Bank Merger Policy

Cite
Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions

Recommended Distribution:
Corporate Strategy, Policy, Legal, Government Relations

Website:
https://files.consumerfinance.gov/f/documents/cfpb_bank-merger-act_rfi_2021-12.pdf

Impact Assessment

- Although only an RFI – and an unofficial one at that – this paper posits a sharp shift in U.S. policy on sizeable bank mergers with implications across the financial industry if, as likely, the OCC, DOJ, and even the Fed agree with some of its concerns.
- Restricting larger bank mergers might advance intra-sector competition in community-based banking but would have adverse implications for shareholder value, mid-size bank viability under stress, and the extent to which banking remains within the regulatory perimeter.
- IDI resolution is cited as a consolidation concern, signaling that the FDIC is less likely to deploy P&A resolutions for any but the smallest banks. This could increase FDIC costs and lead to premium hikes.
- If the agencies concur with the RFI, near-term financial-stability criteria for M&A approval are likely to be proposed.

Overview

Released in a highly-controversial fashion (see below) by two Democrats on the FDIC's board, this RFI posits the need for a significant review of mergers involving insured depository institutions (IDIs) due to many changes in the financial industry and, so it says, the lack of substantive competitive analysis over past decades even of the largest transactions. Echoing conclusions in the fact sheet accompanying President

Biden's executive order on U.S. competition,[1] the RFI also states that bank mergers have led to industry consolidation with an array of adverse implications for smaller and lower-income communities as well as for heightened systemic risk. These adverse results would, it says, likely be redressed if there were more small banks, with the RFI seeking comment on questions and policy options designed to block and/or significantly restrict M&A resulting in a banking organization with assets above $100 billion.

Impact

On its own, the RFI has no direct impact for M&A as it's only a request for views and, at least so far, a thoroughly unofficial and highly-controversial document. However, it comes at a time of considerable uncertainty about the future of bank mergers and acquisitions due to the Biden order and various legislative initiatives (see below). It also speaks to the views of two current office-holders – FDIC Director Gruenberg and Acting Comptroller Hsu – with direct influence over transaction approvals and to those of a third, CFPB Director Chopra, sure to influence both regulatory thinking and that of Democrats on the Hill. The FRB was apparently not involved in this action, but Gov. Brainard – now nominated to be the Fed's vice chair – opposed one large regional-bank merger based on some of the concerns addressed in the RFI. Future Democrats on the Federal Reserve Board are likely to share these concerns.

What's Next

Messrs. Chopra and Gruenberg released this RFI along with accompany statements on December 9. Mr. Chopra then sought to have it considered at the FDIC board meeting on December 14, but Chair McWilliams opposed doing so and prevailed on procedural grounds. Subsequently, Acting Comptroller Hsu issued a statement saying that he voted for this RFI and Mr. Chopra released one harshly critical of Ms. McWilliams' ruling suggesting not only that it will be overturned, but also that he will do what he can to block other FDIC actions to which he is opposed. It is unclear if the OCC will now issue this RFI or if the CFPB, which many believe lacks authority to address bank mergers, does so.

When this RFI was released, Congressional Democrats roundly endorsed it. Sen. Warren (D-MA) backed an initiative advancing concerns in her legislation.[2] HFSC Chairwoman Waters (D-CA) not only did so, but also sent a letter to the banking agencies and the Department of Justice not only answering many of the questions posed in the RFI, but also urging rapid release of a revised bank-merger policy reflecting these changes. In sharp contrast, Republicans blasted the effort to advance the RFI as a "coup" that undermines FDIC legitimacy.

Although the Department of Justice asked for views on bank mergers at the end of the Trump Administration,[3] it has released nothing to date under President Biden furthering the policies outlined above. It is, however, likely to do so once negotiations with the banking agencies conclude. The FRB is also revising its merger policy but

1 See *Client Report* **MERGER6**, July 9, 2021.
2 See **MERGER8**, *Financial Services Management*, October 8, 2021.
3 See *Client Report* **MERGER5**, September 2, 2020.

has announced no deadline for doing so even as relatively small M&A transactions remain on hold.

Analysis

A. Considerations

This RFI includes background and legal analyses supporting the concerns it expresses. Although described only as an RFI from the FDIC, release often says it comes from "the agencies." Further, the legal analysis covers the OCC's relevant law in this arena, but not that of the Federal Reserve with regard either to IDIs under its immediate jurisdiction or holding companies. Key policy and legal concerns include:

- Growing consolidation in banks with over $100 billion in assets poses an array of equity, growth, and financial-stability risks.
- Only GSIBs have addressed their resolvability and risks remain at smaller banks, requiring a rewrite of the financial-stability considerations addressed in merger approvals.
- The FDIC needs to resolve IDIs without resort to the purchase-and-assumption transactions that increase consolidation.
- The extent to which public participation has been solicited requires remedy.
- The nature of current competition considerations requires structural review.

B. Request for Comment

Views are solicited on all aspects of the merger-review process, focusing specifically on:

- the extent to which the current process appropriately considers all statutory approval criteria;
- the need, if any, to revise standards to address financial stability and how this should be done (e.g., specific qualitative or quantitative standards, assumption that all transactions over $100 billion or some other limit pose systemic risk);
- the extent to which prudential criteria such as capital adequacy factor into M&A approval and, if this is warranted, whether there should be express minimum prudential-approval criteria;
- how best to consider convenience and need, with specific attention to branch closings, whether the current approach to CRA suffices, the need for large-bank standards, and whether the CFPB should be consulted;
- the need for quantitative measures beyond the HHI to measure concentration;
- factors that determine anti-competitive effect (e.g., current market definitions and the role of out-of-state competitors and nonbanks); and
- the extent to which the current system now creates a presumption of approval and, if so, what should be done about it.

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