

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Applications for Deposit Insurance

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Statement of policy.

**SUMMARY:** As part of the FDIC's systematic review of its regulations and written policies under section 303(a) of the Riegle Community Development and Regulatory Improvement Act of 1994, the FDIC is revising its Statement of Policy on "Applications for Deposit Insurance." These revisions include changes to the FDIC's policies regarding initial capitalization when a *de novo* bank is organized by certain well managed and well capitalized holding companies. Policies regarding stock benefit plans are amended and regional directors are given more discretion to act under delegated authority. Changes are also made to provide guidance for proposed depository institutions which would be owned by domestic governmental units, to eliminate outdated information, and to reflect current policies and practices that have not previously been incorporated into the Statement of Policy.

**EFFECTIVE DATE:** October 1, 1998.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** This Statement of Policy is a revision of the FDIC's Statement of Policy Regarding Applications for Deposit Insurance adopted on April 13, 1992 (57 FR 12822) (the "1992 Statement of Policy"). Section 303(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRIA) (12 U.S.C. 4803(a)) requires the FDIC to streamline and modify its regulations and written policies in order to improve efficiency, reduce unnecessary costs, and eliminate unwarranted constraints on credit availability. Section 303(a) also requires the FDIC to remove inconsistencies and outmoded and duplicative requirements from its regulations and written policies.

Pursuant to this statute, the FDIC published a proposed Statement of Policy on "Applications for Deposit Insurance" in the **Federal Register** on October 9, 1997 (62 FR 52869). The proposed Statement of Policy was published in conjunction with a notice of proposed rulemaking in the **Federal Register** on October 9, 1997 (62 FR 52810) which would amend 12 CFR part 303 (and other FDIC regulations), including subpart B, concerning the procedures for an applicant to follow in applying for deposit insurance. In connection with the publication of this Statement of Policy, the FDIC has published a final rule amending part 303 (and other FDIC regulations) elsewhere in today's **Federal Register**.

Eleven commenters submitted comments in response to the proposal. The FDIC has carefully considered these comments. The comments are summarized below in the discussion of significant changes to the Statement of Policy.

#### Initial Offering of Stock

The proposed Statement of Policy provided that all stock of a particular class in the initial offering should be sold at the same price and have the same voting rights. Insiders are generally not permitted to acquire a separate class of stock with greater voting rights. Moreover, insiders should not be offered stock at a price more favorable than the price for other subscribers.

One commenter objected to these provisions on the basis that potential investors are adequately protected by the disclosure provisions of the federal securities laws and the "fairness" provisions of state securities laws. Moreover, the commenter argued that such unnecessary restrictions discourage investment in new depository institutions.

The FDIC continues to believe that these restrictions are appropriate. Price disparities or greater voting rights provide insiders with a means to gain control disproportionate to their investments. Furthermore, allowing insiders to purchase stock at a discount provides an immediate appreciation of the insiders' investments resulting from the mere establishment of the depository institution without regard to the institution's financial success and without greater risk to the insider than that borne by other investors. Such arrangements may encourage the formation of depository institutions for speculative purposes. The Statement of Policy specifically discusses the use of options as a means of compensating insiders for money placed at risk during

the organization phase, as compensation for services rendered, and as a reward for contributions to the success of the enterprise. Such arrangements differ significantly from "cheap stock" in that an individual will benefit from options granted with a strike price of fair market value at the time of issuance only if the institution is financially successful. Therefore, these provisions have been adopted as proposed.

#### Wholly Owned Subsidiary of a Holding Company

The 1992 Statement of Policy required an initial capitalization in an amount that is sufficient to provide at least an 8% Tier 1 leverage capital to total assets ratio at the end of the third year of operation. The proposed Statement of Policy provided that, in certain circumstances, the amount of the initial capital injection for a *de novo* institution may be reduced to a minimum of \$2 million or an amount that is sufficient to provide an 8% Tier 1 leverage capital ratio at the end of the first year of operation, or sufficient to meet any minimum standards established by the chartering authority, whichever is greater. This option would be available when the proposed depository institution is to be formed as a wholly owned subsidiary of a holding company which meets the standards established for an "eligible holding company," as set forth in § 303.22 of the FDIC's regulations. The holding company would also be required to provide a written commitment to maintain the proposed depository institution's Tier 1 leverage capital ratio at no less than 8% throughout the first three years of operation. This revision would allow a well-managed holding company to provide less initial capital than would have been required under the former standard. This change is considered appropriate in recognition of the FDIC's ability to reasonably quantify the financial capacity of the parent organization, and to allow the holding company to more efficiently allocate the resources of the entire organization. This amendment will permit the appropriate FDIC regional director (DOS) to act on proposals that contain these provisions when the other factors necessary for delegated authority have been met.

One commenter suggested that the required capital level for a *de novo* institution be well capitalized, rather than an 8% Tier 1 leverage capital ratio, with the agency retaining authority to require a higher amount. The FDIC believes that a *de novo* institution requires a higher level of capitalization during its formative years than does a

mature institution with an established record of sound performance. Accordingly, the FDIC has not adopted the commenter's suggestion and these provisions have been adopted as proposed.

#### **Operating Insured Offices**

In certain instances, the proposal allowed the applicant to request that the benchmark for evaluating the adequacy of capital be such that the proposed depository institution would be classified as well capitalized, as defined by its primary federal regulator. This option would be available when the proposal involves the formation of a depository institution through the acquisition of an existing insured operating office (or offices). Criteria established for this lower initial capital benchmark are that the acquisition involves substantially all of the assets and liabilities of the operating insured office, that the applicant provides reasonable evidence that the *de novo* institution's operations will be stabilized at inception, and that the proponent for the applicant is either an eligible holding company or an established banking group. The proposed Statement of Policy used an identified chain banking group as an example of one type of "established banking group." The term also is intended to cover a group of individuals who have served as directors or officers of an operating insured depository institution. For either a chain banking group or a group of individuals to be considered an established group, the association must be in existence for at least three years. This provision had been added in recognition that deposit insurance for a depository institution being established from operating offices does not present the same risks to the insurance funds as does the chartering of a true *de novo* institution. This provision sought to remove capital requirement inequities that may have existed under prior procedures with respect to certain corporate reorganization activities. This amendment would also permit the appropriate FDIC regional director (DOS) to act on proposals that contain these provisions when the other factors necessary for delegated authority have been met. Two commenters stated that they did not object to this provision and it has been adopted without change from the proposal.

#### **Stock Financing by Directors, Officers, and 10% Shareholders**

The proposal revised guidelines for borrowing limitations by directors, officers, and 10% shareholders to

finance their purchases of stock in the proposed institution. The 1992 Statement of Policy provided that direct or indirect borrowings by an individual insider of more than 75% of the purchase price of the stock subscribed, or more than 50% of the purchase price of the aggregate stock subscribed by directors, officers, and 10% shareholders as a group, is presumed to be excessive. The 1992 Statement of Policy has been amended by deleting the statement that borrowing arrangements in excess of the referenced percentage limits will ordinarily be presumed to be excessive; however, borrowing arrangements would still be carefully reviewed. The burden of providing appropriate information supporting borrowing arrangements will remain with the affected insiders. This amendment would permit the appropriate FDIC regional director (DOS) to evaluate all insider borrowing arrangements on their own merits, without having a set limit for those that will be considered excessive or otherwise inappropriate. This amendment also would permit the appropriate FDIC regional director (DOS) to act on the proposal when insider borrowing arrangements are not detrimental to the institution if the other factors necessary for delegated authority have also been met.

Similarly, borrowings by a holding company to capitalize a proposed depository institution would be evaluated in the context of the holding company's consolidated operations, rather than basing such evaluation on a 50% limit of the total initial capital of the proposed depository institution. The borrowing arrangement would need to meet any leverage guidelines established by the holding company's primary federal regulator and be reasonable. This amendment will permit the appropriate FDIC regional director (DOS) to act on a proposal that involves holding company debt financing of more than 50% when the other factors necessary for delegated authority have been met. Three commenters specifically endorsed this portion of the proposal and the FDIC adopts these provisions as proposed.

#### **Stock Benefit Plans**

The proposed Statement of Policy recognized that it is becoming increasingly common for organizers of *de novo* depository institutions to propose stock benefit plans. Such plans often include not only active officers, but also directors and, in some cases, incorporators or organizers (collectively, "incorporators"). The proposed Statement of Policy provided for

participation of active officers, outside directors, and incorporators in stock benefit plans.

The proposal provided that stock benefit plans must be fully disclosed to all potential subscribers and a description of any such plans must be included in an application for deposit insurance. Stock benefit plans should encourage the continued involvement of the participants and serve as an incentive for the successful operation of the institution. The proposed Statement of Policy further indicated that stock benefit plans should contain no feature that would encourage speculative or high risk activities, or serve as an obstacle to or otherwise impede the sale of additional stock to the public.

Guidelines were included in the proposed Statement of Policy as standards to be used in evaluating the appropriateness of stock benefit plans. These guidelines were intended to provide the applicant with basic guidance and to promote consistency within the FDIC itself. Some concepts were retained from the 1992 Statement of Policy, such as a maximum 10-year limit on options. The FDIC's practice of requiring that the exercise price be established at no less than fair market value at the time of the grant was explicitly stated. New concepts were added which emphasize that the plan should encourage the continued involvement of the proposed management. A vesting period covering the first three years of operation would be appropriate to assure continued involvement. A three-year vesting period was selected based on the FDIC's experience that a three-year period provides reasonable assurance that the business plan will have been fully implemented and stabilized operations achieved. An additional requirement was that a stock benefit plan provide for an exercise or forfeiture clause which may be invoked by the depository institution's primary federal regulator in the event the capital falls below minimum requirements. This was considered necessary to ensure that the dilutive effects of outstanding stock options will not make it unduly difficult for institutions in need of additional capital to increase capitalization in a timely manner.

The proposed Statement of Policy indicated that the FDIC will separately review stock benefit plans established to compensate incorporators who have placed personal funds at risk to finance the organization of the institution or who have provided professional services in conjunction with the organization. Since these plans were envisioned as compensating

incorporators for services already rendered, vesting or restrictions on transferability were not required.

The proposed Statement of Policy also provided that stock appreciation rights and similar plans that involve a cash payment based directly on the market value of the depository institution's stock are specifically identified as objectionable. These types of plans can result in an expense which would reduce the depository institution's capital. Such compensation plans cannot be quantified in relation to the capital adequacy factor and could be detrimental to the overall capital of a depository institution, particularly in its formative years. The proposed Statement of Policy also provided that stock benefit plans offered by *de novo* holding companies in conjunction of a new depository institution will be reviewed in the same manner as if the plan were being established by the proposed depository institution.

The FDIC received five comments in response to the stock benefit plan provisions of the Statement of Policy. The comments were generally supportive of the changes. However, three commenters raised specific concerns.

Stock appreciation rights and similar plans that involve a cash payment based directly on the market value of the depository institution's stock were deemed to be unacceptable. Two of the commenters questioned this prohibition. The FDIC continues to believe that these types of plans tend to reduce the depository institution's capital in contrast to option plans which infuse capital into the institution. This is particularly objectionable in the formative years of a new depository institution when there is often a need to preserve capital during a period of rapid growth and operating losses. One commenter suggested that there could be a requirement to reinvest all cash received in new stock. The FDIC believes this would be the functional equivalent of a grant of stock and has not adopted the suggestion or changed the proposal with respect to this issue.

One commenter questioned the FDIC's authority to impose the criteria concerning stock benefit plans upon a proposed *de novo* holding company. The FDIC believes it has such authority under section 6 of the Act, 12 U.S.C. 1816, which authorizes the FDIC to consider the general character and fitness of the management of the depository institution. Good management will not commit the depository institution, directly or indirectly, to excessive compensation of insiders. Many *de novo* institutions are

organized as subsidiaries of holding companies whose only substantive function is to own the stock of the proposed institution. Without the ability to set standards for stock benefit plans sponsored by *de novo* holding companies, the FDIC's requirements concerning stock benefit plans could easily be avoided by organizing a holding company. The FDIC has adopted this aspect of the proposal without change.

The proposed Statement of Policy did not place limits on the volume of options or warrants that could be issued to directors, officers or incorporators. The Statement of Policy contemplated the FDIC reviewing the volume of options or warrants granted on a case-by-case basis. The FDIC received no comments on this matter. However, since the publication of the proposed Statement of Policy, the FDIC has received a number of applications for deposit insurance contemplating stock benefit plans in which the volume of options granted to organizers went well beyond what the FDIC believed was reasonable. In light of this recent experience, the FDIC now believes that guidance should be provided regarding how the FDIC will determine if the volume of options or warrants granted is acceptable.

The FDIC has now adopted the following standards in the Statement of Policy for evaluating the volume of options or warrants to be granted:

- Stock benefit plans granted to active officers and directors will be reviewed as part of the total compensation package. The Statement of Policy does not place definite limits on stock benefit plans for such individuals.
- In reviewing stock benefit plans granted to incorporators, FDIC will review the individual's financial commitment, time, expertise, and continuing involvement in the management of the proposed financial institution. Plans to compensate incorporators that provide for more than one option or warrant for each share subscribed will generally be considered excessive. It is further expected that incorporators granted options or warrants at or near this level will actively participate in the management of the depository institution as an executive officer or director. On a case-by-case basis, the FDIC may not object to additional options being granted to an incorporator who will also be a senior executive officer.

- In those limited situations where individuals who substantially contribute to the organization of a new depository institution do not intend to serve as an active officer or director after

the institution opens for business, the FDIC will generally not object to such individuals receiving stock options or warrants under certain circumstances. Specifically, organizers who agree to accept shares of bank stock as payment for funds placed at risk during the organization phase or in payment for professional services rendered may receive options or warrants of up to an equal number of shares received. When continuing service is not contemplated, the FDIC will not require vesting or restrictions on transferability, but will review the duration of the rights, exercise price, and exercise or forfeiture clauses.

It is believed that these standards allow incorporators of *de novo* institutions flexibility to design reasonable compensation programs to reward those who have placed money at risk and to incent directors and officers to promote the best interests of the institution, consistent with safe and sound banking practices.

#### **Applicants Owned by Domestic Governmental Units**

The FDIC specifically solicited comment in the proposal on whether deposit insurance should be conferred upon certain applicants that are owned or controlled by public entities, specifically domestic governmental units. The FDIC stated in the proposal that it was concerned that due to their ownership by a governmental unit, such depository institutions presented unique supervisory concerns that do not exist with privately owned depository institutions. The FDIC noted its uncertainty about such an institution's ability to operate independently of the political process, the institution's ability and willingness to raise capital in the equity markets, management stability and business purpose. The FDIC stated that in light of these concerns, the agency would review an application for deposit insurance filed by a domestic governmental unit very closely and that the FDIC was unlikely to resolve favorably all of the statutory factors which must be considered under the FDIC's implementing statute.<sup>1</sup> See 62 FR at 52871 (October 9, 1997).

<sup>1</sup> A distinction was made, however, for banks owned by foreign governments and their subdivisions and banks owned and controlled by Native American tribes or bands. Banks that are owned by foreign governments and their subdivisions are entitled to "national treatment." (See International Banking Act of 1978, 12 U.S.C. 3101 *et seq.*) National treatment requires that all foreign depository institutions, whether publicly- or privately-owned, receive consistent treatment with domestic entities when operating in the United States. This includes eligibility for deposit insurance which is often a condition of either a

The FDIC received seven comments in response. Three were from organizations (both public and private) that provide low- and moderate-income housing in various areas of the country; two were from banking trade associations; one was from the trade association for local housing finance agencies; and one was from a member of the U.S. House of Representatives. Five commenters were opposed to the addition of language to the statement of policy concerning deposit insurance applications from a domestic governmental unit. The two other commenters agreed that the FDIC has legitimate concerns about providing deposit insurance to depository institutions owned by governmental units, but argued that it would still be best to have one application procedure for all applicants.

One of the most common criticisms of the positions taken in the preamble to the proposal is that it amounts to "effective preclusion of ownership and operation of a depository institution by a public entity." The commenters further argued that a bank owned by a governmental unit seeking deposit insurance from the FDIC presents the same issues as any other applicant for deposit insurance. They noted that the criteria for the review of a deposit insurance application are specified by the FDIC's implementing statute and that the FDIC may not exceed those criteria or apply them differently to an applicant owned by a governmental unit.

Two commenters agreed with the FDIC that applications from depository institutions owned by public entities pose special concerns and should be carefully scrutinized. They recommended that notices of such applications be published in the **Federal Register** to ensure that a broad audience has the opportunity to comment on these applications.

state or federal charter. Native American tribes or bands that own or control depository institutions can also be distinguished from a conventional governmental unit that seeks to open or acquire a depository institution. This is because under federal law, Native American tribes and bands function as both governmental and economic, for-profit entities. The Indian Reorganization Act of 1934 (the IRA) (25 U.S.C. 461 *et seq.*) authorizes not only the creation of tribal governments (see section 16 of the IRA, 12 U.S.C. 476), but also provides for the creation of tribal business corporations pursuant to section 17 of the IRA (25 U.S.C. 477). At the same time, however, a tribal government organized under section 16 of the IRA is not precluded from engaging in business activities. See *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 384, 674 P.2d 1376 (Ct. App. 1984). These legal and policy considerations unique to these two categories of insurance applicants outweigh any concerns that the FDIC may have regarding the ownership of such depository institutions by governmental entities.

In response to the comments on the positions taken in the preamble to the proposal, the FDIC emphasizes that it has no intention of exceeding the enumerated statutory criteria for evaluation of a deposit insurance application, nor does the agency propose to apply different standards among deposit insurance applicants. However, the FDIC notes that because of their ultimate control by the political process, such institutions could raise special concerns relating to management stability, their business purpose, and their ability and willingness to raise capital (particularly in the form of true equity rather than governmental transfers). On the other hand, such institutions may be particularly likely to meet the convenience and needs of their local community, particularly if the local community is currently un- or under-served by depository institutions. In view of such considerations and the policy issues they embody, the FDIC will closely evaluate such applications to ensure that the required statutory factors are met.

With respect to the recommendation from commenters that notices of deposit insurance applications from institutions which would be owned by governmental entities be published in the **Federal Register** for comment, the FDIC notes that all applications which are subject to the requirements of the CRA (this includes deposit insurance applications) will be listed on the FDIC's Internet home page. In addition, the FDIC is considering whether to specifically solicit comment on such matters as insurance applications from institutions which would be owned by governmental entities, either on the Internet or by publication in the **Federal Register**.

#### Other Changes

Other changes from the 1992 Statement of Policy included in the proposal are as follows:

- In conjunction with the FDIC's recent rescission of its Statement of Policy regarding Applications, Legal Fees, and Other Expenses (62 FR 15479, April 1, 1997), the proposal included comments relative to fees incident to an application.
- The proposed Statement of Policy replaced the requirement that "no dividends are to be paid until all initial losses have been recaptured . . ." with "during the first three years of operation, cash dividends shall be paid only from net operating income (after tax) . . ." The proposed Statement of Policy also retained the requirement that no dividends be paid until an appropriate allowance for loan and lease

losses has been established and overall capital is adequate. This amendment was designed to provide reasonable accommodation to possible Subchapter S corporation applicants.

- The 1992 Statement of Policy was revised to authorize the appropriate FDIC regional director (DOS) to waive submission of financial information for proposed officers and directors when the proposed depository institution is being formed as a wholly owned subsidiary of a holding company. This was proposed in recognition that, when the proposed depository institution is being formed as a wholly owned subsidiary of a holding company, personal financial information may not be meaningful.

- The 1992 Statement of Policy was also amended by deleting the statement that the chief executive officer is expected to be a qualified and experienced lending officer. It is expected that a qualified lending officer will be provided for in the management structure; however, the chief executive officer need not be that person.

- The proposal deleted the requirement that a majority of the proposed directors will reside within, or have significant business interests within 100 miles of the proposed depository institution. While the FDIC encourages local involvement in proposed depository institutions, a specific residency requirement was not considered necessary.

- The 1992 Statement of Policy was also revised to require that the applicant commit the depository institution to obtain an audit by an independent public accountant annually for only a three-year period, rather than the first five years.

No commenters objected to these provisions and they have been adopted as proposed.

An additional minor change, not included in the proposal, has been added to the Statement of Policy. Under the discussion of the statutory factor "Consistency of Corporate Powers with the Purposes of the Act" a statement has been added which indicates that generally the FDIC will presume that a proposed national bank's or federal savings association's corporate powers are consistent with the purposes of the Act. The 1992 Statement of Policy and the proposal only addressed this statutory factor as it applied to insured state banks and state savings associations. The added provisions clarify the FDIC's position with respect to national banks and federal savings associations.

This Statement of Policy is applicable only to applications for deposit

insurance, and it is not intended to establish policy for other applications or actions undertaken by established operating insured depository institutions.

The Board of Directors of the FDIC has adopted the following Statement of Policy on Applications for Deposit Insurance:

### **FDIC Statement of Policy on Applications for Deposit Insurance**

#### *Introduction*

The Board of Directors of the FDIC is charged by statute with the responsibility of acting on applications for federal deposit insurance by all depository institutions<sup>1</sup> including any national bank, district bank, state bank, federal savings association, state savings association, savings bank, or trust company. In addition, the Board of Directors also will act on applications for federal deposit insurance by an industrial bank (or similar depository institution which the Board of Directors finds to be operating substantially in the same manner as an industrial bank), or any other depository institution which is engaged in the business of receiving deposits, other than trust funds.

An insured depository institution which wishes to continue its insured status after withdrawing from the Federal Reserve System, or when converting from a mutual to a stock form of ownership by the chartering of an interim savings association under the provisions of section 10(o) of the Home Owners Loan Act, also must file an application with the FDIC for deposit insurance.

#### **Procedures**

Forms and instructions for applying for deposit insurance may be obtained from any regional office of the FDIC Division of Supervision (DOS). Completed applications should be filed with the appropriate regional office as

<sup>1</sup> Certain exceptions to the statutory requirement that deposit insurance for all depository institutions be acted on by the FDIC are identified in section 5 of the Act, 12 U.S.C. 1815. For example, federally-chartered interim institutions are deemed to be insured depository institutions upon the issuance of the institution's charter by the appropriate federal agency. Under section 5(a)(2) a federally-chartered interim institution is a federally-chartered depository institution that will not open for business. An application for federal deposit insurance generally is not required for such an institution even if the federal interim institution is the surviving charter of a merger with another insured depository institution. See 12 CFR 303.62(b)(2) and the FDIC's Statement of Policy on Bank Merger Transactions (section 4.2). Additionally, any depository institution whose insured status is continued pursuant to section 4 of the Federal Deposit Insurance Act is not required to apply to continue its insured status. 12 U.S.C. 1815, 1814.

that term is defined in § 303.2(g) of the FDIC's rules and regulations. Organizers and incorporators (collectively, "incorporators") of proposed new depository institutions should file their applications with the FDIC and the appropriate chartering authority at the same time. Information provided to the chartering authority that is also needed as part of the deposit insurance application may be provided to the FDIC by appending a copy of the information to the FDIC application. Use of the FDIC application form is optional; however, the material submitted to the FDIC must contain all information requested in the FDIC application form, unless the FDIC otherwise indicates. In addition, all incorporators must sign and submit the signature page of the FDIC's deposit insurance application form, even if the application itself is not being used. It is strongly recommended that a representative(s) of the organizing group meet with the chartering authority and the FDIC prior to filing an application to reach an understanding of the information requirements of each agency. This practice typically facilitates processing and eliminate unnecessary delays. Information requirements may not be as extensive for applications sponsored by existing holding companies or other well established banking groups. The FDIC may take final action prior to final action by other regulatory authorities in cases in which the FDIC has determined that there is no material disagreement on the action to be taken.

The procedures governing the administrative processing of an application for deposit insurance are contained in part 303, subpart B, of the FDIC's rules and regulations (12 CFR part 303). Processing of an application will not commence until the application is deemed substantially complete. An incomplete application may be returned to the applicant. The applicant must satisfy all terms of a conditional approval prior to deposit insurance becoming effective.

These policies apply to all proposed *de novo* depository institutions and operating institutions applying for deposit insurance, with the exception of applications submitted for the sole purpose of acquiring assets and assuming liabilities of an insured institution in default. Policies are modified in those situations to reflect the urgent nature of the transaction. Guidance for those situations is contained in a separate section of this Policy Statement.

Subpart B of part 303 contains special filing and processing procedures for a

state member bank which seeks to continue its insured status upon termination of membership in the Federal Reserve System and for interim institutions chartered to facilitate mergers.

#### **Proposed Depository Institutions**

In considering applications for deposit insurance for a proposed depository institution, the FDIC must evaluate each application in relation to the factors prescribed in section 6 of the Federal Deposit Insurance Act (hereafter the Act) (12 U.S.C. 1816). Those factors are:

- The financial history and condition of the depository institution;
- The adequacy of its capital structure;
- Its future earnings prospects;
- The general character and fitness of its management;
- The risk presented by such depository institution to the deposit insurance fund;
- The convenience and needs of the community to be served by the depository institution; and
- Whether its corporate powers are consistent with the purposes of the Act.

In general, the applicant will receive deposit insurance if all of these statutory factors plus the considerations required by the National Historic Preservation Act and the National Environmental Policy Act of 1969 are resolved favorably. Additional guidance regarding the National Historic Preservation Act and the National Environmental Policy Act may be found in the respective FDIC Statements of Policy for each of these statutes.

If the proposal contemplates the simultaneous establishment of a holding company, the application should disclose and discuss the proposed activities of the parent holding company, as well as those of the proposed depository institution.

Where the proposed depository institution will be a subsidiary of an existing bank or thrift holding company, the FDIC will consider the financial and managerial resources of the parent organization in assessing the overall proposal and in evaluating the statutory factors prescribed in section 6 of the Act. In such circumstances, the application for deposit insurance should contain a copy of any information submitted to the holding company's primary federal regulator. Subpart B of part 303 of the FDIC's regulations (12 CFR 303.20–303.27) discusses certain expedited procedures that may be available to eligible depository institutions or eligible holding

companies (as those terms are defined in the regulation).

The FDIC may conduct examinations and/or investigations to develop essential information with respect to deposit insurance applications. The appropriate regional director (DOS) will determine the need to conduct an investigation and its scope. Every effort will be made to coordinate any FDIC investigation with any investigations conducted by other regulators.

The FDIC has formulated guidelines for evaluating deposit insurance applications which are designed to ease administration, prevent arbitrary judgment, and assure uniform and fair treatment of all applicants. A discussion of these guidelines follows.

## Statutory Factors

### 1. Financial History and Condition

Proposed and newly organized depository institutions have no financial history to serve as a basis for determining qualifications for deposit insurance. Thus, the primary areas of consideration under this statutory factor are the ability of proponents to provide financial support to the new institution, investment in fixed assets, including lease obligations, and insider transactions. Lease transactions shall be reported in accordance with Financial Accounting Standards Board Statement 13 (Accounting for Leases). Applicants are expected to provide procedures, security devices, and safeguards at least equivalent to the minimums specified in the Bank Protection Act of 1968 (12 U.S.C. 1881-1884).

(a) *Investment in fixed assets and leases*—The applicant's aggregate direct and indirect fixed asset investment, including lease obligations, must be reasonable in relation to its projected earnings capacity, capital, and other pertinent matters of consideration. Applicants are cautioned against purchasing any fixed assets or entering into any noncancelable construction contracts, leases, or other binding arrangements related to the proposal unless and until the FDIC approves the application.

(b) *Insider transactions*—Any financial arrangement or transaction involving the applicant and an insider(s) should be documented by the applicant to demonstrate that: (1) the proposed transaction with insiders is made on substantially the same terms as those prevailing at the time for comparable transactions with non-insiders, and does not involve more than normal risk or present other unfavorable features to the applicant depository institution; and (2) the

proposed transaction must be approved in advance by a majority of the depository institution's incorporators. In addition, full disclosure of any arrangements with an insider must be made to all proposed directors and prospective shareholders. An insider means a person who is proposed to be a director, officer, or incorporator of an applicant; a shareholder who directly or indirectly controls 10% or more of a class of the applicant's outstanding voting stock; or the associates or interests of any such person.

### 2. Adequacy of the Capital Structure

Normally, the initial capital of a proposed depository institution should be sufficient to provide a Tier 1 capital to assets leverage ratio (as defined in the appropriate capital regulation of the institution's primary federal regulator) of not less than 8.0% throughout the first three years of operation. In addition, the depository institution must maintain an adequate allowance for loan and lease losses.

The adequacy of the capital structure of a newly organized depository institution is closely related to its deposit volume, fixed asset investment and the anticipated future growth in liabilities. Deposit projections made by the applicant must, therefore, be fully supported and documented. Projections should be based on established growth patterns in the specific market, and initial capitalization should be provided accordingly. Special purpose depository institutions (such as credit card banks) should provide projections based on the type of business to be conducted and the potential for growth of that business. Initial capital should normally be in excess of \$2 million net of any pre-opening expenses that will be charged to the institution's capital after it commences business.

(a) *Initial offering of stock*—All stock of a particular class in the initial offering should be sold at the same price, and have the same voting rights. Proposals which allow the insiders to acquire a separate class of stock with greater voting rights are generally unacceptable. Insiders should not be offered stock at a price more favorable than the price for other subscribers. Price disparities provide insiders with a means to gain control disproportionate to their investments.

When securities are sold to the public, the disclosure of all material facts is essential. The FDIC's Statement of Policy regarding use of Offering Circulars in connection with Public Distribution of Bank Securities (61 FR 46808, September 5, 1996) provides additional guidance. A copy of the

offering circular prepared by the applicant, the stock solicitation material and the subscription agreement should be submitted to the FDIC when they become available.

(b) *Wholly owned subsidiary of a holding company*—If the applicant is being established as a wholly owned subsidiary of an eligible holding company (as defined in part 303, subpart B), the FDIC will consider the financial resources of the parent organization as a factor in assessing the adequacy of the proposed initial capital injection. In such cases, the appropriate regional director (DOS) may find favorably with respect to the adequacy of capital factor, when the initial capital injection is sufficient to provide for a Tier 1 leverage capital ratio of at least 8% at the end of the first year of operation, based on a realistic business plan, or the initial capital injection meets the \$2 million minimum capital standard set forth in this Statement of Policy, or any minimum standards established by the chartering authority, whichever is greater. The holding company shall also provide a written commitment to maintain the proposed institution's Tier 1 leverage capital ratio at no less than 8% throughout the first three years of operation.

(c) *Operating insured offices*—If the proposal involves the acquisition of an insured operating office or offices, the applicant may request that the benchmark for evaluating the adequacy of capital be an amount necessary for the newly chartered institution to be classified as well capitalized, as defined by its primary federal regulator. In such cases, the appropriate regional director (DOS) may find favorably with respect to the capital factor based on a favorable finding with respect to the following:

- There is a realistic three-year business plan which evidences stabilized operations at inception;
- The proposal involves substantially all assets and deposits attributable to the respective insured operating office(s); and
- The proponent is either an eligible holding company (as defined in part 303, subpart B) or is a banking group that has, as determined by the FDIC, demonstrated its ability to successfully manage an insured depository institution. (A qualified banking group should have an established association of at least three years. A chain banking group which is recognized as such by the FDIC is one type of banking group that is contemplated in this paragraph.)

(d) *Stock financing by proposed officers, directors, and 10% shareholders*—Financing arrangements by proposed officers, directors, and 10%

shareholders of their investments in stock of the proposed depository institution will also be carefully reviewed. Such financing will be considered acceptable only if the party financing the stock can demonstrate the ability to service the debt without reliance on dividends or other forms of compensation from the applicant. When stock financing arrangements of proposed officers, directors, and 10% shareholders are anticipated, information should be submitted with the application demonstrating that adequate alternative independent sources of debt servicing are available. Direct or indirect financing by proposed officers, directors, and 10% shareholders of more than 75% of the purchase price of the stock subscribed by any individual, or more than 50% of the purchase price of the aggregate stock subscribed by the proposed officers, directors, and 10% shareholders as a group, will require supporting justification in the application regarding the reason that the financing arrangements should be considered acceptable. If the proposed financing arrangements are not considered appropriate, the FDIC may find unfavorably on the adequacy of the capital structure.

When the proposed depository institution is being established as a subsidiary of an existing holding company, the funding source being utilized by the holding company for its capital contribution will be evaluated in the context of the holding company's consolidated operations. In such cases, the holding company's proposed leverage must be in accordance with the guidelines of its primary federal regulator.

Loans made to purchase the stock of the proposed institution are not to be refinanced by the newly established institution. Deposits or other funds of the institution at correspondent banks are not to be used as compensating balances for loans to insiders. During the first three years of operation, cash dividends shall be paid only from net operating income, and shall not be paid until an appropriate allowance for loan and lease losses has been established and overall capital is adequate.

### 3. Future Earnings Prospects

Before approving an application for deposit insurance, the FDIC must have reasonable assurance that the new institution can be operated profitably. Therefore, the incorporators will need to demonstrate through realistic and supportable estimates that, within a reasonable period (normally three years), the earnings of the applicant will

be sufficient to provide an adequate profit.

The applicant must also maintain its books and records in accordance with the principles of accrual accounting.

### 4. General Character and Fitness of the Management

To satisfy this factor, the evidence must support a management rating which, in an operating institution, would be equivalent to a rating of 2 or better under the Uniform Financial Institution Rating System.<sup>2</sup> Since in most instances the management of a proposed depository institution will not have an operating record, the individual directors and officers will be evaluated largely on the basis of the following:

- Financial institution and other business experience;
- Duties and responsibilities in the proposed depository institution;
- Personal and professional financial responsibility;
- Reputation for honesty and integrity; and
- Familiarity with the economy, financial needs, and general character of the community in which the depository institution will operate.

All proposed depository institutions shall provide at least a five member board of directors. The identity and qualifications of the proposed full-time chief executive officer should be made known to the FDIC as soon as possible, preferably when the application is filed with the appropriate FDIC regional director (DOS). Prior to the opening of the institution, proponents must advise the FDIC in writing of any change in the directorate, senior active management, or a change in the ownership of stock which would result in a shareholder owning 10% or more of the total shares of either the depository institution or its holding company.

(a) *Fees and expenses*—The commitment to pay or payment of unreasonable or excessive fees and other expenses incident to an application will reflect adversely upon the management of the applicant institution. Fees and other organizational expenses incurred or committed to should be fully supported.

Expenses for professional or other services rendered by insiders will receive special review for any indication of self-dealing to the detriment of the institution and its other shareholders. As a matter of practice, the FDIC expects full disclosure to all directors and

<sup>2</sup> A 2 rating under the Uniform Financial Institution System is generally indicative of a satisfactory record of performance in light of the institution's particular circumstances.

shareholders of any arrangement with an insider.

In no case will a deposit insurance application be approved where the payment of a fee, in whole or in part, is contingent upon any act or forbearance by the FDIC or by any other federal or state agency or official.

(b) *Stock benefit plans*—Stock benefit plans, including stock options, stock warrants, and other similar stock based compensation plans will be reviewed by the FDIC and must be fully disclosed to all potential subscribers. Participants in stock benefit plans may include incorporators, directors, and officers. A description of any such plans proposed must be included in the application submitted to the appropriate regional director (DOS). The structure of stock benefit plans should encourage the continued involvement of the participants and serve as an incentive for the successful operation of the institution. Stock benefit plans should contain no feature that would encourage speculative or high risk activities or serve as an obstacle to or otherwise impede the sale of additional stock to the general public.

Listed below are factors that the FDIC will consider in reviewing stock benefit plans:

- The duration of rights granted should be limited, and in no event should the exercise period exceed ten years;
  - Rights granted should encourage the recipient to remain involved in the proposed depository institution. For example, a vesting period of approximately equal percentages each year over the initial three years of operation is a type of provision that would be appropriate to ensure continued involvement. This requirement may be waived for participants awarded only a nominal number of shares;
  - Rights granted should not be transferable by the participant;
  - The exercise price of stock rights shall not be less than the fair market value of the stock at the time that the rights are granted;
  - Rights under the plan must be exercised or expire within a reasonable time after termination as an active officer, employee or director; and
  - Stock benefit plans should contain a provision allowing the institution's primary federal regulator to direct the institution to require plan participants to exercise or forfeit their stock rights if the institution's capital falls below the minimum requirements, as determined by its state or primary federal regulator.
- Stock benefit plans provided to directors and officers will be reviewed

as a part of the total compensation package offered to such individuals.

The FDIC will closely review stock benefit plans established to compensate incorporators. In reviewing such plans, the FDIC will consider the individual's time, expertise, financial commitment, and continuing involvement in the management of the proposed institution. The FDIC will also consider the amount and basis of any cash payments which will be made to the incorporator for services rendered or as a return on funds placed at risk. Plans to compensate incorporators that provide for more than one option or warrant for each share subscribed will generally be considered excessive. It is further expected that incorporators granted options or warrants at or near this level will actively participate in the management of the depository institution as an executive officer or director. On a case-by-case basis, the FDIC may not object to additional options being granted to an incorporator who will also be a senior executive officer.

The FDIC recognizes that there will be limited instances where individuals who substantially contribute to the organization of a new depository institution do not intend to serve as an active officer or director after the institution opens for business. The FDIC generally will not object to awarding warrants or options to incorporators who agree to accept shares of stock in lieu of cash payment for funds placed at risk or for professional services rendered. In such instances, the FDIC defines funds placed at risk to include "seed money" actually paid into the organizational fund and the value of professional services rendered as the market value of legal, accounting and other professional services rendered. Generally, warrants or options for organizers who will not participate in the management of the institution will be considered excessive if the amount of options or warrants to be granted exceeds the number of shares of stock received in repayment for funds placed at risk and/or for professional services rendered. The granting of options to incorporators who guarantee loans to finance an institution's organization generally would not be objectionable, but options granted should be limited so that the market value of the stock subject to option does not exceed the amount of the loan guarantees (although guarantees exceeding the amount drawn or expected to be drawn will not be considered). When continuing service is not contemplated, the FDIC will not require vesting or restrictions on transferability, but will review the

duration of the rights, exercise price, and exercise or forfeiture clauses in the same manner as discussed above.

In evaluating benefit and compensation plans for insiders, the FDIC will look to the substance of the proposal. Those proposals that are determined to be substantially stock based plans will be evaluated based on the foregoing stock benefit plan criteria. Stock appreciation rights and similar plans that include a cash payment to the recipient based directly on the market value of the depository institution's stock are unacceptable.

If the proposal involves the formation of a *de novo* holding company and a stock benefit plan is being proposed at the holding company level, that stock benefit plan will be reviewed by the FDIC in the same manner as a plan involving stock issued by the proposed depository institution.

In some instances, the exercise of rights granted by a stock benefit plan will trigger the requirements of the Change in Bank Control Act of 1978, section 7(j) of the FDI Act (12 U.S.C. 1817(j)). The approval of an Application for Deposit Insurance which includes a description of stock benefit plans does not satisfy the prior notice requirements of the Change in Bank Control Act, if the exercise of rights would trigger the prior notice requirement.

(c) *Background and biographical information*—Proposed directors, officers, and 10% shareholders must file financial and biographical information in connection with the deposit insurance application. The FDIC may request a report from the Federal Bureau of Investigation or other investigatory agencies on these individuals. Fingerprinting of individuals may be required. Background checks and fingerprinting may be waived by the appropriate FDIC regional director (DOS) for individuals who are currently associated with, or have had a recent past association with, an insured depository institution. When the proposed depository institution is being established as a wholly owned subsidiary of an eligible holding company, the appropriate FDIC regional director (DOS) may waive financial information for those persons who are being proposed as directors or officers of the applicant. Background checks conducted by other federal financial institution regulators in connection with charter applications are generally adequate for the FDIC if the other regulators agree to notify the FDIC of instances in which further investigation is warranted.

In the event any present or prospective director, officer, employee,

controlling stockholder, or agent of the applicant has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution of such offense, the applicant must obtain the FDIC's written consent under section 19 of the Act (12 U.S.C. 1829), before any such person may serve in one or more of those capacities. Guidelines regarding section 19 applications may be obtained from the appropriate FDIC regional office (DOS).

Proponents should be aware of the prohibitions against interlocking management officials which are applicable to depository institutions and depository institution holding companies and which are contained in the Depository Institution Management Interlocks Act (12 U.S.C. 3201).

(d) *Fidelity insurance, policies, and audit coverage*—An insured depository institution should maintain sufficient fidelity bond coverage on its active officers and employees to conform with generally accepted industry practices. Primary coverage of no less than \$1 million is ordinarily expected. Approval of the application may be conditioned upon acquisition of adequate fidelity coverage prior to opening for business.

Applicants are expected to develop appropriate written investment, loan, funds management and liquidity policies. Establishment of an acceptable audit program is required for proposed depository institutions. Applicants for deposit insurance coverage are expected to commit the depository institution to obtain an audit by an independent public accountant annually for at least the first three years of operation. The FDIC may determine,<sup>3</sup> on a case-by-case basis, that a separate audit is unnecessary where the applicant is owned by a holding company and the proposed depository institution will undergo an audit performed by an independent public accountant as part of an audit of the consolidated financial statements of its parent company.

##### *5. Risk Presented to the Bank Insurance Fund or Savings Association Insurance Fund*

In order to resolve this factor favorably, the FDIC must be assured that the proposed institution does not present an undue risk to the Bank Insurance Fund or the Savings Association Insurance Fund. As a

<sup>3</sup>In a situation in which the FDIC is not to be the primary federal regulator, these determinations will be made in consultation with the primary federal regulator.

general matter, the FDIC interprets this factor very broadly. In making its determination, the FDIC will rely on any information available to it, including, but not limited to the applicant's business plan. The FDIC expects that an applicant will submit a business plan commensurate with the capabilities of its management and the financial commitment of the incorporators.<sup>4</sup> Submission of an unsound business plan will unfavorably impact the finding concerning this factor. An applicant's business plan should demonstrate the following:

- Adequate policies, procedures, and management expertise to operate the proposed depository institution in a safe and sound manner;
- Ability to achieve a reasonable market share;
- Reasonable earnings prospects;
- Ability to attract and maintain adequate capital; and
- Responsiveness to community needs.

Operating plans that rely on high risk lending, a special purpose market, or significant funding from sources other than core deposits, or that otherwise diverge from conventional bank related financial services will require specific documentation as to the suitability of the proposed activities for an insured institution. Similarly, additional documentation of plans is required where markets to be entered are intensely competitive or economic conditions are marginal.

#### 6. Convenience and Needs of the Community to be Served

The essential considerations in evaluating this factor are the deposit and credit needs of the community to be served, the nature and extent of the opportunity available to the applicant in that location, and the willingness and ability of the applicant to serve those financial needs.

The applicant must clearly define the community it intends to serve and provide information on that community, including economic and demographic data and a description of the competitive environment. The applicant should also define the services to be offered in relation to the needs of the community. The proposed depository institution's Community Reinvestment Act documentation, including any applicable public file information, prepared in accordance with the requirements of the institution's

<sup>4</sup> Any significant deviation from the business plan within the first three years of operation must be reported by the insured depository institution to the primary federal regulator before consummation of the change.

primary federal regulator, is an important part of the FDIC's evaluation of the convenience and needs of the community to be served.

#### 7. Consistency of Corporate Powers with the Purposes of the Act

(a) *National banks and Federal savings associations*—Generally the FDIC will presume that a proposed national bank's or federal savings association's corporate powers are consistent with the purposes of the Act.

(b) *Insured state banks and state savings associations*—Pursuant to section 24 of the Act (12 U.S.C. 1831a), no insured state bank may engage as principal in any type of activity that is not permissible for a national bank, unless the FDIC has determined that the activity would pose no significant risk to the appropriate deposit insurance fund and the state bank is, and continues to be, in compliance with applicable capital standards prescribed by its primary federal regulator. Similarly, section 28 of the Act (12 U.S.C. 1831e) provides that a state chartered savings association may not engage in any type of activity that is not permissible for a federal savings association, unless the FDIC has determined that the activity would pose no significant risk to the affected deposit insurance fund and the savings association is, and continues to be, in compliance with the capital standards for the association. Applicants shall agree in the application not to engage in any prohibited activities after deposit insurance has been granted.

State nonmember banks may not exercise trust powers without the prior written approval of the FDIC.

#### Operating Noninsured Institutions

This section discusses the evaluation of applications for deposit insurance submitted by operating noninsured institutions. The FDIC's criteria for evaluating applications submitted by operating institutions are generally the same as those for proposed depository institutions.

The FDIC must consider the seven factors found in section 6 of the Act, which are discussed above.

The condition of an applicant institution will be determined from all available information and will generally include an on-site examination as part of the investigation process. Results of the examination should reflect an institution that is fundamentally sound, although some modest weaknesses may exist. The nature and severity of deficiencies found should not be material, and the institution must be

stable and able to withstand business fluctuations.

Capital ratios will be calculated using financial statements prepared in accordance with the "Instructions-Consolidated Reports of Condition and Income" or "Thrift Financial Reports" in use for insured institutions at the time. An applicant's capital adequacy will be measured in relation to the capital ratios established in the capital regulations of the institution's primary federal regulator. Based on an analysis of the type and quality of the institution's assets, the kind of powers exercised, the institution's funding sources, or other factors, an initial capital level higher than the minimum levels prescribed may be required. The analysis will include consideration of such matters as whether the applicant is relatively new,<sup>5</sup> has embarked upon a substantive change in powers exercised, or has experienced erratic growth patterns in recent years.

As part of the application investigation process, the FDIC will discuss with the applicant its future operating intentions. If any change in its kind or level of activity is expected following, or as a result of, the approval by the FDIC of deposit insurance, the applicant may be requested to submit a plan for maintaining adequate capital in the future.

Unless waived in writing by the FDIC, an applicant shall have a full scope audit conducted by an independent public accountant prior to submitting an application and shall submit a copy of the auditor's report as part of the application.

Section 24 of the Act (12 U.S.C. 1831a) limits the powers of insured state banks, and section 28 of the Act (12 U.S.C. 1831e) limits the powers of state chartered savings associations. If the institution is exercising any powers not authorized under the applicable statute, the application should contain an agreement and plan for eliminating the activity as soon as possible, or a separate application should be submitted seeking the FDIC's consent to continue the activity.

#### Deposit Insurance Applications From Proposed Publicly Owned Depository Institutions

An application for deposit insurance for a proposed depository institution

<sup>5</sup> This Statement of Policy provides that the initial capital for a proposed depository institution should be sufficient to provide a leverage ratio of Tier I capital to total estimated assets of at least 8% throughout the first three years of operation. This standard shall also be applied to a recently organized institution applying for deposit insurance.

which would be owned or controlled by a domestic governmental entity (such as, for example, a state, county or a municipality) will be reviewed very closely.<sup>6</sup> The FDIC is of the opinion that due to their public ownership, such depository institutions present unique supervisory concerns that do not exist with privately owned depository institutions. For example, because of their ultimate control by the political process, such institutions could raise special concerns relating to management stability, their business purpose, and their ability and willingness to raise capital (particularly in the form of true equity rather than governmental transfers). On the other hand, such institutions may be particularly likely to meet the convenience and needs of their local community, particularly if the local community is currently un- or under-served by depository institutions. In view of such considerations and the policy issues they embody, the FDIC will closely evaluate such applications to ensure that the required statutory factors are met.

#### **Proposed Depository Institutions Formed for the Sole Purpose of Acquiring Assets and Assuming Liabilities of an Insured Institution in Default**

Because of the urgent nature of this type of transaction, the procedures described above for insuring proposed

<sup>6</sup>Banks that are owned by foreign governments and their subdivisions and banks that are owned or controlled by Native American tribes or bands are distinguished from conventional governmental units and will continue to be reviewed in the same manner as in the past. Banks that are owned by foreign governments and their subdivisions are entitled to "national treatment." (See International Banking Act of 1978, 12 U.S.C. 3101 *et seq.*). National treatment requires that all foreign depository institutions, whether publicly- or privately-owned, receive consistent treatment with domestic entities when operating in the United States. This includes eligibility for deposit insurance which is often a condition of either a state or federal charter. Native American tribes or bands that own or control depository institutions can also be distinguished from a conventional governmental unit that seeks to open or acquire a depository institution. This is because under federal law, Native American tribes and bands function as both governmental and economic, for-profit entities. The Indian Reorganization Act of 1934 (the IRA) (25 U.S.C. 461 *et seq.*) authorizes not only the creation of tribal governments (see section 16 of the IRA, 12 U.S.C. 476), but also provides for the creation of tribal business corporations pursuant to section 17 of the IRA (25 U.S.C. 477). At the same time, however, a tribal government organized under section 16 of the IRA is not precluded from engaging in business activities. See *S. Unique Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 384, 674 P.2d 1376 (Ct. App. 1984). These legal and policy considerations unique to these two categories of insurance applicants outweigh any concerns that the FDIC may have regarding the ownership of such depository institutions by governmental entities.

depository institutions are modified when the institution is being formed for the sole purpose of acquiring assets and assuming liabilities of an institution in default. Such institutions are approved based on the statutory factors contained in section 6 of the Act; however, the procedures for resolving these factors are modified significantly.

The evaluation of the statutory factor "financial history and condition" will be based to a great extent on the quality of assets purchased and the types of liabilities assumed in the transaction.

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

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

#### **Relationships With Other Federal Regulators**

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

By order of the Board of Directors.

Dated at Washington, D.C., this 7th day of July, 1998.

Federal Deposit Insurance Corporation.

**James LaPierre,**

*Deputy Executive Secretary.*

[FR Doc. 98-21488 Filed 8-19-98; 8:45 am]

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## **FEDERAL DEPOSIT INSURANCE CORPORATION**

### **Bank Merger Transactions**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Statement of policy.

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

**EFFECTIVE DATE:** October 1, 1998.

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

**SUPPLEMENTARY INFORMATION:** On October 9, 1997, the FDIC issued for a public comment a proposal to revise the existing Statement of Policy (62 FR 52877). The proposal was issued in connection with section 303(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), 12 U.S.C. 4803(a), which required that each of the federal banking agencies conduct a review of its regulations and written policies, for two general purposes. These purposes were: (1) To streamline and modify the regulations and policies in order to improve efficiency, reduce unnecessary costs, and eliminate unwarranted constraints on credit availability; and (2) to remove inconsistencies and outmoded and duplicative requirements.

As part of this review, the FDIC determined that the Statement of Policy should be revised. The primary purpose of the revision was to update the Statement of Policy to reflect statutory changes and other developments since its last revision in 1989. In addition, certain clarifications and refinements were proposed, as well as new provisions intended to give guidance in