This document is scheduled to be published in the
Federal Register on 03/11/2025 and available online at
https://federalregister.gov/d/2025-03832, and on **https://govinfo.gov**

FED

12 CFR Part 303

RIN 3064-ZA45

Statement of Policy on Bank Merger Transactions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Proposed rescission and reinstatement of statement of policy; request for comment.

SUMMARY: The FDIC is requesting public comment on a proposal to rescind the Statement of Policy on Bank Merger Transactions published in 2024 and reinstate its prior Statement of Policy on Bank Merger Transactions. The FDIC expects to request comment on all aspects of the regulatory framework governing the FDIC's review of bank merger transactions in connection with a future proposal to comprehensively revise its merger policy.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*.]**.

ADDRESSES: You may submit comments to the FDIC, identified by RIN 3064-ZA45, by any of the following methods:

- *Agency Website*: *https://www.fdic.gov/resources/regulations/federal-register-publications*. Follow instructions for submitting comments on the FDIC's website.
- *E-mail*: *comments@FDIC.gov*. Include the RIN 3064-ZA45 in the subject line of the message.
- *Mail*: Jennifer Jones, Deputy Executive Secretary, Attention: Comments/Legal OES (RIN 3064-ZA45), Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

- *Hand Delivered/Courier*: Comments may be hand-delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street NW) on business days between 7 a.m. and 5 p.m.

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

FOR FURTHER INFORMATION CONTACT: Division of Risk Management Supervision: Thomas F. Lyons, Associate Director of Risk Management Policy, (202) 898-6850, *tlyons@fdic.gov*; George Small, Senior Examination Specialist, (347) 267-2453, *gsmall@fdic.gov*. Legal Division: Annmarie Boyd, Assistant General Counsel, (202) 898-3714, *aboyd@fdic.gov*; Benjamin Klein, Senior Counsel, (202) 898-7027, *bklein@fdic.gov*; Amanda Ledig, Counsel, (972) 761-5895, *aledig@fdic.gov*; Nicholas Simons, Counsel, (202) 898-6785, *nsimons@fdic.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Section 18(c) of the Federal Deposit Insurance Act (FDI Act), which codifies the Bank Merger Act (BMA), prohibits an insured depository institution (IDI) from engaging in a bank merger transaction except with the prior approval of the responsible Federal banking agency.[1] The FDIC has jurisdiction to act on merger transactions that solely 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 transactions that involve an IDI and any non-insured entity, notwithstanding the IDI's charter.[3]

The FDIC published a request for comment on a proposed Statement of Policy on Bank Merger Transactions in the *Federal Register* on April 19, 2024,[4] and subsequently issued it as final on September 27, 2024 (the 2024 Statement).[5] The 2024 Statement superseded the FDIC's prior Statement of Policy on Bank Merger Transactions (Merger Policy Statement), which was initially adopted in 1998 and amended most recently in 2008.[6]

II. Overview of the Notice

A. Purpose

The FDIC is pursuing this action in light of concerns that implementation of the 2024 Statement has added considerable uncertainty to the merger application process. As an example, the 2024 Statement has led to a number of questions regarding when merger applications are required.[7] The 2024 Statement also deemphasizes the use of the Herfindahl-Hirschman Index (HHI) thresholds in the competitive effects analysis, which

[1] 12 U.S.C. 1828(c).
[2] 12 U.S.C. 1828(c)(2).
[3] 12 U.S.C. 1828(c)(1).
[4] 89 FR 29222 (April 19, 2024).
[5] 89 FR 79125 (Sep. 27, 2024).
[6] *See* 63 FR 44761 (Aug. 20, 1998), 67 FR 48178 (Jul. 23, 2002), 67 FR 79278 (Dec. 27, 2002), and 73 FR 8870 (Feb. 15, 2008).
[7] *See e.g.*, *supra* n. 5 at 89 FR 79134 ("The applicability of the BMA will depend on the facts and circumstances of the proposed transaction. In addition to transactions that combine institutions into a single legal entity through merger or consolidation, the scope of merger transactions subject to approval under the BMA encompasses transactions that take other forms, including purchase and assumption transactions or other transactions that are mergers in substance, and assumptions of deposits or other similar liabilities.").

have long served as a predictable proxy for determining whether a proposed transaction is anticompetitive,[8] and replaces it with more subjective criteria. In addition, the 2024 Statement places an affirmative burden on applicants to demonstrate that a merger transaction will enable the resulting institution to better meet the convenience and needs of the community to be served than would otherwise occur in the absence of the merger without offering any objective or quantifiable criteria regarding how the FDIC will evaluate this factor.[9] The combined effect of these and several other provisions of the 2024 Statement is that the FDIC's bank merger review process has become less transparent and less predictable, leaving prospective applicants unclear about their prospects for approval and the resources and time they will need to allocate to the merger application process. Accordingly, in the interim, the FDIC is proposing to return to the historical approach, which is well-understood by the public and market participants, while the agency develops future policy.

B. Summary of the Merger Policy Statement

The Merger Policy Statement was first published in 1998 and was subsequently amended several times,[10] most recently in 2008. The Merger Policy Statement is essentially[11] identical to the 2008 document. It includes a general introduction, followed by an overview of application procedures, a discussion of the FDIC's evaluation of merger applications based on the statutory factors required for consideration under the BMA,[12] and concludes with a list of related considerations. The discussion of the BMA statutory factors addresses the competitive factors, the prudential considerations related to financial and managerial resources and future prospects, the convenience and needs of

[8] *See id.* at 89 FR 79136.
[9] *See id.* at 89 FR 79138.
[10] *See supra* n. 6.
[11] The only changes are technical edits updating a room number and a citation.
[12] *Supra* n. 1.

the community to be served, and the effectiveness of each insured depository institution involved in the proposed merger transaction in combatting money-laundering activities.

Although the Merger Policy Statement does not directly address the BMA's statutory factor related to the risk to the stability of the United States banking or financial system, which was added to the BMA by the Dodd-Frank Act in 2010,[13] the FDIC has articulated its approach to evaluating this factor in the context of merger transactions in the FDIC's Applications Procedures Manual.[14]

III. Request for Comment

The FDIC seeks comment on the proposal to rescind the 2024 Statement and reinstate the Merger Policy Statement as an interim measure. The FDIC plans to issue a future proposal to comprehensively revise its merger policy at a later date, and will solicit further comments at that time.

IV. Administrative Law Matters

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA),[15] the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

---

[13] 12 U.S.C. 1828(c)(5), as amended by Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 604(f), 124 Stat. 1376, 1602 (2010).

[14] *See* FDIC Applications Procedures Manual, pp. 4-22—4-23, available at: *https://www.fdic.gov/sites/default/files/2024-03/pr19111a.pdf*. ("In evaluating a merger application, the FDIC must consider the risk to the stability of the United States banking or financial system (Section 18(c)(5) of the FDI Act). [The FDIC] consider[s] both quantitative and qualitative metrics when evaluating a transaction's impact on financial stability. The following is a non-exhaustive list of quantitative metrics [the FDIC] consider[s]: the size of the resulting firm; the availability of substitute providers for any critical products and services offered by the resulting firm; the interconnectedness of the resulting firm with the banking or financial system; the extent to which the resulting firm contributes to the complexity of the financial system; and the extent of cross-border activities of the resulting firm. In addition to these quantitative metrics, qualitative factors should inform the evaluation of the financial stability factor. Such factors include those that are indicative of the relative degree of difficult in resolving the resulting firm, such as the opaqueness and complexity of the resulting institution's operations.")

[15] 44 U.S.C. 3501 *et seq*.

The Merger Policy Statement does not create any new or revise any existing collections of information under the PRA. Therefore, no information collection request will be submitted to the OMB for review.

V. Merger Policy Statement

The text of the Statement of Policy is as follows:

FDIC Statement of Policy on Bank Merger Transactions

I. Introduction

Section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), popularly known as the "Bank Merger Act," requires the prior written approval of the FDIC before any insured depository institution may:

(1) Merge or consolidate with, purchase or otherwise acquire the assets of, or assume any deposit liabilities of, another insured depository institution if the resulting institution is to be a state nonmember bank, or

(2) Merge or consolidate with, assume liability to pay any deposits or similar liabilities of, or transfer assets and deposits to, a noninsured bank or institution.

Institutions undertaking one of the above described "merger transactions" must file an application with the FDIC. Transactions that do not involve a transfer of deposit liabilities typically do not require prior FDIC approval under the Bank Merger Act, unless the transaction involves the acquisition of all or substantially all of an institution's assets.

The Bank Merger Act prohibits the FDIC from approving any proposed merger transaction that would result in a monopoly, or would further a combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States. Similarly, the Bank Merger Act prohibits the FDIC from approving a proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other

manner would be in restraint of trade. An exception may be made in the case of a merger transaction whose effect would be to substantially lessen competition, tend to create a monopoly, or otherwise restrain trade, if the FDIC finds that 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, the FDIC may approve a merger transaction to prevent the probable failure of one of the institutions involved.

In every proposed merger transaction, the FDIC must also consider 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 effectiveness of each insured depository institution involved in the proposed merger transaction in combating money-laundering activities, including in overseas branches.

II. Application Procedures

1. *Application filing.* Application forms and instructions may be obtained from the appropriate FDIC office. Completed applications and any other pertinent materials should be filed with the appropriate FDIC office. The application and related materials will be reviewed by the FDIC for compliance with applicable laws and FDIC rules and regulations. When all necessary information has been received, the application will be processed and a decision rendered by the FDIC.

2. *Expedited processing.* Section 303.64 of the FDIC rules and regulations (12 CFR 303.64) provides for expedited processing, which the FDIC will grant to eligible applicants. In addition to the eligible institution criteria provided for in § 303.2 (12 CFR 303.2), § 303.64 provides expedited processing criteria specifically applicable to proposed merger transactions.

3. *Publication of notice.* The FDIC will not take final action on a merger application until notice of the proposed merger transaction is published in a newspaper or

newspapers of general circulation in accordance with the requirements of section 18(c)(3) of the Federal Deposit Insurance Act. See § 303.65 of the FDIC rules and regulations (12 CFR 303.65). The applicant must furnish evidence of publication of the notice to the appropriate FDIC office following compliance with the publication requirement. See § 303.7(b) of the FDIC rules and regulations (12 CFR 303.7(b)).

4. *Reports on competitive factors.* As required by law, the FDIC will request a report on the competitive factors involved in a proposed merger transaction from the Attorney General This report must ordinarily be furnished within 30 days, and the applicant upon request will be given an opportunity to submit comments to the FDIC on the contents of the competitive factors report.

5. *Notification of the Attorney General.* After the FDIC approves any merger transaction, the FDIC will immediately notify the Attorney General. Generally, unless it involves a probable failure, an emergency exists requiring expeditious action, or it is solely between an insured depository institution and one or more of its affiliates, a merger transaction may not be consummated until 30 calendar days after the date of the FDIC's approval. However, the FDIC may prescribe a 15-day period, provided the Attorney General concurs with the shorter period.

6. *Merger decisions available.* Applicants for consent to engage in a merger transaction may find additional guidance in the reported bases for FDIC approval or denial in prior merger transaction cases compiled in the FDIC's annual “Merger Decisions” report. Reports may be obtained from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-1005, Arlington, VA 22226. Reports may also be viewed at *http://www.fdic.gov*.

III. Evaluation of Merger Applications

The FDIC's intent and purpose is to foster and maintain a safe, efficient, and competitive banking system that meets the needs of the communities served. With these

broad goals in mind, the FDIC will apply the specific standards outlined in this Statement of Policy when evaluating and acting on proposed merger transactions.

Competitive Factors

In deciding the competitive effects of a proposed merger transaction, the FDIC will consider the extent of existing competition between and among the merging institutions, other depository institutions, and other providers of similar or equivalent services in the relevant product market(s) within the relevant geographic market(s).

1. *Relevant geographic market.* The relevant geographic market(s) includes the areas in which the offices to be acquired are located and the areas from which those offices derive the predominant portion of their loans, deposits, or other business. The relevant geographic market also includes the areas where existing and potential customers impacted by the proposed merger transaction may practically turn for alternative sources of banking services. In delineating the relevant geographic market, the FDIC will also consider the location of the acquiring institution's offices in relation to the offices to be acquired.

2. *Relevant product market.* The relevant product market(s) includes the banking services currently offered by the merging institutions and to be offered by the resulting institution. In addition, the product market may also include the functional equivalent of such services offered by other types of competitors, including other depository institutions, securities firms, or finance companies. For example, share draft accounts offered by credit unions may be the functional equivalent of demand deposit accounts. Similarly, captive finance companies of automobile manufacturers may compete directly with depository institutions for automobile loans, and mortgage bankers may compete directly with depository institutions for real estate loans.

3. *Analysis of competitive effects.* In its analysis of the competitive effects of a proposed merger transaction, the FDIC will focus particularly on the type and extent of

competition that exists and that will be eliminated, reduced, or enhanced by the proposed merger transaction. The FDIC will also consider the competitive impact of providers located outside a relevant geographic market where it is shown that such providers individually or collectively influence materially the nature, pricing, or quality of services offered by the providers currently operating within the geographic market.

The FDIC's analysis will focus primarily on those services that constitute the largest part of the businesses of the merging institutions. In its analysis, the FDIC will use whatever analytical proxies are available that reasonably reflect the dynamics of the market, including deposit and loan totals, the number and volume of transactions, contributions to net income, or other measures. Initially, the FDIC will focus on the respective shares of total deposits[16] held by the merging institutions and the various other participants with offices in the relevant geographic market(s), unless the other participants' loan, deposit, or other business varies markedly from that of the merging institutions. Where it is clear, based on market share considerations alone, that the proposed merger transaction would not significantly increase concentration in an unconcentrated market, a favorable finding will be made on the competitive factor.

Where the market shares of the merging institutions are not clearly insignificant, the FDIC will also consider the degree of concentration within the relevant geographic market(s) using the Herfindahl-Hirschman Index (HHI)[17] as a primary measure of market concentration. For purposes of this test, a reasonable approximation for the relevant geographic market(s) consisting of one or more predefined areas may be used. Examples

---

[16] In many cases, total deposits will adequately serve as a proxy for overall share of the banking business in the relevant geographic market(s); however, the FDIC may also consider other analytical proxies.

[17] The HHI is a statistical measure of market concentration and is also used as the principal measure of market concentration in the Department of Justice's Merger Guidelines. The HHI for a given market is calculated by squaring each individual competitor's share of total deposits within the market and then summing the squared market share products. For example, the HHI for a market with a single competitor would be: $100^2 = 10{,}000$: for a market with five competitors with equal market shares, the HHI would be: $20^2 + 20^2 + 20^2 + 20^2 + 20^2 = 2{,}000$.

of such predefined areas include counties, the Bureau of the Census Metropolitan-Statistical Areas (MSAs), or Rand-McNally Ranally Metro Areas (RMAs).

The FDIC normally will not deny a proposed merger transaction on antitrust grounds (absent objection from the Department of Justice) where the post-merger HHI in the relevant geographic market(s) is 1,800 points or less or, if it is more than 1,800, it reflects an increase of less than 200 points from the pre-merger HHI. Where a proposed merger transaction fails this initial concentration test, the FDIC will consider more closely the various competitive dynamics at work in the market, taking into account a variety of factors that may be especially relevant and important in a particular proposal, including:

- The number, size, financial strength, quality of management, and aggressiveness of the various participants in the market;
- The likelihood of new participants entering the market based on its attractiveness in terms of population, income levels, economic growth, and other features;
- Any legal impediments to entry or expansion; and
- Definite entry plans by specifically identified entities.

In addition, the FDIC will consider the likelihood that new entrants might enter the market by less direct means; for example, electronic banking with local advertisement of the availability of such services. This consideration will be particularly important where there is evidence that the mere possibility of such entry tends to encourage competitive pricing and to maintain the quality of services offered by the existing competitors in the market.

The FDIC will also consider the extent to which the proposed merger transaction likely would create a stronger, more efficient institution able to compete more vigorously in the relevant geographic markets.

4. *Consideration of the public interest.* The FDIC will deny any proposed merger transaction whose overall effect likely would be to reduce existing competition

substantially by limiting the service and price options available to the public in the relevant geographic market(s), unless the anticompetitive effects of the proposed merger 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 this purpose, the applicant must show by clear and convincing evidence that any claimed public benefits would be both substantial and incremental and generally available to seekers of banking services in the relevant geographic market(s) and that the expected benefits cannot reasonably be achieved through other, less anticompetitive means.

Where a proposed merger transaction is the least costly alternative to the probable failure of an insured depository institution, the FDIC may approve the merger transaction even if it is anticompetitive.

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. In assessing capital adequacy and earnings prospects, particular attention will be paid to the adequacy of the allowance for loan and lease losses. In evaluating management, the FDIC will rely to a great extent on the supervisory histories of the institutions involved and of the executive officers and directors that are proposed for the resultant institution. In addition, the FDIC may review the adequacy of management's disclosure to shareholders of the material aspects of the merger transaction to ensure that management has properly fulfilled its fiduciary duties.

Convenience and Needs Factor

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.

Anti-Money Laundering Record

In every case, the FDIC will take into consideration the effectiveness of each insured depository institution involved in the proposed merger transaction in combating money-laundering activities, including in overseas branches. In this regard, the FDIC will consider the adequacy of each institution's programs, policies, and procedures relating to anti-money laundering activities; the relevant supervisory history of each participating institution, including their compliance with anti-money laundering laws and regulations; and the effectiveness of any corrective program outstanding. The FDIC's assessment may also incorporate information made available to the FDIC by the Department of the Treasury, other Federal or State authorities, and/or foreign governments. Adverse findings may warrant correction of identified problems before consent is granted, or the imposition of conditions. Significantly adverse findings in this area may form the basis for denial of the application.

Special Information requirement if applicant is affiliated with or will be affiliated with an insurance company.

If the institution that is the subject of the application is, or will be, affiliated with a company engaged in insurance activities that is subject to supervision by a state insurance regulator, the applicant must submit the following information as part of its application:

(1) The name of insurance company; (2) a description of the insurance activities that the company is engaged in and has plans to conduct; and (3) a list of each state and the lines of business in that state which the company holds, or will hold, an insurance license. Applicant must also indicate the state where the company holds a resident license or charter, as applicable.

IV. Related Considerations

1. *Interstate bank merger transactions.* Where a proposed transaction is an interstate merger transaction between insured banks, the FDIC will consider the additional factors provided for in section 44 of the Federal Deposit Insurance Act, 12 U.S.C. 1831u.

2. *Interim merger transactions.* An interim institution is a state- or federally-chartered institution that does not operate independently, but exists, normally for a very short period of time, solely as a vehicle to accomplish a merger transaction. In cases where the establishment of a new or interim institution is contemplated in connection with a proposed merger transaction, the applicant should contact the FDIC to discuss any relevant deposit insurance requirements. In general, a merger transaction (other than a purchase and assumption) involving an *insured* depository institution and a *federal* interim depository institution will not require an application for deposit insurance, even if the federal interim depository institution will be the surviving institution.

3. *Branch closings.* Where banking offices are to be closed in connection with the proposed merger transaction, the FDIC will review the merging institutions' conformance to any applicable requirements of section 42 of the FDI Act concerning notice of branch closings as reflected in the Interagency Policy Statement Concerning Branch Closing Notices and Policies. See 64 FR 34844 (Jun. 29, 1999).

4. *Legal fees and other expenses.* The commitment to pay or payment of unreasonable or excessive fees and other expenses incident to an application reflects adversely upon the management of the applicant institution. The FDIC will closely review expenses for professional or other services rendered by present or prospective board members, major shareholders, or other insiders for any indication of self-dealing to the detriment of the institution. As a matter of practice, the FDIC expects full disclosure to all directors and shareholders of any arrangement with an insider. In no case will the FDIC approve an application 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.

5. *Trade names.* Where an acquired bank or branch is to be operated under a different trade name than the acquiring bank, the FDIC will review the adequacy of the steps taken to minimize the potential for customer confusion about deposit insurance coverage. Applicants may refer to the Interagency Statement on Branch Names for additional guidance. See FDIC, Financial Institution Letter, 46-98 (May 1, 1998).

Federal Deposit Insurance Corporation.
By order of the Board of Directors.

Dated at Washington, DC, on March 3, 2025.

Jennifer M. Jones
Deputy Executive Secretary.

BILLING CODE 6714-01-P

[FR Doc. 2025-03832 Filed: 3/10/2025 8:45 am; Publication Date: 3/11/2025]