asset size thresholds (*e.g.,* $50 billion, $100 billion, $250 billion, etc.) are most likely to present such concerns. In addition, commenters are invited to provide detailed views on the nature of competitive concerns that are associated with mergers that involve a large institution absorbing a community bank.

Financial Resources and Managerial Resources and Future Prospects

The BMA requires the Federal banking agencies to take into account the financial and managerial resources and future prospects of the existing and proposed institutions involved in a merger transaction.

Financial Resources

The FDIC assesses the financial history, condition, and performance of each entity involved in the merger transaction, as well as the combined financial resources of the resulting IDI. The assessment of financial resources includes an analysis of capital, asset quality, earnings, liquidity, and sensitivity to market risk. The FDIC will consider the liquidity risk of the resultant IDI, including the extent of its projected reliance on uninsured deposits and its contingency funding strategies. An IDI's overreliance on uninsured deposits or non-core funding sources may not be consistent with a favorable finding on this statutory factor.

Overall, the FDIC expects that the resulting IDI will reflect sound financial performance and condition consistent with the IDI's size, complexity, and risk profile. Generally, the FDIC will not find favorably on this factor if the merger would result in a larger, weaker IDI from an overall financial perspective.

RFI commenters were split on whether bright lines or formally defined metrics should be developed and implemented for the evaluation of this factor. Several RFI commenters desired to have defined ratings and benchmarks formally articulated, and requested that merging entities meeting these defined standards should have a streamlined review or a presumption of approval. The Proposed SOP does not include specific requirements for a favorable finding on this factor, as the FDIC believes each transaction should be evaluated based on the facts and circumstances presented in the application, and any determination on the filing should be specific to that transaction. The incorporation or adoption of formal metrics restricts the FDIC's ability to effectively analyze the findings regarding the statutory factors and make informed determinations and recommendations based on those findings.

If the proposed merger involves an operating non-insured entity, the FDIC will consider the entity's operational activities and performance record when evaluating financial resources. The FDIC will review audited financial statements (covering at least three years, unless the entity's operating history is shorter) including details regarding any deferred tax assets or liabilities, intangible assets, contingent liabilities, and any recent or pending legal or regulatory actions. The FDIC may also require an identification of, and accounting for, low quality assets, including independent appraisals or valuations to support the projected value of any businesses or assets expected to transfer to the resultant IDI upon consummation of the merger.

The FDIC's evaluation of financial resources also will consider the current and projected financial impact of any related entities on the IDI, including the parent organization and any key affiliates. For each relevant entity, the FDIC will consider, among other items, the size and scope of operations, capital position, quality of assets, overall financial performance and condition, compliance and regulatory history, primary revenue and expense sources, and funding strategies.

Depending on the anticipated risk profile of the resulting IDI, the FDIC may impose, as a non-standard condition, capital requirements that are higher than applicable capital standards. Further, as appropriate, the FDIC may impose a non-standard condition that requires the resulting IDI and other applicable parties (such as certain affiliates or investors) to enter into one or more written agreements that may address, as applicable, capital maintenance requirements, liquidity or funding support, affiliate transactions, and other relevant items.

Managerial Resources

The FDIC assesses the managerial resources of the existing entities involved in a merger transaction, as well as the proposed management of the resulting IDI. The FDIC expects that the proposed directors, officers, and as appropriate, principal shareholders (collectively, management) possess the capabilities to administer the resultant IDI's affairs in a safe and sound manner. The background and experience of each member of the proposed management team will be reviewed relative to the size, complexity, and risk profile of the resulting IDI. The capability of management to identify, measure, monitor, and control risks and ensure an efficient operation in compliance with applicable laws and regulations are important facets of the evaluation of managerial resources.

A few RFI commenters requested that specific performance standards (such as the management component rating) for small and mid-sized institutions should be publicly stated, and entities in compliance with these standards that meet certain other metrics (such as total asset size) would have a presumption of approval or streamlined review protocols. As previously stated, the Proposed SOP does not include specific performance metrics or bright lines for any of the statutory factors in order to maintain flexibility in the analysis and to ensure each proposed transaction is evaluated on its merits, facts, and circumstances.

The FDIC will review supervisory assessments of management made by the relevant prudential regulators. This includes the current and historical management ratings for any IDI involved in the proposed merger, and the managerial performance and supervisory record of any subsidiaries and affiliates. The FDIC will evaluate the extent and effect of any organizational relationships on the IDI, while also considering the operating history, risk management, and control environment of the parent organization. Inherent in these considerations are the condition, performance, risk profile, and prospects of the organization as a whole, as well as the capacity of management to successfully implement the resulting IDI's strategic (or business) plan.

The evaluation of managerial resources includes an assessment of each entity's record of compliance with respect to consumer protection, fair lending, and other relevant consumer laws and regulations. The FDIC will review supervisory assessments of management made by the relevant regulators. In addition, the FDIC will

analyze the record of compliance with consumer laws and regulations, the compliance management system for each of the IDIs, as well as the compliance management rating system for the resulting IDI, to ensure that there are appropriate controls to identify, monitor, and address consumer compliance risks. Consideration is also given to the consumer compliance rating pursuant to the Uniform Interagency Consumer Compliance Rating System and the CRA.[31]

The FDIC expects management to develop and implement effective plans and strategies, and the resulting IDI to have sufficient managerial and operational capacity, to integrate the acquired entity. Effective integration includes, but is not limited to, human capital; products and services; operating systems, policies, and procedures; internal controls and audit coverage; physical locations; information technology; and risk management programs. In conjunction with the integration, the FDIC expects a resulting IDI to have the managerial and operational capacity, and to devote adequate resources, to ensure full and timely compliance with any outstanding corrective programs or supervisory recommendations.

Various other matters are also pertinent to the evaluation of managerial resources. The FDIC will consider the breadth and depth of management, including the adequacy of succession planning; responsiveness to issues or supervisory recommendations raised by regulators or auditors; existing or pending formal or informal enforcement actions; management's performance with respect to information technology, consumer protection, and other specialty or functional areas; recent rapid growth and the record of management in overseeing and controlling risks associated with such growth; and the reasonableness of fees, expenses, and other payments made to insiders.

Future Prospects

The FDIC evaluates the future prospects of the existing and proposed entities involved in a merger transaction. As part of this evaluation, the FDIC will review the submitted business (or strategic) plan, including pro-forma financial projections and related assumptions to assess whether the resulting IDI will be able to operate in a safe and sound manner on a sustained basis following consummation of the merger. Any accompanying valuations (such as those related to the target entity, goodwill, or other assets) will also be reviewed to ensure that the applicant adequately supports that the resulting IDI will maintain an acceptable risk profile.

The FDIC will consider the economic environment, the competitive landscape, the acquiring IDI's history in integrating merger targets, the anticipated scope of the resulting IDI's operations and the quality of its supporting infrastructure, and any other relevant factors. Any significant planned changes to the resulting IDI's strategies, operations, products or services, activities, income or expense levels, or other key elements of its business will be closely assessed.

Questions:

17. To what extent is the FDIC's evaluation of financial resources appropriate, and what additional items, if any, should be considered?

18. To what extent is the FDIC's evaluation of managerial resources appropriate, and what additional items, if any, should be considered?

19. To what extent is the FDIC's evaluation of future prospects appropriate, and what additional items, if any, should be considered?

Convenience and Needs of the Community To Be Served

The BMA requires the Federal banking agencies to take into account the convenience and needs of the community to be served when evaluating a merger transaction.[32] One of the items considered in connection with this factor is each IDI's CRA performance evaluation record and any comments submitted by the public on the application. The FDIC provides the public the ability to search pending merger applications submitted to the FDIC and allows comments on merger applications to be submitted electronically during the comment period. A few RFI commenters suggested that the FDIC update its website to facilitate the public's ability to review and comment on applications; and that the FDIC should post any regulatory questions or information requests to the applicants, and any applicant responses to its website. The FDIC is considering enhancing the current website to include information regarding public comments received on applications.

Several RFI commenters requested that approval should be conditioned upon the fulfillment of a strategy to address the convenience and needs of the community, and that regulatory approval or non-objection should be sought when the resultant IDI deviates from the submitted plan. The Proposed SOP describes the analytical considerations, but does not require a separate strategy to address the convenience and needs of the community. However, the applicant is expected to provide forward-looking information to the FDIC for the purposes of evaluating the benefits of the merger on the community to be served. As appropriate, claims and commitments made by the applicant to the FDIC may be included in the Order and Basis for Approval, and the FDIC's ongoing supervisory efforts will evaluate the IDI's adherence to any such claims and commitments.

Multiple RFI commenters raised concerns with reliance on only the most recent CRA evaluation. One RFI commenter noted that an Outstanding CRA rating on two out of the most recent three CRA evaluations should be a predicate to obtain regulatory approval for a merger; and another RFI commenter requested a three-year average score for the CRA rating as a benchmark. Some RFI commenters stated the CRA rating should be no less than Outstanding, with a minimum of Satisfactory ratings on component categories. A few RFI commenters requested that a presumptive denial should be established if the CRA rating is not currently (or over a recent, multi-year average period) at least Outstanding with Satisfactory component ratings. The Proposed SOP does not establish specific CRA rating benchmarks or bright lines in order to maintain flexibility in the analysis and to ensure each proposed transaction is evaluated on its merits, facts, and circumstances. However, a less than Satisfactory rating or significant deterioration in CRA performance may present significant concerns in resolving this factor. The FDIC's review is not limited to the CRA record of the institutions and will encompass a broad review of the institutions' existing products and services and whether the products and services proposed by the applicants will meet the convenience and needs of the community to be served.

In addition, the FDIC will consider the record of each institution in complying with consumer protection requirements and maintaining a sound and effective compliance management system. This review will include consideration of any existing orders, ongoing enforcement actions, and pending reviews or investigations of

[31] Uniform Interagency Consumer Compliance Rating System, 81 FR 79473, (Nov. 14, 2016). Community Reinvestment Act ratings are defined in 12 CFR part 345, Appendix A.

[32] 12 U.S.C. 1828(c)(5).

violations of consumer protection laws and regulations. A less than Satisfactory consumer compliance rating may present significant concerns in resolving this factor.

The FDIC will evaluate the community to be served broadly, which will include the proposed assessment area(s), retail delivery systems, populations in affected communities, and identified needs for banking services. The FDIC expects that a merger between IDIs will enable the resulting IDI to *better* meet the convenience and the needs of the community to be served than would occur absent the merger. The FDIC expects applicants to demonstrate how the transaction will benefit the community such as through higher lending limits, greater access to existing products and services, introduction of new or expanded products or services, reduced prices and fees, increased convenience in utilizing the credit and banking services and facilities of the resulting IDI, or other means. Several RFI commenters suggested that a higher burden should be placed on the applicant to demonstrate the public benefits of the transaction. Multiple RFI commenters stated that the FDIC should focus the analysis on the additive benefits of the transaction for consumers, particularly those in low- to moderate-income and minority communities. Numerous RFI commenters indicated that a community benefit plan should be required, as should mandatory public hearings to discuss the impact on the relevant communities. Further, several RFI commenters stated that a cost/benefit analysis of the proposed merger should be prepared and included in the publicly available application materials. The Proposed SOP outlines the FDIC Board's expectations with regard to the public benefits of the transaction, but does not require public benefit statements or plans to be established.

In addition to the CRA and consumer compliance ratings and performance, the FDIC will also consider the resulting assessment area(s) and branch locations, as well as the impact of branch closings or consolidations, particularly on low- and moderate-income neighborhoods or designated areas. The application form solicits information regarding projected or anticipated branch expansions, closings, or consolidations. Generally, the FDIC considers a substantially complete merger application to include, among other items, at least three years of information regarding projected branch expansions, closings, or consolidations. Some RFI commenters suggested that the projected impact of prospective branch closings should be closely scrutinized, and that public meetings and community hearings should be conducted to discuss the impact of the proposed closings. The Proposed SOP states that any proposed or expected closures, including the timing of each closure, the effect on the availability of products and services, particularly to low- or moderate-income individuals or designated areas, any job losses or lost job opportunities from branching changes, and the broader effects on the convenience and needs of the community to be served will be closely evaluated. Applications that project material reductions in service to low- and moderate-income communities or consumers will generally result in unfavorable findings. A favorable finding on this factor may not necessarily be sufficient for approval of the application when anticompetitive effects are noted.

Further, the Proposed SOP advises applicants to be prepared to make commitments regarding future retail banking services in the community to be served for at least three years following consummation of the merger. The Proposed SOP places an affirmative expectation on applicants to provide specific and forward-looking information to enable the FDIC to evaluate the expected impact of the merger on convenience and needs of the community to be served. In certain cases, the FDIC may hold hearings or other proceedings in connection with evaluating a merger application The Proposed SOP provides that the FDIC will generally consider it is in the public interest to hold a hearing for merger applications resulting in an IDI with greater than $50 billion in assets or for which a significant number of CRA protests are received. The FDIC may also hold public or private meetings to receive input on the transaction. The decision to hold such meetings depends on issues raised during the comment period and the significance of the merger transaction to the public interest, the banking industry, and communities affected.

Questions:

20. How could the Proposed SOP more effectively describe the FDIC's expectations with regard to its review of the convenience and needs factor, and what notable considerations, if any, are overlooked?

21. What are the pros and cons of providing forward-looking information? What are some specific challenges and difficulties that applicants might experience when providing information concerning projected or anticipated branch expansion, closings, or consolidations for the first three years following consummation of the merger?

22. What are the pros and cons of holding a hearing for merger applications resulting in an IDI with greater than $50 billion in assets or for which a significant number of CRA protests are received? For what other situations, in addition to those described, would it generally be in the public interest to hold hearings?

23. How can the FDIC best consider comments and feedback from the public in the context of evaluating the convenience and needs of the community to be served, consistent with the BMA's public notice requirements?

24. What are the benefits of imposing a non-standard condition that captures the affirmative commitments an IDI has made to the FDIC to serve the needs of its community?

25. In addition to the methods described, how should the FDIC consider an institution's CRA performance in the context of an application subject to the BMA?

26. What additional information should be included in the application materials to enable a more comprehensive review of branch closings or consolidations? What additional information should be included in application materials related to retail delivery systems?

27. What additional benefits to the community could be specified in the SOP beyond those already detailed?

28. What other elements should be considered in the evaluation of the convenience and needs of the community with respect to mergers?

29. What types of merger transactions may present unique factors that the FDIC should consider in its evaluation of the convenience and needs of the community to be served? For example, are there special considerations that should be considered in connection with transactions in which a community bank is absorbed by a larger institution?

Risk to the Stability of the United States Banking or Financial System

The Dodd-Frank Act amended the BMA to require the responsible agency to consider the risk to the stability of the U.S. banking or financial system when evaluating a proposed bank merger.[33] The FDIC expects that the resulting IDI will not materially increase the risk to the stability of the U.S. banking or financial system. Multiple RFI commenters noted the FDIC's Current SOP does not incorporate this statutory factor. Additionally, while some RFI commenters asked for more clarity and

[33] 12 U.S.C. 1828(c)(5).

transparency regarding the FDIC's financial stability analysis, others objected to changing the existing regulatory framework. Finally, some RFI commenters asserted that recent large mergers have increased concentration within the banking sector and have created more systemic risk, while others presented positions that attempt to refute this assertion. The Proposed SOP largely builds upon the financial stability criteria previously employed in practice by the FDIC, FRB, and OCC since passage of the Dodd-Frank Act, and clarifies the FDIC's perspective when conducting the analysis.[34]

The Proposed SOP details the considerations that the FDIC uses to determine whether a resulting IDI's systemic footprint would be such that its financial distress or failure could compromise the stability of the U.S. banking or financial system. While many RFI commenters addressed entities other than a resulting IDI (*e.g.,* bank holding companies and broker-dealer subsidiaries), the Proposed SOP considers financial stability influences primarily from the perspective of the resulting IDI. Where appropriate, the FDIC's analysis will take into account the facts and circumstances of parent companies and affiliates. Proposed transactions that solely involve affiliates that were related at the time a merger application is filed generally will not raise concerns with regard to this factor. However, each such proposal will be reviewed to ensure that the resulting IDI would not present any new or unforeseen stability risks that may not have existed when the merging entities operated on a standalone basis.

In evaluating the risk to the stability of the U.S. banking or financial system, the Proposed SOP identifies the following: (i) the size of the entities involved in the transaction; (ii) the availability of substitute providers for any critical products and services to be offered by the resulting IDI; (iii) the resulting IDI's degree of interconnectedness with the U.S. banking or financial system; (iv) the extent to which the resulting IDI contributes to the U.S. banking or financial system's complexity; and (v) the extent of the resulting IDI's cross-border activities. These items are addressed in more detail below:

Size. The distress or failure of an IDI is more likely to adversely impact the banking or financial system if the IDI's activities comprise a relatively large share of system-wide activities. Upon financial distress or failure, a larger IDI may present greater challenges to replacing or substituting the services and products it provides, as compared with smaller institutions, thereby potentially increasing the possibility for the IDI's distress or failure to disrupt the broader system. Additionally, the negative effects to the banking or financial system caused by stress at a single large institution may be greater than the impact of simultaneous stress at multiple smaller institutions engaged in business lines similar to those of their larger peer. The majority of comments regarding financial stability focused on the resulting IDI's asset size with many concerned about not creating institutions that are ''too big to fail.'' Numerous RFI commenters suggested the imposition of asset limits, thresholds, or other quantitative measures that would be applicable to IDIs of a certain size, and suggested that any analysis start with certain presumptions. Others stated that any limits or presumptions with respect to asset size would be contrary to the plain language of the BMA, have anticompetitive results, and could even serve to ''insulate'' the largest banks. Some RFI commenters suggested the imposition of enhanced capital requirements in lieu of size limitations.

With respect to these suggestions, the FDIC believes that the asset size of a resulting IDI should not serve as the sole basis for evaluating this statutory factor. Rather, size is only one of several important considerations that needs to be evaluated in the context of the other criteria. However, transactions that result in a large IDI (*e.g.,* in excess of $100 billion) are more likely to present potential financial stability concerns with respect to substitute providers, interconnectedness, complexity, and cross-border activities, and will be subject to added scrutiny. The FDIC takes the view that the failure of a larger IDI with a traditional community bank business model may pose significantly different resolvability and stability risks than a smaller IDI with one or more complex business lines, large derivative exposures, or extensive cross-border operations.

Availability of substitute providers. The purpose of considering the availability of substitute providers is to understand whether an inability or unwillingness by a resulting IDI to continue providing specific products or services could be disruptive to the U.S. banking or financial system. The FDIC considers whether the resulting IDI provides critical products or services that may be difficult to replace or substitute, or conducts activities that comprise a relatively large share of the relevant activity in the banking or financial system. Concerns are heightened, and may preclude favorable resolution of this factor, in situations where there are limited readily available substitutes, as relied upon services may be disrupted or discontinued if the resulting IDI encounters financial distress or fails. Several RFI commenters recommended that specific risk factors be developed to address the availability of substitute providers; however, the Proposed SOP does not include specific targets or bright lines regarding the consideration and assessment of this factor.

Interconnectedness. The purpose of considering interconnectedness is to assess the degree to which the resulting IDI may be engaged in transactions with other financial system participants and the risk that exposures to the resulting IDI of creditors, counterparties, investors, or other market participants could affect U.S. banking or financial system stability. The purpose of considering the effects of asset liquidation by the resulting IDI as a component of interconnectedness is to assess whether, following the proposed merger, the resulting IDI would hold assets that, if liquidated quickly, could significantly disrupt the operation of key markets or cause significant losses or funding problems for other firms with similar holdings. The analysis of interconnectedness specifically contemplates intra-financial system assets and liabilities; exposures to creditors and counterparties; the potential volatility of the resulting IDI's funding structure; and the potential results of rapid asset liquidation.

A resulting IDI may present greater risk from a stability perspective if key aspects of its business (including any on- or off-balance sheet activities) are highly interconnected with other financial system participants. For example, securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, inter-affiliate guarantees, and other similar contracts which the FDI Act refers to collectively as ''qualified financial contracts'' [35] are all examples of interconnected exposures within the U.S. banking or financial system. A high volume of such contracts may equate to a higher degree of potential systemic spillover effects if the resulting IDI, or its parent or affiliates, are unable to perform.

Increased Complexity. Under the Proposed SOP, evaluation of the

[34] See, *e.g.,* Order and Basis for Corporation approval of BB&T's application for consent to merger with SunTrust Bank. Refer to FDIC Press Release PR–111–2019: *https://www.fdic.gov/news/press-releases/2019/pr19111.html.*

[35] 12 U.S.C. 1821(e)(8)(d)(i).

resulting IDI's contribution to the U.S banking or financial system's complexity would consider the full scope of the resulting IDI's operations. This includes the resulting IDI's business lines, products and services, on- and off-balance sheet activities, delivery channels, and any material affiliate or other third-party relationships. One RFI commenter stated that many large regional banks do not have complex operations and have recently reduced their level of complexity. The FDIC considers an important part of the complexity analysis to be the potential financial stability consequences of the resulting IDI failing and being placed into a receivership under Section 11 of the FDI Act. The FDIC is responsible for resolving the resulting IDI in a way least costly to the DIF.

The FDIC has several options for carrying out the resolution of an IDI. First, the FDIC can sell some or most of the assets of the failed IDI to a healthy acquiring IDI, which would also generally assume all of the deposits or only the insured deposits of the failed IDI along with some or most of the remaining liabilities. This is generally called a ''purchase and assumption transaction.'' Second, a special type of purchase and assumption transaction used when additional time is needed to market a failed IDI is referred to as a ''bridge bank.'' A bridge bank is a bank chartered by the OCC and temporarily owned and operated by the FDIC to bridge the time between the date of failure and the date of sale to an acquiring IDI. Use of a bridge bank enhances the FDIC's ability to pursue options that could involve the sale to multiple acquirers, and/or spinning off some remaining streamlined operations as a restructured entity with ongoing viability depending on which strategy is most desirable. The final option is executing an insured deposit payout. However, in deciding which option to pursue, the FDIC must show how it would meet the least cost test set forth in Section 13(c)(4) of the FDI Act. Additionally, regardless of the strategy selected, the challenges associated with resolving a large bank would be significant, both operationally and financially.

In addition to the resolution challenges presented based on size, many regional IDIs present complexities such as large branch networks, substantial information technology systems, millions of account holders, and heavy reliance on uninsured deposits. Further, cross-border operations or key dependencies on non-affiliated entities can raise additional challenges to effecting an orderly and least costly resolution.

The failure of a larger IDI with a traditional community bank business model may present significantly different resolvability and stability risks than a smaller IDI with a complex businesses model. Staff from the FDIC's Division of Resolutions and Receiverships and (if appropriate) the Division of Complex Institution Supervision and Resolution will identify potential purchasers for the resulting IDI or its component parts, and identify resolution impediments that could impact the stability of the U.S. banking or financial system. Some potential resolution impediments include the resulting IDI's organizational structure and the necessity and difficulty of: (i) continuing the IDI's operations and activities until they can be sold or wound down, (ii) marketing and selling key business lines and asset portfolios at the least cost to the DIF,[36] and (iii) separating business lines and other assets to enable their sale or other disposition. While the FDIC would perform this analysis on the IDI, it would also take into account possible alternative resolution strategies and scenarios. This process could consider the presence of support agreements from the resulting IDI's ultimate parent company, strengthened risk governance procedures, and capital maintenance requirements for the IDI. Several RFI commenters suggested formal thresholds should be developed (such as total asset metrics) for when a resolution plan should be required. Such thresholds have not been incorporated into the Proposed SOP as each prospective resolution presents unique facts and circumstances, and the FDIC does not believe a one size fits all approach to the resolution process is appropriate.

While the vast majority of IDIs that the FDIC has resolved have been relatively small in size (assets under $10 billion), experience has shown that the failure of a larger IDI can have a contagion effect. Two recent examples that illustrate the systemic risk associated with the failure of a large regional IDI are Silicon Valley Bank (SVB) and Signature Bank.

SVB, with $209 billion in assets as of December 31, 2022, failed on March 10, 2023. SVP's depositors were primarily commercial and private banking clients, mostly linked to businesses financed through venture capital. Total assets grew rapidly, coinciding with rapid growth in the innovation economy and a significant increase in the valuation placed on public and private companies. The resulting influx of deposits was largely invested in medium- and long-term Treasury and Agency securities.

On March 8, 2023, Silvergate Bank, with $11.3 billion in assets as of December 31, 2022, and a business model focused almost exclusively on providing services to digital asset firms, announced its self-liquidation.[37] On that same day, SVB announced that it had sold substantially its entire available-for-sale securities portfolio at a loss. Many of SVB's venture capital customers took to social media to urge companies to move their deposit accounts out of SVB. The deposit run, coupled with insufficient liquidity to meet the demands of depositors and other creditors, resulted in its failure.

On March 12, 2023, just two days after the failure of SVB, Signature Bank, with $110 billion in assets at year-end 2022, was closed and the FDIC was appointed as receiver. Signature Bank implemented an operating model that shared risk characteristics with SVB. Like SVB, Signature Bank grew rapidly, held deposit accounts for crypto-asset firms, and was heavily reliant on uninsured deposits for funding. As word of SVB's problems began to spread, Signature Bank began to experience contagion effects with deposit outflows. Signature Bank failed as withdrawal requests mounted beyond its ability to pay.

Because of these failures, and the fact that other institutions were experiencing stress, serious concerns arose about a broader economic spillover. As such, the FDIC invoked the systemic risk exception under Section 13 of the FDI Act in winding down SVB and Signature Bank.[38] These failures demonstrate the implications that IDIs with assets over $100 billion can have on financial stability. As of December 2023, the failures of SVB and Signature Bank have resulted in an estimated cost

[36] Id.

[37] Following the collapse of digital asset exchange FTX in November 2022, Silvergate Bank experienced a rapid loss of deposits, which necessitated the sale of debt securities to cover deposit withdrawals. The securities sales resulted in substantial losses. The troubles experienced by Silvergate Bank demonstrated the impact of a lack of diversification, aggressive growth, maturity mismatches in a rising interest rate environment, and inadequate management of liquidity risk. Many of these same risks were also present at SVB.

[38] As a general rule, Section 13(c)(4) of the FDI Act requires the FDIC to resolve failed IDIs at the least cost to the DIF, but provides an exception for instances where the failure would have serious adverse effects on economic conditions or financial stability, and any action to be taken would avoid or mitigate such adverse effects.

of $21.8 billion and $1.8 billion, respectively, to the DIF.[39]

Additional examples that highlight the impact of a larger IDI failure on the DIF are the failures of Washington Mutual Bank and IndyMac Bank in 2008. Washington Mutual Bank (Washington Mutual), with over $300 billion in assets at the time of its failure in September 2008, was the largest thrift institution in the United States and the sixth largest IDI. Its failure was the largest in the FDIC's history in terms of the IDI's asset size. Several factors made it possible for Washington Mutual to fail with no loss to the DIF and no loss imposed on its $45 billion of uninsured deposits, which approximated 24 percent of total deposits. First, there was an acquirer with the capacity to assume all the assets and all the deposits through a traditional purchase and assumption transaction. This acquirer could act quickly at the time of failure because it had previously performed due diligence on Washington Mutual for a potential open bank acquisition. Second, Washington Mutual had a substantial volume of unsecured debt—$13.8 billion, or 4.5 percent of total assets—which was available to absorb losses in resolution. This loss absorbing capacity was essential to meeting the least cost test and for uninsured depositors to avoid taking a loss. Absent these factors, the FDIC likely would have had to establish a bridge bank and take over the operation of the failed institution. The failure of Washington Mutual in that scenario would have depleted the DIF, and uninsured depositors would likely have had to take a loss in order to meet the least cost test. Imposing losses on uninsured deposits could have had a significantly destabilizing effect, especially given the stressed economic and financial environment in September 2008. The only way to avoid that outcome would have been for the FDIC to exercise the systemic risk exception.

When IndyMac Bank—a $30 billion thrift—failed in July 2008, it had no unsecured debt and there was no viable acquirer. The FDIC established a bridge bank and uninsured depositors realized losses.[40] IndyMac Bank was the most costly failure in the FDIC's history up to that point, resulting in a $12.4 billion loss to the DIF. If these conditions were to repeat for an institution several times larger, the effects could be significant for U.S. financial stability.

[39] See 2023 FDIC Annual Report, at *https://www.fdic.gov/about/financial-reports/reports/2023annualreport/2023-arfinal.pdf.*

[40] Uninsured deposits totaled $2.6 billion, which was almost 14 percent of total deposits.

Cross-Border Activities. The purpose of considering cross-border activities is to assess the degree to which coordination of the resulting IDI's supervision and resolution could be complicated by different legal requirements, geopolitical events, and competing national interests, leading to increased potential for spillover effects. A high degree of cross-border activity by the resulting IDI presents significant challenges to supervising and examining the operations of IDIs and their subsidiaries. Historically, cross-border operations present significant challenges to supervision and examination, and cross-border proceedings can be slow, cumbersome, and require significant amounts of coordination between different resolution authorities with differing objectives and administrators. Accordingly, the FDIC would determine if the resulting IDI's cross-border activities represent a significant component of operations; and if so, whether the activities present a high degree of cross-jurisdictional claims, liabilities, and other impediments to effective supervision and resolution. The Proposed SOP affirms that such activities may present challenges from both supervisory and resolution perspectives given the potential exposure to differing legal requirements, geopolitical events, and competing national interests.

Other Financial Stability Considerations

RFI commenters suggested that the FDIC impose various requirements upon large newly merged IDIs such as a requirement to submit resolution plans, a single-point-of entry resolution strategy, enhanced capital levels, total loss absorbing capacity standards, and other quantitative measures. With respect to these comments, the Proposed SOP does not include such requirements, in order to enable the FDIC to retain flexibility to review and evaluate the facts and circumstances appropriate to the application. For example, the FDIC may consider previously filed resolution plans (if any)[41] relevant to any IDI that may be party to a bank merger application. Resolution plans submitted are highly relevant and those submitted by large IDIs are intended to enable the FDIC, as receiver, to provide customers prompt access to their insured deposits and maximize the return from the sale or disposition of the bank's assets. These resolution plans include information pertaining to the bank's organizational structure, core business lines, information technology, funding needs, and other data to assist in the sale or disposition of the bank's deposit franchise, business lines, and material assets.

The FDIC will closely assess the degree to which the resulting IDI's potential financial distress or failure could cause other IDIs with similar activities or business profiles to experience a loss of market confidence, falling asset values, or liquidity stress and decreased funding options. Further, the FDIC may consider the resulting IDI's regulatory framework post-merger; however, the resulting framework cannot solely ameliorate other identified financial stability concerns.

In addition to the items previously noted, the FDIC will evaluate any additional elements that may affect the risk to the U.S. banking or financial system stability. This may include the resulting IDI's regulatory framework; however, the framework alone would not result in a favorable finding on this factor when other financial stability concerns exist. As appropriate, consideration may be given to the merging IDIs' records with respect to cybersecurity as well as their stress-testing results. For example, the FDIC evaluates the IDI's record of preventing data breaches and responding to and preventing cybersecurity threats.

Questions:

30. How could the FDIC enhance its approach to evaluating risk to the stability of the U.S. banking or financial system?

31. Should the FDIC adopt size thresholds (other than the proposed $100 billion threshold) related to financial stability? If so, why, and what size thresholds would be appropriate to identify transactions that present concerns for this statutory factor?

32. Should the FDIC consider a quantitative risk indicator for overall financial stability? If so, how should this indicator be calculated, and what historical data would support the validity of its usage?

33. How should the FDIC measure the potential impact (*e.g.,* financial, economic, or other) of a resulting IDI on the banking or financial system?

[41] This would include resolution plans filed under 12 CFR part 381 (those filed under Section 165(d) of the Dodd-Frank Act), as well as those filed under 12 CFR 360.10 (IDI Plans). Section 165(d) resolution plans typically include details of the firm's structure, assets, and obligations; information on how the depository subsidiaries are protected from risks posed by its non-bank affiliates; and information on the firm's cross-guarantees, counterparties, and processes for determining to whom collateral has been pledged. IDI Plans typically include information and analysis on the IDI that better enable the FDIC to resolve the IDI under the FDI Act.

34. When measuring the potential impact of a merger, what potential scenarios or assumptions regarding financial and economic conditions would be appropriate, regarding both the merger transaction parties and the overall banking and financial systems?

35. What, if any, additional criteria should be included in the evaluation of the financial stability risk factor?

36. How should the FDIC assess whether a change in the overall risk to financial stability is problematic? Should the FDIC place more emphasis on the creation of new risk to financial stability, an increase to existing risk, or both? If so, what emphasis should be placed and why?

Effectiveness in Combatting Money Laundering Activities

In every case, the BMA directs the responsible agency to consider the effectiveness of any IDI involved in the proposed merger transaction in combatting money laundering activities, including in overseas branches.[42] The FDIC expects that the resulting IDI will operate under a satisfactory anti-money laundering (AML)/countering the financing of terrorism (CFT) program commensurate with its risk profile and business (or strategic) plan.[43]

As part of its evaluation of this factor, the FDIC will undertake a comprehensive analysis of each entity's record with regard to AML/CFT. Among other relevant items, the FDIC will consider each entity's overseas branch operations; policies, procedures, and processes; risk management programs; supervisory record, including compliance with the Bank Secrecy Act (BSA) and its implementing regulations; and remediation efforts pursuant to any outstanding corrective programs. Significant unresolved AML/CFT deficiencies, or an outstanding or proposed formal or informal enforcement action that includes provisions related to AML/CFT, is generally inconsistent with a favorable resolution of this factor. One RFI commenter suggested a bar on the approval of any mergers where an IDI ''has been found guilty of AML misconduct in the previous five years.'' No such bar has been included in the Proposed SOP to retain flexibility in evaluating the merits of each proposed transaction.

Questions:

37. What additional items should the FDIC evaluate as it relates to the respective merger parties' AML/CFT programs?

38. If one party to the transaction has a less than satisfactory AML/CFT compliance program, how much emphasis should be placed on the resultant IDI's AML/CFT compliance program and its plan for integrating the target entity?

Other Matters and Considerations

With regard to interstate mergers, the Proposed SOP states that the FDIC will ensure that the additional requirements and restrictions of Section 44 are satisfied.[44]

The SOP highlights other matters and considerations, such as filings from non-banks[45] or banks that are not traditional community bank[46] applicants, as well as applications from operating non-insured entities.

While the Proposed SOP is solely an FDIC issuance, the FDIC is working collaboratively with the relevant Federal agencies to review and evaluate existing merger—related regulations, guidance, and instruction. Several RFI commenters requested that any amendments to any new merger regulations, guidelines, and instructions should be applied on an interagency basis, and any changes should be made prospectively. Regarding the roles of the Federal banking agencies, several RFI commenters requested that the Consumer Financial Protection Bureau (CFPB) be consulted on all mergers, or at least all mergers for which the CFPB has an examination interest. A similar number of RFI commenters presented the opposite position and noted that the CFPB should not be consulted in any capacity, as that is not their congressional mandate. Several RFI commenters noted that state regulatory and supervisory authorities should be consulted, such as state financial regulators, state Attorney's General, and courts. The Proposed SOP does not specifically address the CFPB by name, but as previously stated, the FDIC works collaboratively with the other Federal regulators, as well as the relevant state authorities when processing merger applications.

Finally, RFI commenters requested that the FDIC review, to the extent possible, the effects of past mergers to evaluate the appropriateness of merger guidelines; and make the results of the evaluation public and apply the results to future merger decisions. The FDIC is considering this recommendation.

Question:

39. Are there other elements of the Proposed SOP that would benefit from additional clarity? If so, please provide details and explain how the elements may be clarified.

IV. Administrative Law Matters

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),[47] the agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

The proposed SOP does not create any new or revise any existing collections of information under the PRA. Therefore, no information collection request will be submitted to the OMB for review. The FDIC is separately requesting comment on proposed changes to the FDIC Supplement to the interagency Bank Merger Act application form.

[42] 12 U.S.C. 1828(c)(11).

[43] The Anti-Money Laundering Act of 2020 (the AML Act), amended subchapter II of chapter 53 of title 31 United States Code (the legislative framework commonly referred to as the Bank Secrecy Act or BSA). The AML Act requires the Financial Crimes Enforcement Network (FinCEN), in consultation with Federal functional regulators, to promulgate AML/CFT regulations. Due to the addition of the CFT, and for consistency with FinCEN, the FDIC will use the term AML/CFT (which includes BSA) when referring to, issuing, or amending regulations to address the requirements of the AML Act of 2020.

[44] See 12 U.S.C.1831u.

[45] A ''non-bank'' refers to an IDI that is a ''bank'' for purposes of the FDI Act, but not for purposes of the BHCA. Non-banks may be owned by parent companies that are not subject to the BHCA and therefore may not regulated or supervised by the FRB. Existing insured non-banks include IDIs that are controlled by parent organizations engaged in a variety of commercial activities. These include industrial banks and industrial loan companies, trust and credit card banks organized under the Competitive Equality Banking Act, and other IDIs, such as municipal deposit banks.

[46] In contrast to a traditional community bank, an IDI that is not a traditional community bank generally: (1) focuses on products, services, activities, market segments, funding, or delivery channels other than local lending and deposit taking; (2) pursues a broad geographic footprint (such as operating nationwide from a limited number of offices); (3) pursues a monoline, limited, or specialty business model; or (4) operates within an organizational structure that involves significant affiliate or other third-party relationships (other than common relationships such as audit, human resources, or core information technology processing services). A non-community bank may or may not operate under a non-bank charter. Specialty (sometimes referred to as ''niche'') IDIs are less-diversified and usually considered ''non-community'' in nature given the concentrated business focus or emphasis on specialized activities.

[47] 44 U.S.C. 3501–3521.

Appendix A—Merger Application Activity [48]

TABLE 1—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS [49] (BANK-TO-BANK)

[1/1/2004–12/31/2023]

Year	Approve	Return	Withdraw	Totals
2004	145	2	2	149
2005	103	1	3	107
2006	137	3	7	147
2007	143	2	1	146
2008	99		10	109
2009	66	2	11	79
2010	86	5	5	96
2011	84	1	13	98
2012	135	6	11	152
2013	133	7	10	150
2014	136		11	147
2015	135		5	140
2016	108		4	112
2017	96	1	4	101
2018	118	2	5	125
2019	94	3		97
2020	58	1	6	65
2021	88	1		89
2022	44		7	51
2023	46	2	1	49
Totals	2,054	39	116	2,209

TABLE 2—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS BY ASSET SIZE OF RESULTANT IDI (BANK-TO-BANK)

[1/1/2004–12/31/2023]

Asset size of resultant IDI	Approve	Return	Withdraw	Totals
No Reported Assets	3	13	34	50
Assets >$0 and ≤$10 Billion	1,953	26	76	2,055
Assets >$10 Billion and ≤$100 Billion	91		6	97
Assets >$100 Billion	7			7
Totals	2,054	39	116	2,209

[48] Source of data in Tables 1–7: FDIC.

[49] Merger applications may be returned if they are not substantially complete. At its discretion, the FDIC may offer an applicant an opportunity to withdraw an application. Applicants may withdraw an application at any time if they elect not to pursue the transaction. In some cases, in anticipation of a denial recommendation, applicants choose to withdraw their filing. The number of mergers that occur in a given year may differ from the number of mergers approved by the FDIC that same year, as a merger may not be consummated in the same year it is approved.

A regular merger is generally a combination of the assets and liabilities of two or more unaffiliated IDIs under one IDI's charter with the extinguishment or cancellation of the charter(s) of the other IDI(s). For purposes of these tables, ''Bank to Bank'' refers to a merger when all of the parties involved are IDIs and the resulting IDI is a state nonmember bank or state savings association; ''Involving Credit Unions'' refers to a merger that involves the combination of any IDI with a credit union; and ''Involving Uninsured Entities'' refers to a merger that involves the combination of any IDI with an uninsured entity.

TABLE 3—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS (INVOLVING CREDIT UNIONS)

[1/1/2004–12/31/2023]

Year	Approve	Return	Withdraw	Totals
2004	1			1
2005	2			2
2006	2		1	3
2007	1			1
2008				0
2009				0
2010	2			2
2011	2			2
2012	4			4
2013	7			7
2014	3		1	4
2015	2			2
2016	7			7
2017	5		1	6
2018	12		2	14
2019	17			17
2020	13		4	17
2021	8	3	1	12
2022	19		2	21
2023	14			14
Totals	121	3	12	136

TABLE 4—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS BY ASSET SIZE OF RESULTANT IDI (INVOLVING CREDIT UNIONS)

[1/1/2004–12/31/2023]

Asset size of resultant institution	Approve	Return	Withdraw	Totals
No Reported Assets			2	2
Assets >$0 and ≤$10 Billion	115	3	10	126
Assets >$10 Billion and ≤$100 Billion	5			5
Assets >$100 Billion	1			1
Totals	121	3	12	136

TABLE 5—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS (INVOLVING UNINSURED ENTITIES)

[1/1/2004–12/31/2023]

Year	Approve	Return	Withdraw	Totals
2004	6	2	1	9
2005	6			6
2006	15		2	17
2007	2		1	3
2008	5		2	7
2009	2	2	1	5
2010	2		1	3
2011				0
2012	4		4	8
2013	2		1	3
2014	5		1	6
2015	2		1	3
2016	10	3	1	14
2017	8	1	2	11
2018	11		1	12
2019	14	1		15
2020	6		2	8
2021	10		1	11
2022	5		3	8
2023	1	1	1	3
Totals	116	10	26	152

TABLE 6—NUMBER AND DISPOSITION REGULAR MERGER APPLICATIONS BY ASSET SIZE OF RESULTANT IDI (INVOLVING UNINSURED ENTITIES)

[1/1/2004–12/31/2023]

Asset size of resultant IDI	Approve	Return	Withdraw	Totals
No Reported Assets	1	7	8	16
Assets >$0 and ≤$10 Billion	92	2	15	109
Assets >$10 Billion and ≤$100 Billion	20	1	.....	21
Assets >$100 Billion	3	.....	3	6
Totals	116	10	26	152

TABLE 7—NUMBER OF IDIS ACQUIRED PURCHASE & ASSUMPTION TRANSACTIONS [50]

[1/1/2004–12/31/2023]

Year	No.
2004	128
2005	132
2006	167
2007	148
2008	130
2009	91
2010	104
2011	106
2012	112
2013	152
2014	146
2015	161
2016	159
2017	134
2018	149
2019	151
2020	99
2021	94
2022	75
2023	78
Total	2,516

V. Proposed Statement of Policy

The text of the proposed Statement of Policy follows:

FDIC Statement of Policy on Bank Merger Transactions

I. Introduction

This Statement of Policy (SOP) communicates the FDIC Board of Directors' expectations and views regarding applications filed pursuant to Section 18(c) of the Federal Deposit Insurance Act (FDI Act), which is referred to herein as the Bank Merger Act (BMA). The SOP reflects the FDIC's interpretations of the BMA and its implementing regulations. The structure of the SOP follows the BMA's core statutory provisions, and its content highlights the principles that guide the FDIC's evaluation of the statutory factors for a merger application.

The BMA prohibits an insured depository institution (IDI) from engaging in a merger transaction without regulatory approval. It identifies the types of undertakings that constitute ''merger transactions'' and outlines which of the three Federal banking agencies is the ''responsible agency'' for acting on a given merger application.[1] In addition, the BMA sets forth advance public notice requirements [2] and generally requires the responsible agency to request a report on the competitive factors for a merger transaction from the Attorney General.[3]

The BMA generally prohibits the responsible agency from approving a monopolistic or otherwise anticompetitive merger transaction.[4] In addition to competitive considerations, the BMA requires the relevant agency to evaluate a merger transaction in light of the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, the risk to the stability of the United States (U.S.) banking or financial system,[5] and the effectiveness of the IDIs involved in the merger transaction in combatting money laundering.[6]

II. Jurisdiction and Scope

The FDIC is one of three Federal banking agencies with responsibility for evaluating transactions subject to the BMA. The FDIC has jurisdiction to act on merger applications that involve an IDI and any non-insured entity,[7] and those that solely involve IDIs in which the acquiring, assuming, or resulting

[50] Only includes transactions in which the resulting institution was an FDIC-supervised state nonmember bank or state savings association, or in which an IDI sold substantially all of its assets to a credit union and ceased operation.

[1] 12 U.S.C. 1828(c)(1) and (2).

[2] 12 U.S.C. 1828(c)(3).

[3] 12 U.S.C. 1828(c)(4).

[4] 12 U.S.C. 1828(c)(5).

[5] Ibid.

[6] See Financial Stability Board 2022 list of GSIBs available at *https://www.fsb.org/wp-content/uploads/P211122.pdf.*

[7] 12 U.S.C. 1828(c)(1). A non-insured entity refers to any entity that is not FDIC insured.

institution is an FDIC-supervised institution.[8]

The BMA requires regulatory approval for any merger transaction involving an IDI.[9] The applicability of the BMA will depend on the facts and circumstances of the proposed transaction. In addition to transactions that combine institutions into a single legal entity through merger or consolidation, the scope of merger transactions subject to approval under the BMA encompasses transactions that take other forms, including purchase and assumption transactions or other transactions that are mergers in substance, and assumptions of deposits or other similar liabilities.[10]

The FDIC considers transactions to be mergers in substance when a target would no longer compete in the market, regardless of whether the target plans to liquidate immediately after consummating the transaction. An example of a transaction that is a merger in substance, and therefore subject to the BMA, is when an IDI absorbs all (or substantially all) of a target entity's assets and the target entity dissolves (or otherwise ceases to engage in the acquired lines of business).

An FDIC-supervised IDI's assumption of a deposit from another IDI, or any IDI's assumption of a deposit from a non-insured entity, is likewise subject to FDIC approval even in the absence of an express agreement for a direct assumption. Similarly, a transfer of deposits from any IDI to a non-insured entity is subject to FDIC approval.[11] The definition of ''deposit'' per Section 3(*l*) of the FDI Act is broad and extends beyond traditional demand deposits to include trust funds and escrow funds, among other items.

Merger and other corporate transactions may be conducted through a single transaction or through a series of related transactions that each require an application, such as transactions effected through interim institutions. In all cases, the FDIC will evaluate the substance of all of the facts and circumstances of the transaction and any related transactions, identify which aspects of the transaction(s) are subject to FDIC approval, and fully evaluate the statutory factors applicable to each transaction.

Overview of the Application Process

The FDIC encourages prospective applicants to engage in a pre-filing process to discuss regulatory expectations. It is particularly important for the application to be substantially complete when initially filed.[12] The quality and comprehensiveness of a filing are critical to the FDIC's evaluation of the application under the statutory factors and other regulatory requirements.[13] The FDIC expects all submitted materials, including the financial projections and any related analyses, to be well supported and sufficiently detailed. The narrative describing the analysis and evaluation of the transaction should be supported by studies, surveys, analyses and reports, including those prepared by or for officers, directors, or deal team leads. Incomplete filings or non-responsiveness to additional information requests are substantial impediments to the FDIC's ability to fully evaluate and resolve the statutory factors.

Public feedback is an important component of the FDIC's review of a merger application. Section 18(c)(3) of the FDI Act requires that public notice of the proposed merger transaction be published in an approved form and at appropriate intervals in a newspaper or newspapers of general circulation. A list of pending merger applications subject to the Community Reinvestment Act (CRA) is available on the FDIC's website using the Applications in Process Subject to the CRA Report Selection Options.[14] In all cases, the FDIC will review and evaluate any public comments received regarding the merger application, and will provide the applicant an opportunity to respond to any comment that is determined to be a CRA protest.[15] The FDIC will also consider the views of each relevant Federal and state agency. Generally, the FDIC will not approve a merger application if adverse CRA comments have not been resolved.[16] In certain cases, the FDIC may hold hearings or other proceedings in connection with evaluating a merger application.[17]

Section 18(c)(4) of the FDI Act requires the FDIC to request a competitive factors report from the Attorney General of the United States for any merger transaction between an IDI and a non-affiliated entity, unless the FDIC finds that it must act immediately in order to prevent the probable failure of an IDI involved in the transaction.[18] As circumstances warrant, the Department of Justice (DOJ) and the FDIC will coordinate the review when there are concerns or questions regarding the competitive effects of the transaction. As described below, the FDIC undertakes an independent review consistent with the statutory factors of the BMA.

Merger Application Adjudication

Generally, if all statutory factors are favorably resolved, and all other regulatory requirements are satisfied, the FDIC will approve the merger application. Approvals will be subject to the standard conditions detailed in 12 CFR 303.2(bb) and any non-standard conditions deemed appropriate by the FDIC. However, the FDIC will not use conditions as a means for favorably resolving any statutory factors that otherwise present material concerns. The Order and Basis for Approval (Order) will be posted to the FDIC's Decisions on Bank Applications web page.[19] The Order will address all statutory factors, as well as summarize information regarding any CRA protests. The FDIC will summarize the related analysis and conclusions and include any conditions imposed in conjunction with the approval.

The FDIC's publicly available Delegations of Authority set forth criteria that must be satisfied in order for staff in the FDIC Regional Offices or

[8] The Office of the Comptroller of the Currency has jurisdiction for any merger transaction between IDIs in which the acquiring, assuming, or resulting institution is a national bank or a Federal savings association. The Board of Governors of the Federal Reserve System (FRB) has jurisdiction for any merger transaction between IDIs in which the acquiring, assuming, or resulting institution is a state-chartered bank that is a member of the Federal Reserve System. The FRB also has approval authority under the Bank Holding Company Act for mergers involving bank holding companies and the Home Owners' Loan Act for mergers involving savings and loan holding companies. Merger transactions that are subject to the FDIC's review may also be subject to the review of state authorities.

[9] 12 U.S.C. 1828(c).

[10] A merger that includes the establishment or relocation of branches is also subject to approval under 12 U.S.C. 1828(d).

[11] 12 U.S.C. 1828(c)(1)(C).

[12] As noted in Section 1.1 of the Applications Procedures Manual, a filing that is not substantially complete lacks the substance necessary for the FDIC to evaluate the statutory factors.

[13] Regulatory requirements for merger applications are provided in 12 CFR part 303 (including Subparts A and D) and any other Federal or state regulations, statutes, or laws applicable to the filing.

[14] Applications In Process Subject to the CRA Report Selection Options, *https://cra.fdic.gov/*.

[15] 12 CFR 303.2(*l*) 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 in 12 CFR 303.2(c), as any objection, protest, or other adverse written statement submitted by an interested party relating to a filing.

[16] See 12 CFR 303.2(c) and 303.2(*l*).

[17] See 12 CFR 303.10.

[18] 12 U.S.C. 1828(c)(4). In addition to acting to prevent the probable failure of an IDI, Section 18(c)(4)(C) of the FDI Act includes exceptions for merger transactions involving solely an IDI and one or more of its affiliates.

[19] Decisions on Bank Applications, *https://www.fdic.gov/regulations/laws/bankdecisions/merger/*.

Washington Office to approve a merger application.[20] Notably, the Board of Directors reserves the authority to deny any merger application or act on certain types of proposed transactions, including any transaction for which one or more statutory factors are unfavorably resolved.

Generally, applications will present significant concerns and will likely result in unfavorable findings with regard to one or more statutory factors if they include the following circumstances:

- Non-compliance with applicable Federal or state statutes, rules, or regulations (this includes, for example, transactions that would exceed the 10 percent nationwide deposit limit, as well as both issued and pending enforcement actions);
- Unsafe or unsound condition relating to the existing IDIs or the resulting IDI;
- Less than Satisfactory examination ratings, including for any specialty areas (*i.e.,* information technology or trust examinations);
- Significant concerns regarding financial performance or condition, risk profile, or future prospects;
- Inadequate management, including significant turnover, weak or poor corporate governance, or lax oversight and administration; or
- Incomplete, unsustainable, unrealistic or unsupported projections, analyses, and/or assumptions.

Additionally, the FDIC may not be able to find favorably on any given statutory factor (and the application as a whole) if there are unresolved deficiencies, issues, or concerns (including with respect to any public comments). A lack of sustained performance under corrective programs will also be inconsistent with a favorable finding on one or more statutory factors, particularly when the transaction implicates the areas that are the subject of the corrective program. Further, the inability or unwillingness of the applicant to agree to proposed conditions or execute written agreements, if deemed necessary, will result in unfavorable findings and would require action by the Board of Directors on the application.

If FDIC staff finds unfavorably on one or more statutory factors based on the application review, staff generally will recommend denial of the application. At the FDIC's discretion, applicants may be offered the opportunity to withdraw the filing. If an applicant withdraws their filing, the Board of Directors may release a statement regarding the concerns with the transaction if such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants.

III. Statutory Factors

Merger applications are evaluated under the framework of statutory factors as described in the BMA. Generally, the BMA prohibits approval of monopolistic or otherwise anticompetitive transactions; and requires the responsible agency to consider specific statutory factors related to financial and managerial resources and future prospects, convenience and needs of the community to be served, combatting money laundering, and financial stability. The BMA also prohibits interstate mergers in which the resulting IDI would control more than 10 percent of the deposits of IDIs in the United States.[21] Evaluations of each statutory factor consider the respective entities' supervisory record, potential risks and compensating controls, and any other available information deemed appropriate.

Monopolistic or Anticompetitive Effects

The FDIC strives to ensure that resulting institutions continue as participants in a competitive environment. Section 18(c)(5) of the BMA prohibits the FDIC from approving a merger transaction that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking in any part of the U.S. The BMA also prohibits the FDIC from approving a merger transaction that may substantially lessen competition in any section of the country, unless 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.[22] For example, such a circumstance may exist where a transaction is necessary to prevent the probable failure of an IDI.

The FDIC will evaluate the competitive effects of a proposed merger in a manner that is most relevant to each transaction. Consistent with the majority of merger transactions typically presented to the FDIC, the FDIC generally employs a framework for evaluating competitive effects involving a transaction between IDIs with traditional community banking operations within their local geographic markets. However, the FDIC will tailor its evaluation to consider the size and competitive effects of the resulting IDI. Additionally, the FDIC will consider all relevant market participants. For example, the FDIC may include any other financial service providers that the FDIC views as competitive with the merging entities, including providers located outside the geographic market when it is evident that such providers materially influence the market. Further, in cases involving merging entities with specialty lines of business or non-traditional products, services, or delivery methods, the FDIC will take into account any additional data sources or appropriate analytical approaches to fully assess the competitive effects of the transaction.

In assessing competitive effects, the FDIC considers concentrations with respect to both geographic and product markets. The FDIC identifies all relevant geographic markets (local, regional, and national) based on the geographic areas in which the merging entities operate and in which customers may practically turn to competitors for alternative products and services.[23] The FDIC uses deposits as an initial proxy for commercial banking products and services. The FDIC will initially measure the respective shares of total deposits held by the merging entities and the various other participants with offices in the geographic market. The FDIC evaluates the market concentration and change in market concentration in each geographic and product market.[24]

In addition, the FDIC will consider concentrations beyond those based on deposits. As appropriate, the FDIC may consider concentrations in any specific products or customer segments, such as, for example, the volume of small business or residential loan originations or activities requiring specialized expertise. Additionally, when relevant, the analysis may incorporate other products offered by the merging entities with consideration given to whether consumers retain meaningful choices. In its analysis, the FDIC will evaluate a market with a scope that is appropriate to the products or services offered or planned. Moreover, the FDIC will consider the emergence of new competitors for products or services in relevant markets; and the expansion of products and services offered by the merging entities and other market participants. Finally, as necessary or

[20] Refer to *https://www.fdic.gov/regulations/laws/matrix/delegations-filings.pdf.*

[21] 12 U.S.C. 1828(c)(5), 1828(c)(11), and 1828(c)(13).

[22] 12 U.S.C. 1828(c)(5).

[23] See *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963).

[24] Indicators of market concentration and change in concentration include calculations using the Herfindahl-Hirschman Index (HHI).

appropriate, the FDIC will consider other products or services and additional methods of assessing the competitive nature of markets. In particular, the FDIC may consider information on the pricing of products and services to assess the competitive effects of a proposed merger when practicable and relevant.

The FDIC may require divestitures of business lines, branches, or portions thereof as a means to mitigate competitive concerns before allowing the merger to be consummated. In such cases, the FDIC will generally require that the selling institution will not enter into non-compete agreements with any employee of the divested entity nor enforce any existing non-compete agreements with any of those entities.

Nationwide Deposit Cap

The BMA prohibits approval of an interstate merger that results in an IDI (and its affiliates) controlling more than 10 percent of the total deposits of IDIs in the U.S.[25] This prohibition does not apply to transactions that involve one or more IDIs in default or in danger of default. Consistent with the competitive effects review, the FDIC will use the most current Summary of Deposits data to confirm the nationwide deposit share of the resulting IDI following the proposed transaction.

Financial Resources

The BMA requires the responsible agency to consider the financial resources of the existing and proposed entities involved in a merger transaction.[26] The FDIC expects that the resulting IDI will reflect sound financial performance and condition.[27] Generally, the FDIC will not find favorably on the financial resources factor if the merger would result in a weaker IDI from an overall financial perspective.

A critical component of the analysis of financial resources is the resultant IDI's ability to meet applicable capital standards (including maintenance of appropriate allowances for loan or credit losses). Depending on the anticipated risk profile of the resulting IDI, the FDIC may impose, as a non-standard condition, capital requirements that are higher than applicable capital standards.[28] Further, as appropriate, the FDIC may impose a non-standard condition that requires the resulting IDI and other relevant parties (such as certain affiliates or investors) to enter into one or more written agreements that address, as applicable, capital maintenance requirements, liquidity or funding support, affiliate transactions, and other relevant provisions. The FDIC also expects the resulting IDI to maintain sufficient liquidity and appropriate funding strategies given its size, complexity, and risk profile.

The FDIC will also consider the current and projected financial impact of any related entities on the IDI, including the parent organization and any key affiliates. For each relevant entity, the FDIC will consider, among other items, the size and scope of operations, capital position, quality of assets, overall financial performance and condition, compliance and regulatory history, primary revenue and expense sources, and funding strategies.

Managerial Resources

The BMA requires the responsible agency to consider the managerial resources of the existing and proposed entities involved in a merger transaction.[29] The FDIC expects that the directors, officers, and as appropriate, principal shareholders (collectively, management) possess the capabilities to administer the resultant IDI's affairs in a safe and sound manner, and effectively implement post-merger integration plans and strategies.

The capability of management to identify, measure, monitor, and control risks and ensure a safe and sound operation in compliance with applicable laws and regulations is included in the evaluation of managerial resources. The FDIC will consider the background and experience of each member of management relative to the size, complexity, and risk profile of the resulting IDI, including the managerial performance and supervisory record of affiliates and subsidiaries.

The FDIC will review supervisory assessments of management made by the relevant regulatory authorities, as well as the nature and extent of organizational relationships. The FDIC will also evaluate the effect of such relationships on the IDI, as well as the operating history, risk management, and control environment of the parent organization. Inherent in these considerations are the condition, performance, risk profile, and prospects of the organization as a whole, as well as the consistency of the proposed merger with the resulting IDI's strategic (or business) plan.

The FDIC will assess each IDI's record of compliance with respect to consumer protection, fair lending, and other relevant consumer laws and regulations. The FDIC will analyze the compliance management system of each of the IDIs, as well as the compliance management system for the resulting IDI to ensure that appropriate controls will be implemented to identify, monitor, and address consumer compliance risks. Consideration will also be given to the consumer compliance rating pursuant to the Uniform Interagency Consumer Compliance Rating System and the CRA rating.[30]

Additional managerial resource considerations include:

- The supervisory history of each entity involved in the proposed merger, including the management rating[31] for any IDI involved in the transaction;
- The breadth and depth of management, and adequacy of succession planning;
- Management's responsiveness to issues or supervisory recommendations raised by regulators or auditors;
- Any existing or pending enforcement actions;
- Any issues or concerns with regard to specialty areas including information technology, trust, consumer compliance, CRA, or Anti-Money Laundering (AML)/countering the financing of terrorist activities (CFT);[32] and
- The reasonableness of fees, expenses, and other payments made to insiders.
- Recent rapid growth and the record of management in overseeing and controlling risks associated with such growth.

The FDIC expects management to develop and implement effective plans and strategies, and the resulting IDI to have the managerial and operational capacity to integrate the acquired entity. Effective integration includes, but is not limited to, human capital; products and

[25] 12 U.S.C. 1828(c)(13).

[26] 12 U.S.C. 1828(c)(5).

[27] This evaluation encompasses capital, asset quality, earnings, liquidity, and sensitivity to market risk, as described in the Uniform Financial Institution Rating System (UFIRS); see 61 FR 67021 (December 19, 1996).

[28] Refer to the applicable capital regulations for the relevant parties. The minimum capital ratios for FDIC-supervised institutions are set forth at 12 CFR 324.10, and the capital measures and capital category definitions for the purposes of Prompt Corrective Action are set forth at 12 CFR 324.403 for FDIC-supervised institutions.

[29] 12 U.S.C. 1828(c)(5).

[30] 81 FR 79473, (Nov. 14, 2016).

[31] The management rating is defined in the UFIRS.

[32] The Anti-Money Laundering Act of 2020 (the AML Act), amended subchapter II of chapter 53 of title 31 United States Code (the legislative framework commonly referred to as the Bank Secrecy Act or BSA). The AML Act requires the Financial Crimes Enforcement Network (FinCEN), in consultation with Federal functional regulators, to promulgate AML/CFT regulations. Due to the addition of the CFT, and for consistency with FinCEN, the FDIC will use the term AML/CFT (which includes BSA) when referring to, issuing, or amending regulations to address the requirements of the AML Act of 2020.

services; operating systems, policies, and procedures; internal controls and audit coverage; physical locations; information technology; and risk management programs. In conjunction with the integration, the FDIC expects a resulting IDI to have the managerial and operational capacity, and to devote adequate resources, to ensure full and timely compliance with any outstanding corrective programs or supervisory recommendations.

Future Prospects

The BMA requires the responsible agency to consider the future prospects of the existing and proposed entities involved in a merger transaction.[33] The FDIC expects that the resulting IDI will operate in a safe and sound manner on a sustained basis following consummation of the merger. Among other items, the FDIC will consider the economic environment, the competitive landscape, the acquiring IDI's history in integrating merger targets and managing growth, the anticipated scope of the resulting IDI's operations, the quality of its supporting infrastructure, and other pertinent factors. Any significant planned changes to the resulting IDI's strategies, operations, products or services, activities, income or expense levels, or other key elements of its business will be closely assessed. The FDIC will review the pro forma financial projections, the underlying assumptions, and any accompanying valuations (such as those related to the target entity, goodwill, or other assets) to ensure they demonstrate and support that the resulting IDI will maintain an acceptable risk profile.

Convenience and Needs of the Community To Be Served

The BMA requires the responsible agency to consider the convenience and needs of the community to be served when evaluating a merger transaction.[34] The FDIC expects that a merger between IDIs will enable the resulting IDI to *better* meet the convenience and the needs of the community to be served than would occur absent the merger. Applicants are expected to demonstrate how the transaction will benefit the public through higher lending limits, greater access to existing products and services, introduction of new or expanded products or services, reduced prices and fees, increased convenience in utilizing the credit and banking services and facilities of the resulting IDI, or other means.

The FDIC expects applicants to provide specific and forward-looking information to enable the FDIC to evaluate the expected benefits of the merger on the convenience and needs of the community to be served. As appropriate, claims and commitments made to the FDIC to support the FDIC's evaluation of the expected benefits of the merger may be included in the Order, and the FDIC's ongoing supervisory efforts will evaluate the IDI's adherence with any such claims and commitments. The FDIC will evaluate the community to be served broadly, which will include the proposed assessment area(s), retail delivery systems, populations in affected communities, and identified needs for banking services.

As part of its evaluation, the FDIC will review the CRA record of the institutions. The CRA requires the FDIC to take into account each IDI's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of such institution.[35] As such, the FDIC will consider each institution's CRA performance evaluation record of helping to meet the credit needs of its assessment areas, including low- and moderate-income neighborhoods, and record of community development activity, as applicable. A less than Satisfactory historical rating or significant deterioration in CRA performance will generally result in unfavorable findings. The FDIC's review is not limited to the CRA record of the institutions and will encompass a broad review of the institutions' existing products and services and whether the products and services proposed by the applicants will meet the convenience and needs of the community to be served.

In addition, the FDIC will consider the record of each institution in complying with consumer protection requirements and maintaining a sound and effective compliance management system. This review will include consideration of any existing or pending orders, ongoing enforcement actions, and pending reviews or investigations of violations of consumer protection laws and regulations. A less than Satisfactory consumer compliance rating [36] may present significant concerns in resolving this factor.

The CRA assessment area(s) and branch locations resulting from the merger are evaluated as part of this factor. The assessment area(s) should be delineated in accordance with 12 CFR part 345 (or other appropriate regulations), and should not reflect illegal discrimination. The FDIC will evaluate all projected or anticipated branch expansion, closings, or consolidations for the first three years following consummation of the merger.[37] Branch closings are subject to both Section 42 of the FDI Act and the Interagency Policy Statement Concerning Branch Closing Notices and Policies.[38] Information regarding any proposed or expected closures, including the timing of each closure, the effect on the availability of products and services, particularly to low- or moderate-income individuals or designated areas, any job losses or lost job opportunities from branching changes, and the broader effects on the convenience and needs of the community to be served will be closely evaluated. Applications that project material reductions in service to low- and moderate-income communities or consumers will generally result in unfavorable findings.

The FDIC will consider all substantive public comments received in accordance with 12 CFR 303.9, as well as the views of relevant state and Federal regulators regarding the ability of the applicant to meet the convenience and needs of the community to be served. Non-standard conditions may be imposed, as appropriate, in response to CRA weaknesses, relevant regulator input, bank commitments, or public comments. The FDIC will consider whether it is in the public interest to hold a hearing for merger applications, and generally expects to hold a hearing for any application resulting in an IDI with greater than $50 billion in assets or for which a significant number of CRA protests are received. The FDIC may also hold public or private meetings to receive input on the transaction. The decision to hold such meetings depend on issues raised during the comment period and the significance of the merger transaction to the public interest, to the banking industry, and communities affected.

As noted above, the BMA prohibits the FDIC from approving a merger transaction that may substantially lessen competition in any section of the country, unless the anticompetitive

[33] 12 U.S.C. 1828(c)(5).

[34] 12 U.S.C. 2902(3)(E) and 2903(a)(2).

[35] 12 U.S.C. 2902(3)(E) and 2903(a)(2).

[36] Uniform Interagency Consumer Compliance Rating System, 81 FR 79473 (Nov. 14, 2016).

[37] Generally, the FDIC considers a substantially complete merger application to include, among other items, at least three years of information regarding projected branch expansions, closings, or consolidations. Short-distance consolidations that may not be subject to Section 42 outside of a merger context should be included in this information.

[38] 64 FR 34845 (June 29, 1999).

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.[39] In situations where anticompetitive effects are identified, the FDIC will evaluate whether the applicant has established that the benefits to the convenience and needs of the community will clearly outweigh the anticompetitive effects. A favorable finding on the convenience and needs of the community to be served factor may not support approval of the application when anticompetitive effects are identified.

Risk to the Stability of the United States Banking or Financial System

Section 604 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the BMA to require the FDIC to consider the risk posed by a merger transaction to the stability of the U.S. banking or financial system. The FDIC expects that the resulting IDI (or consolidated company) will not materially increase the risk to the stability of the U.S. banking or financial system.[40] Consistent with the other Federal banking agencies,[41] the FDIC evaluates this factor with respect to the following:

- The size of the entities involved in the transaction;
- The availability of substitute providers for any critical products or services to be offered by the resulting IDI;
- The resulting IDI's degree of interconnectedness with the U.S. banking or financial system;
- The extent to which the resulting IDI contributes to the U.S. banking or financial system's complexity; and
- The extent of the resulting IDI's cross-border activities.

Generally, the FDIC will not view the size of the entities involved in a proposed merger transaction as a sole basis for determining the risk to the U.S. banking or financial system's stability. However, transactions that result in a large IDI (*e.g.,* in excess of $100 billion) are more likely to present potential financial stability concerns with respect to substitute providers, interconnectedness, complexity, and cross border activities, and will be subject to added scrutiny. The FDIC will consider the nature and scope of operations of the target entity, the resulting IDI, and any other elements that may also influence the risk to the U.S. banking or financial system's stability.

With regard to substitute providers, the FDIC will consider whether the resulting IDI provides critical products or services that may be difficult to replace, or conducts activities (including specific business lines) that comprise a relatively large share of system-wide activities. Concerns are heightened, and may preclude favorable resolution of this factor, in situations where there are limited readily available substitutes, as relied upon services may be disrupted or discontinued if the resulting IDI encounters financial distress or fails.

In assessing the resulting IDI's interconnectedness, the FDIC will consider the degree to which the merging entities are engaged in transactions or relationships with IDIs, affiliates of banking organizations, or other financial service providers. Consideration will be given to whether any exposures with creditors, counterparties, investors, or other market participants could affect the U.S. banking or financial system. A resulting IDI may present financial stability concerns if key aspects of its business (including any on- or off-balance sheet activities) are highly interconnected with other financial system participants.

The FDIC's evaluation of the resulting IDI's contribution to the U.S banking or financial system's complexity will consider the full scope of the IDI's operations. This includes the IDI's business lines, products and services, on- and off-balance sheet activities, branch network and delivery channels, number of account holders (including the volume of uninsured deposits), extent of information technology systems, and any material affiliate or other third-party relationships. As part of evaluating the resulting IDI's impact on complexity, the FDIC will also consider its resolvability in a potential failure situation. The FDIC may not be able to find favorably on this factor when the resultant IDI's organizational and funding structure preclude its ability to: (i) continue operations and activities until they can be sold or wound down, (ii) sell key business lines or large asset portfolios, and (iii) be marketed for sale in a manner that limits the potential for losses to the Deposit Insurance Fund.[42]

The extent of a resulting IDI's cross-border activities may also have implications with regard to a favorable finding on this factor. The FDIC will consider whether cross-border activities comprise a material component of the resulting IDI's operations and present a significant degree of cross-jurisdictional claims or liabilities. Such activities may present challenges from both supervisory and resolution perspectives given the potential exposure to differing legal requirements, geopolitical events, and competing national interests.

Other Stability Considerations

The above list of items is not exhaustive. The FDIC will evaluate any additional elements that may affect the risk to the U.S. banking or financial system's stability. This may include the resulting IDI's regulatory framework; however, the framework alone would not result in a favorable finding on this factor when other financial stability concerns exist. As appropriate, consideration may be given to the merging IDIs' records with respect to cybersecurity and stress-testing results. The FDIC may also evaluate the degree to which the resultant IDI's potential financial distress or rapid liquidation could cause other market participants with similar activities or business profiles to experience a loss of market confidence, falling asset values, or decreased funding options.

Proposed transactions that solely involve affiliates that were related at the time a merger application is filed generally will not raise concerns with regard to this factor. However, each proposal will be reviewed to ensure that the resulting IDI would not present any new or unforeseen financial stability risks that may not have existed when the merging entities operated as affiliates or on a standalone basis.

Effectiveness in Combatting Money Laundering Activities

The BMA requires the responsible agency to consider the effectiveness of any IDI involved in a merger transaction in combatting money-laundering activities, including in overseas branches.[43] The FDIC expects that approved merger transactions will result in institutions with effective programs to combat money laundering (Anti-Money Laundering or AML) and counter the financing of terrorism (CFT). A favorable finding on this factor will be based on a comprehensive evaluation of each entity's AML/CFT program that includes overseas branches; policies, procedures, and processes; risk

[39] 12 U.S.C. 1828(c)(5).

[40] 12 U.S.C. 1828(c)(5).

[41] The FDIC will consider data collected by the Federal Reserve to monitor the systemic risk profile of the institutions, which are subject to enhanced prudential standards under Section 165 of the Dodd-Frank Act.

[42] In addition to considering the FDIC's potential role as receiver of the resulting IDI under Section 11 of the FDI Act, it will also take into account possible alternative resolution scenarios.

[43] 12 U.S.C. 1828(c)(11).

management programs; the supervisory record of each participating entity, the entity's compliance with Bank Secrecy Act (BSA) and its implementing regulations; and remediation efforts pursuant to an outstanding corrective program.[44] In all cases, the FDIC will consider whether the resulting IDI has developed an appropriate plan for the integration of the combined operations into a single, comprehensive, and effective program to combat money laundering and terrorist financing. Additionally, the FDIC expects the applicant to demonstrate how the resulting IDI will comply with the BSA and its implementing regulations following consummation of the merger.

Significant unresolved AML/CFT concerns or uncorrected problems, or an outstanding or proposed formal or informal enforcement action that includes provisions related to AML/CFT, will generally result in unfavorable findings on this factor. In limited cases, sufficient mitigating factors may support a favorable finding, such as when an acquirer with a strong AML/CFT program replaces a target entity's less than satisfactory program and presents an appropriate plan to address the target entity's deficiencies.

IV. Other Matters and Considerations

Interstate Merger Transactions

In cases where Section 44 of the FDI Act applies to an interstate merger transaction, the FDIC will ensure that the additional requirements and restrictions of Section 44 are satisfied.[45]

Applications Involving Non-Banks or Banks That Are Not Traditional Community Banks

Historically, most merger transactions considered by the FDIC have involved traditional community banks. In general, traditional community banks focus on providing the banking services, including loans and core deposits, typically relied on by individuals and businesses in their local communities. However, merger applications may also involve non-banks[46] or banks that are not traditional community banks, which may involve more complexity than a traditional community bank in terms of its business model, products, services, activities, market segments, funding, delivery channels, geographic footprint, operations, or intercompany or other third-party relationships. Merger applications where the resulting IDI will be a non-bank or not a traditional community bank are subject to the same statutory factors as any other merger application. However, the FDIC will appropriately tailor its review to the nature, complexity, and scale of the entities involved in the transaction and the underlying business model. The FDIC's Washington Office or Board of Directors reserve authority to act on certain merger applications that do not involve traditional community banks.

Applications Involving Operating Non-Insured Entities

Applications may involve an existing IDI merging with an operating entity that is not FDIC-insured. Operating non-insured entities may vary widely in the type of business and activities conducted (*e.g.,* credit unions, which typically offer products and services consistent with a traditional community bank, mortgage companies, financing companies, payment services firms, or other types of entities whose business model may have elements more consistent with that of a non-community bank). Merger applications that involve an operating non-insured entity are subject to the same statutory factors as any other merger application. However, in reviewing such applications, the FDIC will consider the nature and complexity of the non-insured entity, its scale relative to the existing IDI, its current condition and historical performance, and any other relevant information regarding the entity's operations or risk profile.

The FDIC will review audited financial statements (covering at least three years, unless the entity's operating history is shorter) and assess any deferred tax assets or liabilities, intangible assets, contingent liabilities, and any recent or pending legal or regulatory actions. Further, independent appraisals or valuations may be necessary to support the projected value of any business (or assets) expected to be transferred from the operating non-insured entity to the resultant IDI through the merger transaction.

V. Resources

FDIC Bank Application Resource page, *https://www.fdic.gov/regulations/applications/resources/*
FDIC Regional Offices, *https://www.fdic.gov/about/contact/directory/region.html*
FDIC Law, Regulations, Related Acts, *https://www.fdic.gov/regulations/laws/rules/*
Section 18(c) of the FDI Act, 12 U.S.C. 1828(c)
Section 42 of the FDI Act, 12 U.S.C. 1831r–1
Section 44 of the FDI Act, 12 U.S.C. 1831u
12 CFR part 303, subparts A and D
Interagency Policy Statement Concerning Branch Closing Notices and Policies, 64 FR. 34845 (June 29, 1999)
Applications Procedures Manual (APM), *https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/index.html*
Section 1 of the FDIC APM, *https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-01-01-overview.pdf*
Section 4 of the FDIC Application Procedures Manual, *https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-04-mergers.pdf*
FDIC Delegations of Authority—Filings, *https://www.fdic.gov/regulations/laws/matrix/index.html*
Interagency Bank Merger Act Form, *https://www.fdic.gov/formsdocuments/f6220-01.pdf*
Deposit Market Share Reports—Summary of Deposits, *http://www.fdic.gov/sod*
Federal Reserve Bank of St. Louis, Competitive Analysis and Structure Source Instrument for Depository Institutions, *https://cassidi.stlouisfed.org/index*

Authority: 12 U.S.C. 1813, 1818, 1819, 1828, 1831u, 1831r–1, 1835a, 2901–2908, 5412.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, March 21, 2024.

James P. Sheesley,

Assistant Executive Secretary.

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[44] An IDI under an outstanding formal enforcement action should make substantial progress to correct problem(s) addressed in the action. Progress should be sufficient to determine that the AML/CFT program is now adequate.

[45] See 12 U.S.C.1831u.

[46] A ''non-bank'' refers to an IDI that is a bank for purposes of the FDI Act, but that is not a bank for purposes of the Bank Holding Company Act (BHCA). Non-banks may be owned by parent companies that are not subject to the BHCA, and therefore may not regulated or supervised by the FRB.