STATEMENT OF

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on

MERGER POLICIES OF THE FEDERAL BANKING AGENCIES

before the

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND MONETARY POLICY
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Introduction

Chairman Barr, Ranking Member Foster, and members of the Subcommittee, thank you for the opportunity to appear today to discuss the Federal Deposit Insurance Corporation's (FDIC) role in bank merger transactions. My testimony today will summarize the statutory framework under which the FDIC evaluates bank merger transactions, the current merger application submission and review process, and finally, recently proposed updates to the FDIC's Statement of Policy (Proposed SOP) on bank merger transactions.

Statutory Framework

The FDIC is one of three federal banking agencies with responsibility for evaluating transactions subject to the Bank Merger Act (BMA).[1] Section 18(c) of the Federal Deposit Insurance Act (FDI Act), which codifies the BMA, prohibits an insured depository institution (IDI) from engaging in a merger transaction without regulatory approval. The FDIC has jurisdiction to act on transactions that involve IDIs in which the acquiring, assuming, or resulting institution is an FDIC-supervised institution.[2] The FDIC also has jurisdiction to act on merger applications that involve an IDI and any non-insured entity, notwithstanding the IDI's charter.[3]

The FDIC evaluates each merger application against the same set of statutory factors, regardless of the size of the parties to the transaction. The factors include the following.

1. *Competitive Effects* – This factor specifically prohibits transactions that would result in a monopoly in any part of the United States, and generally prohibits any transaction that

[1] Section 18(c) of the FDIC Act, 12 U.S.C. § 1828(c).
[2] 12 U.S.C. § 1828(c)(2).
[3] 12 U.S.C. § 1828(c)(1).

would substantially lessen competition in any section of the country or otherwise restrain trade unless outweighed in the public interest.[4]

2. *Financial and Managerial Resources of the Existing and Proposed Institutions* – In considering this factor, the FDIC evaluates the condition of the entities involved and what the resulting institution would look like on a combined basis from both a financial and managerial perspective.[5]

3. *Future Prospects of the Existing and Proposed Institutions* – In considering this factor, the FDIC assesses the financial projections, assumptions, and other relevant elements of the transaction to determine whether the resulting institution would maintain an acceptable risk profile.[6]

4. *Convenience and Needs of the Community to be Served* – In considering this factor, the FDIC evaluates whether the transaction would be beneficial to communities served by the entities involved in the transaction, and the Community Reinvestment Act (CRA) record of the FDIC-insured institutions involved in meeting the credit needs of its community, including low- and moderate-income neighborhoods.[7]

5. *Risk to the Stability of the United States Banking or Financial System* – In considering this factor, the FDIC evaluates a variety of quantitative and qualitative considerations including the size of the entities, their complexity, their degree of interconnectedness

[4] 12 U.S.C. § 1828(c)(5)(A) and 12 U.S.C. § 1828(c)(5(B).
[5] 12 U.S.C. § 1828(c)(5).
[6] Id.
[7] Id.

with the banking or financial system, the availability of substitute providers for critical products and services, and the extent of any cross-border activities.[8]

6. *Effectiveness of the Involved IDIs in Combatting Money Laundering Activities* – In considering this factor, the FDIC evaluates whether approved merger transactions will result in institutions with effective programs to combat money laundering and counter the financing of terrorism.[9]

The FDIC carries out its responsibilities under the BMA today within this statutory framework.

Current Bank Merger Application Process

In order to implement its responsibilities under the BMA, the FDIC has codified regulations;[10] issued a Statement of Policy (Current SOP);[11] and published the Applications Procedures Manual (APM).[12] The FDIC's APM provides application-processing instructions for the FDIC's professional staff assigned to review, evaluate, and process applications, notices, and other requests submitted to the FDIC. The APM includes a section on processing merger applications that provides detailed procedural instructions to staff, as well as information regarding the assessment of each statutory factor. In addition, together with the other federal

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[8] Id.
[9] 12 U.S.C. § 1828(c)(11).
[10] Part 303, Subpart D, of the FDIC Rules and Regulations.
[11] See FDIC Statement of Policy on Bank Merger Transactions, available at https://www.fdic.gov/regulations/laws/rules/statement-of-policy-on-bank-merger-transactions.pdf.
[12] See FDIC Application Procedures Manual – Section 4: Mergers, available at https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-04-mergers.pdf.

banking agencies, the FDIC has issued an interagency application form, which includes a supplemental section specific to the FDIC.[13]

Application Processing

The Interagency Bank Merger Act Application Form sets forth a series of information requests to gather information relevant to the FDIC's evaluation of the statutory factors. FDIC staff thoroughly analyze the application and all supporting exhibits and materials. As necessary, any follow-up questions, issues, or information needs are communicated to the applicant and the other applicable regulators. The FDIC will acknowledge the application acceptance in writing.

FDIC staff will also request a competitive factors report from the Attorney General of the United States (Attorney General), which the Department of Justice typically provides to the FDIC within 30 days.[14] In addition to the Attorney General, the FDIC works closely with the state chartering authority and, if holding companies are involved, the Federal Reserve. For interstate bank mergers, the FDIC will request confirmation that the applicant has complied with the filing requirements of the state bank supervisor of the host state.

Public feedback is an important component of the FDIC's review of a merger application. Section 18(c)(3) of the FDI Act requires that public notice of the proposed merger transaction be published in an approved form and at appropriate intervals in a newspaper or newspapers of general circulation. In all cases, the FDIC will review and evaluate any public comments

[13] The Interagency Bank Merger Application form can be located here: https://www.fdic.gov/formsdocuments/f6220-01.pdf. The FDIC is also seeking comment on changes to the FDIC Supplement to the Interagency Form. *See*: https://www.federalregister.gov/documents/2024/04/19/2024-08021/agency-information-collection-activities-proposed-collection-renewal-comment-request.

[14] A request for a competitive factors report is not required in cases where (i) the responsible agency finds that it must act immediately in order to prevent the probable failure of one or more of the IDIs involved in the merger transaction; or (ii) the merger transaction involves solely an IDI and one or more of the affiliates of such depository institution. 12 U.S.C. § 1828(c)(4)(C). In cases where the Federal Reserve requires a full application for a related holding company transaction, the request for a competitive factors report is generally made by the Federal Reserve.

received regarding the merger application, and will provide the applicant an opportunity to respond to any comment that is determined to be a CRA protest. The FDIC will also consider the views of each relevant federal and state agency. Generally, the FDIC will not approve a merger application if adverse comments have not been resolved.

The analysis of the application is coordinated across divisions within the FDIC, involving subject matter experts in the Division of Risk Management Supervision, Division of Depositor and Consumer Protection, Legal Division, and Division of Insurance and Research. Depending on the size of the parties to the transaction, specialists from the Division of Complex Institutions Supervision and Resolution will also assist with the review and analysis.

The FDIC's delegations of authority authorize the FDIC's staff to approve merger transactions only when each statutory factor is favorably resolved. The FDIC Board reserves authority to deny a merger application or otherwise act on any merger transaction for which one or more factors are not favorably resolved. If approval is recommended, the FDIC prepares an approval letter, an Order and Basis of Approval, and a letter to the Attorney General advising of the approval.

As described in the FDIC's APM,[15] when applications are recommended for denial, FDIC staff is directed to contact applicants, describe their concerns, and provide a final opportunity to provide additional information that might influence the decision. The APM also states that, at its discretion, the FDIC may offer applicants the opportunity to withdraw the application. Applicants that choose to withdraw an application frequently do so before receiving a public denial.

[15] See APM, Section 1.3, "Denials and Disapprovals."

According to the most recent Merger Decisions Report to Congress, there were 134 applications approved in 2022.[16] The Report also lists all applications that were acted upon in the last year; the filings are listed by specific application and are broken out by regular merger, corporate reorganization, and interim mergers. The data presented also includes any failed or closed bank mergers. Additionally, the FDIC publishes an application search tool that enables searches for actions taken on selected applications received from January 1, 2013, through March 31, 2024, and applications pending as of the most recent quarter-end.[17] From January 1, 2004, through December 31, 2023, the FDIC processed 2,497 merger applications that were either "bank-to-bank" merger applications, solely involving IDIs where the resulting institution was an FDIC-supervised institution, or that involved an IDI and a credit union or other non-insured institution. This does not include pending applications or applications for corporate reorganizations or interim mergers.

Of the 2,209 bank-to-bank applications processed over the referenced period, 92.9 percent (2,054) were approved, 5.4 percent (116) were withdrawn at the applicant's discretion, 1.7 percent (39) were returned due to insufficient information provided in the application submission, and none were denied.

Overview of the Proposed Statement of Policy

Although there has been a significant amount of consolidation in the banking sector over the last 30 years, due in part to mergers and acquisitions, there has not been a significant review of the implementation of the BMA by the banking agencies in that time.

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[16] The merger decision report can be located at: https://www.fdic.gov/bank/individual/merger/index.html. As of April 25, 2024, the 2023 merger decision report has not been published. There were 115 applications approved in 2023.
[17] The FDIC's application search tool can be located at: https://www.fdic.gov/regulations/applications/actions.html.

The number of large IDIs, especially IDIs with total assets of $100 billion or more, has grown considerably over the past few decades. This change is due to a combination of factors, including consolidation in the banking sector (fueled in part by mergers and acquisitions), the easing of interstate banking restrictions,[18] and organic growth.

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

After the 2008 financial crisis, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the BMA to include, for the first time, a factor related to the risk to the stability of the United States banking or financial system (financial stability factor).[19]

[18] Prior to the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law 103– 328, many states did not permit intra-state or interstate branching, and interstate branch branching was not federally sanctioned. Following the passage of this law, many multi-bank holding companies with subsidiary IDIs with different home states chose to consolidate existing bank charters.

[19] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 604(f), 124 Stat. 1602 (2010) (codified at 12 U.S.C. 1828(c)(5)).

In addition, a July 9, 2021 Executive Order addressed the impact that consolidation may have on maintaining a fair, open, and competitive marketplace, as well as the impact on the welfare of workers, farmers, small businesses, startups, and consumers.[20]

On March 31, 2022, the FDIC published in the *Federal Register* a Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions (RFI) that apply to merger transactions subject to the FDIC's approval.[21] The RFI solicited comments regarding the effectiveness of the existing framework of the laws, practices, rules, regulations, guidance, and statements of policy in meeting the statutory requirements of the BMA.

After review of the public comments received in response to the RFI, the FDIC Board of Directors determined that it is both timely and appropriate to review its regulatory framework for merger transactions, and on March 21, 2024 approved the publication of the Proposed SOP on Bank Merger Transactions in the *Federal Register* to obtain public comment.[22]

The Proposed SOP reflects regulatory, legislative, and industry changes since it was last amended, including the Dodd-Frank Act's adoption of the financial stability factor. The Proposed SOP would update, strengthen, and clarify the FDIC's approach to evaluating transactions subject to its approval under the BMA. It also includes new content to make it more

[20] Executive Order 14036 "Promoting Competition in the American Economy" (July 9, 2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/. On December 18, 2023, the Department of Justice and the Federal Trade Commission jointly released the 2023 Merger Guidelines, available at https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf. These guidelines build upon, expand, and clarify frameworks set out in previous versions.
[21] See Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions, 87 F.R. 18740 (March 31, 2022), available at https://www.fdic.gov/sites/default/files/2024-03/2021-12-06-notational-fr.pdf.
[22] See Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, available at https://www.fdic.gov/sites/default/files/2024-04/2024-03-21-notice-dis-b-fr.pdf.

principles-based, communicates the FDIC Board's expectations regarding the evaluation of merger applications filed pursuant to the BMA, and describes the types of applications subject to the FDIC's approval.

Key considerations for each statutory factor under the Proposed SOP are as follows.

Monopolistic or Anti-Competitive Effects

As previously referenced, the BMA prohibits the FDIC from approving a merger transaction that would result in a monopoly or would be in furtherance of an attempt to monopolize the business of banking in any part of the United States. The BMA also prohibits the FDIC from approving a merger transaction that may substantially lessen competition in any section of the country, unless the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. For example, such a circumstance may exist where a transaction is necessary to prevent the probable failure of an IDI.

The Proposed SOP approaches the evaluation of competitive effects with the expectation that a resulting institution would operate in a competitive environment in which consumers would retain meaningful choices. The evaluation would include all relevant financial services providers that compete in the identified geographic and product markets.

The Proposed SOP clarifies that the FDIC's assessment of competitive effects considers concentrations beyond those based on deposits. The FDIC may consider concentration in any specific products or customer segments, such as the volume of small business or residential loan originations.

In cases where divestiture may be necessary, the Proposed SOP clarifies that divestitures are expected to be completed *before* consummation of a merger transaction. Further, the FDIC will generally require that the selling institution will not enter into non-compete agreements with any employee of the divested entity nor enforce any existing non-compete agreements with any of those entities.

The FDIC will continue to work collaboratively with the Department of Justice and the other federal banking authorities in carrying out its responsibilities regarding this factor.

Financial Resources, Managerial Resources, and Future Prospects

The Proposed SOP emphasizes that the FDIC expects that the resulting IDI will reflect sound financial performance and condition. Generally, the FDIC will not find favorably on the financial resources factor if the merger would result in a weaker IDI from an overall financial perspective.

The evaluation of managerial resources assesses management's capabilities to administer the resultant IDI's affairs in a safe and sound manner, and effectively implement integration plans and strategies for absorbing the acquired entity. Managerial resource considerations also include the supervisory history, adequacy of succession planning, responsiveness to supervisory recommendations, existing or pending enforcement actions, and any recent rapid growth and management's record in controlling risks associated with such growth.

The evaluation of future prospects assesses whether the resulting IDI will be able to operate in a safe and sound manner and maintain an acceptable risk profile on a sustained basis following consummation of the merger.

Effectiveness in Combatting Money Laundering Activities

The Proposed SOP articulates the evaluative considerations used to assess the effectiveness in combatting money laundering.

Convenience and Needs of the Community to be Served

The Proposed SOP would also clarify and emphasize the FDIC's expectation that a merger subject to its approval will result in an institution that is positioned to *better* meet the convenience and needs of the community to be served than would occur absent the merger. The Proposed SOP explains that this may be demonstrated through higher lending limits; greater access to products, services, and facilities; introduction of new or expanded products or services; reduced prices and fees; or other means.

The evaluation of this factor also includes the proposed assessment area considerations; expectations for meeting the needs of the entire community, including low- and moderate-income neighborhoods; and a thorough accounting of expected branch expansions, closures, consolidations, and relocations for the first three years following the merger.

The FDIC's review is broad in nature and not limited to the CRA record of the institution. The FDIC will consider the record of each institution in complying with consumer protection requirements and maintaining a sound and effective compliance management system.

In addition, the evaluation will also consider public input. To that end, the Proposed SOP communicates the FDIC's general expectation to hold hearings for transactions with a resulting institution exceeding $50 billion in assets, or for which a significant number of CRA protests are received. The FDIC may also hold public or private meetings to receive input on the transaction.

These mechanisms for gathering additional public input complement the BMA's statutory public notice requirements.

Risk to the Stability of the U.S. Banking or Financial System

Following the 2008 financial crisis, the Dodd-Frank Act amended the BMA to include a statutory factor related to the risk to the stability of the United States banking or financial system.[23] The Proposed SOP addresses the evaluation of this factor, which generally reflects the FDIC's approach since the enactment of the Dodd-Frank Act in 2010. The FDIC's assessment of the financial stability factor focuses on:

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

Although size alone may not be dispositive, the Proposed SOP indicates that a resulting institution with $100 billion or more in assets is more likely to present potential financial

[23] See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 604(f), 124 Stat. 1602 (2010) (codified at 12 U.S.C. 1828(c)(5)).

stability concerns, and thus will be subject to added scrutiny. The bank failures of 2023 underscore the risks that banks with assets over $100 billion can have for financial stability.

Conclusion

Extensive consolidation has occurred in the banking industry over the last 30 years, and consolidation among both large and small banks is likely to continue in the coming years. In that light, the effectiveness of the regulatory framework in meeting the requirements of the BMA is critical to the future safety and soundness, financial stability, community accountability, and competitiveness of the banking system. As such, a review of that framework is both timely and warranted.

The Proposed SOP would update, strengthen, and clarify the FDIC's approach to evaluating mergers under the BMA. The comments received in response to the 2022 RFI have helped inform the content of the Proposed SOP, and publishing the Proposed SOP for public comment will give the FDIC an additional opportunity to benefit from public input. Additionally, concurrent with the Proposed SOP, the FDIC is seeking comment on proposed revisions to its supplemental section to the interagency Bank Merger Act application form.

The FDIC will continue to collaborate with the other federal bank regulatory agencies as it considers the appropriate framework for reviewing bank merger transactions. The FDIC remains committed to engaging with the public, industry stakeholders, and members of Congress in support of its mission. Thank you, and I look forward to your questions.