I. INTRODUCTION

This Section provides general guidance for developing and applying conditions related to a filing seeking the FDIC's approval/non-objection. While standard and common non-standard conditions are referenced within other sections of these Procedures, this section provides Case Managers guidance on developing additional non-standard conditions.

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

II. CONDITIONS

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

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

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

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

(4) In the case of a merger transaction, including a corporate reorganization, that the proposed transaction not be consummated before the 30th calendar day (or shorter time period as may be prescribed by the FDIC with the concurrence of the Attorney General) after the date of the order approving the merger transaction.[1]

Non-standard conditions include all other conditions that the FDIC imposes in connection with its approval or non-objection to a filing. A number of non-standard conditions for deposit

1 This condition is not required for corporate reorganization merger transactions. Under section 18(c)(6) of the FDI Act, transactions solely between an insured depository institution and one or more of its affiliates do not necessitate a competitive factors report and may be consummated immediately upon FDIC approval. For merger transactions involving non-affiliates, which do necessitate a competitive factors report from the Attorney General, the Attorney General typically concurs with a 15-day post-approval waiting period.

insurance applications are common and generally are used for approvals under delegated authority. These non-standard conditions are addressed in the *Deposit Insurance Applications Procedures Manual*. Non-standard conditions that may be imposed in conjunction with other filings are addressed in the applicable sections of these Procedures.

III. PROCESS

Typically, non-standard conditions are used when it is determined through the filing review process that the conditions are necessary or appropriate to address, for instance, the risk profile presented, unique elements of the filing, other circumstances relating to the applicant, or required actions not yet completed at the time the approval or non-objection action is issued. The type of conditions to be imposed can be proactive or restrictive. In drafting conditions, staff should consider the source of potential concern, such as the business plan; the timeframe to be addressed by the condition; management depth or ability to successfully implement the business plan; the proposed infrastructure, including systems, processing and risk management mechanisms; and the potential influence of control parties, affiliates, and insiders and their related interests. Conditions should clearly and specifically address the requirement or restriction that is the subject of a condition, the timing of any action to be taken and the duration of the condition, and any follow-up activities such as reporting and monitoring.

The Regional Office (RO) must obtain the applicant's written agreement to non-standard conditions if the filing is to be acted on under delegated authority. If non-standard conditions are not agreed to by the applicant, the filing must be forwarded to the Washington Office (WO) for final action.

The following resources should be consulted when developing standard and non-standard conditions:

- Section 303.2(dd) of the FDIC Rules and Regulations lists the four standard conditions that the FDIC may impose as a routine matter when approving a filing, whether or not the applicant has agreed to their inclusion.

- *Delegations of Authority Relating to 12 CFR Part 303 – Notices and Filings, Enforcement Actions, Transfer Agents, and Pledge Agreements*, lists the standard conditions when granting deposit insurance as well as delegated authority to act when non-standard conditions are imposed for a variety of filings.

- *The Delegations of Authority: Board Resolution Relating to Filings and Enforcement Matters,* Seal No. 071098, dated December 3, 2002, provides guidance on delegated authority when certain conditions are met and the applicant agrees to non-standard conditions in writing.

Case Managers should document any non-standard conditions imposed in the Non-standard Conditions comments section in the appropriate internal database. When each condition has been satisfied, Case Managers should enter the date in the internal application tracking system.

FDIC Use of Written Agreements

Depending on the nature and complexity of the filing, the FDIC may impose non-standard conditions that require the institution and/or other applicable parties (such as certain affiliates or investors) to enter into a written agreement. Written agreements provide a supplemental tool that may address specific risks or supervisory matters with regard to an institution, and have been used in conjunction with approving or non-objecting to deposit insurance applications, change in control notices, and certain other filings.

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

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

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

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

Parent company agreements and CALMAs also generally include provisions under which the FDIC may pursue formal enforcement action under Section 8 of the FDI Act if a party fails to comply with provisions of an agreement. Parent company agreements and CALMAs are generally executed by the FDIC, the institution, and the parent company (or companies).

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

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

IV. REFERENCES

Section 303.2(dd) of the FDIC Rules and Regulations

Delegation of Authority for Applications, Filings and Enforcement Matters, Board Resolution Seal No. 071098, December 3, 2002

Deposit Insurance Applications Procedures Manual