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Members, FDIC Board of Directors

Request for Public Comment on the Bank Merger Act

December 9, 2021

The Board of the Federal Deposit Insurance Corporation (FDIC) has approved a Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions.[1] This marks the beginning of a careful review of the effectiveness of the existing regulatory framework in meeting the requirements of the Bank Merger Act. Effective implementation of the Bank Merger Act has deep implications for the safety and soundness, financial stability, community accountability, and competitiveness of the banking system. We strongly support this Request for Comment.

The Bank Merger Act of 1960 established a framework that requires, in general, approval by the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, or the FDIC, as appropriate, of bank mergers.[2] FDIC approval is also required for a bank merger or consolidation with a non-insured bank or institution.[3]

The statute generally requires the banking agencies to consider several factors when reviewing a merger application including whether a proposed merger would substantially lessen competition or tend to create a monopoly, the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system.[4] This last factor was added by the Dodd-Frank Act of 2010.[5]

The FDIC has adopted a rule and a policy statement implementing the statutory requirements but neither yet addresses the financial stability provision added to the Bank Merger Act under the Dodd-Frank Act.[6]

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[1] The Board's action instructs the Executive Secretary to record the vote in the minutes of the proceedings of the Board and authorizes the Executive Secretary to transmit the Request for Information to the Federal Register for publication. Once published in the Federal Register, a sixty-day comment period will commence.

[2] Bank Merger Act, Pub. L. 86-463, 72 Stat. 129 (1960); Bank Merger Act Amendments of 1966, Pub. L. 89-356, 80 Stat. 7 (codified as amended at 12 U.S.C. 1828(c)(2018)). Available at https://www.fdic.gov/regulations/laws/rules/1000-2000.html#1000sec.18c .

[3] 12 U.S.C. 1828(c)(1) and (2).

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

[5] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, section 604(f), 124 Stat. 1376, 1602 (2010) (codified at 12 U.S.C. 1828(c)(5)), available at https://www.govinfo.gov/app/details/PLAW-111publ203

[6] 12 CFR part 303, available at https://www.fdic.gov/regulations/laws/rules/2000-250.html and 63 FR 44762, August 20, 1998, effective October 1, 1998; amended at 67 FR 48178, July 23, 2002; 67 FR 79278, December 27, 2002; and FDIC Statement of Policy on Bank Merger Transactions,73 FR 8871, February 15, 2008, available at https://www.fdic.gov/regulations/laws/rules/5000-1200.html .

Although there has been a significant amount of consolidation in the banking sector over the last thirty years, fueled in large part by mergers and acquisitions, there has not been a significant review of the implementation of the Bank Merger Act by the agencies in that time. As the preamble to the Request for Comment points out, "In 1990, there was only one insured depository institution with assets greater than $100 billion; however, that number had increased to 33 by 2020.…While insured depository institutions with total assets of more than $100 billion comprise less than one percent of the total number of insured depository institutions, they hold about 70 percent of total industry assets and 66 percent of domestic deposits."[7]

While this Request for Comment seeks public input on a broad range of questions related to the Bank Merger Act, there are three areas to which we would draw particular attention.

Financial Stability Factor

The requirement that the agencies consider "the risk to the stability of the United States banking or financial system" as a factor in a Bank Merger Act review is the newest in the regulatory framework and one for which the agencies would particularly welcome thoughtful and detailed comment.

As mentioned, the FDIC has not yet explicitly incorporated the financial stability factor into its rule or statement of policy implementing the Bank Merger Act. The FDIC has a particular interest given its resolution and deposit insurance responsibilities. As noted in the preamble, the FDIC may utilize mergers and so-called purchase and assumption transactions as resolution tools in carrying out its responsibilities for bank holding company resolution under the Orderly Liquidation Authority of Title II of the Dodd-Frank Act and large bank resolution under the Federal Deposit Insurance Act. A purchase and assumption transaction is when the FDIC, in its receivership capacity, arranges the sale of a failed bank to an open, healthy bank. In addition, the Bank Merger Act provides an exception to some requirements if the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the insured depository institutions involved in the merger transaction.

During the 2008 Global Financial Crisis, the FDIC had multiple experiences with mergers or acquisitions of large banks as part of a resolution.[8]

When Washington Mutual Bank failed in September 2008 with assets of over $300 billion, the fifth largest bank in the United States at the time, it was acquired by the much larger and complex JPMorgan Chase & Co. When Wachovia Bank, with total holding company assets of approximately $800 billion, required resolution days later it was acquired on an open institution basis by the larger Wells Fargo & Company. This was after the FDIC, Federal Reserve, and the Treasury Secretary invoked the systemic risk exception under the Federal Deposit Insurance Act to provide public support to facilitate the acquisition of Wachovia by

[7] Preamble to Request for Information and Comment on rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions at 5-6.
[8] See FDIC, Crisis and Response: An FDIC History, 2008–2013, available at http://www.fdic.gov/bank/historical/crisis/

another large insured depository institution on a closed bank basis. This was subsequently made unnecessary by the open institution acquisition by Wells Fargo.

Both Washington Mutual Bank and Wachovia Bank, as a matter of size, would be viewed today as regional banks. Yet clearly their prospective failures in 2008, and the resolution challenges they presented, triggered systemic risk concerns. Experience demonstrates that consideration of financial stability risk under the Bank Merger Act should not be limited to the very largest Global Systemically Important Banks (GSIBs). Further, the solution utilized in 2008 of facilitating acquisition of failing regional banks by GSIBs arguably exacerbated concentration in the banking system and increased long-term financial stability risk.

There is need for thoughtful comment on this issue. Detailed questions are asked in the Request for Comment, including whether the agencies should presume that any merger transaction that results in a financial institution that exceeds a predetermined asset size threshold, for example $100 billion in total consolidated assets, poses a systemic risk concern.

This request for comment also provides a basis for the FDIC to undertake a fundamental review of its approach to bank holding company resolution under the Orderly Liquidation Authority of Title II of the Dodd-Frank Act and large bank resolution under the Federal Deposit Insurance Act.

Prudential Factors

As previously noted, the Bank Merger Act requires the agencies to consider the financial and management resources and future prospects of the existing and proposed institutions.

The FDIC Statement of Policy on Bank Merger Transactions describes the agency's approach on prudential factors, "The FDIC does not wish to create larger weak institutions or to debilitate existing institutions whose overall condition, including capital, management, and earnings, is generally satisfactory. Consequently, apart from competitive considerations, the FDIC normally will not approve a proposed merger transaction where the resulting institution would fail to meet existing capital standards, continue with weak or unsatisfactory management, or whose earnings prospects, both in terms of quantity and quality, are weak, suspect, or doubtful."[9]

The Request for Comment seeks public input on the FDIC's approach to considering prudential factors in acting on a bank merger application. Specifically, the Request for Comment asks whether bright line minimum standards for prudential factors should be established, and if so, what minimum standards for which prudential factors. In light of the risks posed by a newly merged institution, particularly one of significant size, implicit in these questions is whether these minimum standards should be more stringent than those imposed on well-established institutions with strong track records of performance. Responses to these questions will be highly relevant to the consideration of the financial stability factor as well.

[9] https://www.fdic.gov/regulations/laws/rules/5000-1200.html

Convenience and Needs Factor

Finally, the Bank Merger Act requires the agencies to consider the convenience and needs of the community to be served by a proposed bank merger.

The FDIC's Statement of Policy addresses this requirement as follows, "In assessing the convenience and needs of the community to be served, the FDIC will consider such elements as the extent to which the proposed merger transaction is likely to benefit the general public through higher lending limits, new or expanded services, reduced prices, increased convenience in utilizing the services and facilities of the resulting institution, or other means. The FDIC, as required by the Community Reinvestment Act, will also note and consider each institution's Community Reinvestment Act performance evaluation record. An unsatisfactory record may form the basis for denial or conditional approval of an application."[10]

A key objective of the Request for Comment is to seek detailed public input on the FDIC's current approach to considering the convenience and needs factor in reviewing a bank merger application. For example, the statement of policy states an expectation that the institution resulting from the merger should provide greater public benefit than the existing entities. Is this reflected in the FDIC's current approach?

In addition, there currently appears to be significant reliance on the insured depository institution's CRA performance evaluation record. Is this sufficient, and implicit in the question is whether an "unsatisfactory record" is the appropriate standard. The Request for Comment also specifically asks to what extent the convenience and needs factor should take into consideration the impact that branch closings and consolidations may have on affected communities.

Consumer compliance examinations for banks with assets over $10 billion are done exclusively by the Consumer Financial Protection Bureau (CFPB). In light of that, the Request for Comment asks the extent to which the CFPB should be consulted by the agencies when considering the convenience and needs factor, and whether that consultation should be formalized. Feedback on this question would be an important consideration in reviewing the current agency approach to the convenience and needs factor.

Conclusion

Extensive consolidation has occurred in the banking industry over the last 30 years, and the prospect is for continued consolidation among both large and small banks in the coming years. In that light, the effectiveness of the regulatory framework in meeting the requirements of the Bank Merger Act is critical to the future safety and soundness, financial stability, community accountability, and competitiveness of the banking system. A review of that framework is thus timely and long overdue. For that reason, we strongly support this Request for Comment.

[10] Id.