LUSE GORMAN

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LEGAL UPDATE

FDIC Proposes to Modernize Processing and Evaluation of Bank Mergers, and Promote Parity for State Banks and National Banks Providing Services Out-of-State

On September 17, 2026, the Federal Deposit Insurance Corporation (the "FDIC") issued a notice of proposed rulemaking on merger transactions to fundamentally reform the FDIC's framework for processing and evaluating merger transactions under the Bank Merger Act ("BMA") and a second proposed rule on State bank parity to establish parity between out-of-state State banks and national banks regarding the application of host State laws. Comments on the proposed rules are due 60 days after publication in the Federal Register.

Merger Transactions

The FDIC acknowledges that many aspects of its current merger framework are outdated, including the Herfindahl-Hirschman Index (HHI) competitive effects analysis that does not account for nonbank competitors, the absence of prescribed processing timelines, and an undisciplined and inconsistent review and approval process generally. The proposed rule would purportedly improve efficiency, certainty and predictability, and reduce regulatory burden by (i) overhauling the FDIC's approach to reviewing merger transactions under the BMA and (ii) codifying the FDIC's standards for evaluating the BMA's statutory factors in a new regulation (Part 333.5) for greater durability and transparency.

The proposal includes various structural and procedural reforms to filing, processing, reviewing, and approving merger applications subject to the BMA. The letter filing process the FDIC would establish for "deemed approval" of *de minimis* merger transactions and the inclusion of "nonbanks" (*e.g.*, credit unions) to the Herfindahl-Hirschman Index (HHI) competitive effects analysis are particularly noteworthy.

De minimis Transactions. These include transactions where the assets acquired are less than 5% of the acquiring institution's total assets (and are below the adjusted lower threshold under the Hart-Scott-Rodino Act ($133.9 million for 2026)), as well as certain corporate reorganizations. Additionally, to be eligible for rapid processing, each of the transacting parties must have: (i) a UFIRS composite rating of 3 or better, (ii) a satisfactory or better CRA rating, (iii) a compliance rating of 1, 2, or 3 from its primary Federal regulator, (iv) well-capitalized status, and (v) no outstanding enforcement actions. A streamlined letter filing (rather than a full merger application) would be available for *de minimis* transactions, which would be deemed approved only five business days after receipt of a substantially complete filing. The public comment period would also be eliminated for all *de minimis* merger transactions.

Corporate reorganizations that are not *de minimis* would qualify for expedited processing — the FDIC would have to act within 30 days of receiving a substantially complete filing, and the public comment period would be shortened from 30 days to 15 days. Expedited processing would also generally be more widely available by the proposed increase to the threshold of the maximum total assets to be transferred from 10% to 25% of the acquiring institution's total assets.

<u>Competitive Effects Analysis</u>. The HHI would be updated to include credit union shares and centrally booked deposits alongside traditional bank and thrift deposits to more accurately depict the competitive environment and deposit market share in which a State bank operates. The proposed rule would also establish a safe harbor under which the FDIC could not deny a merger application based on competitive effects where the transaction is a corporate reorganization, or, absent any objection from the Attorney General, where (i) the post-merger HHI is 1,800 or less in each relevant market, or (ii) if the post-merger HHI is greater than 1,800 in any relevant market, the pre- to post-merger HHI increase is less than 200 points.

The FDIC is seeking comments on whether to establish a separate HHI-based safe harbor for rural areas, recognizing that many rural markets are highly concentrated and traditional HHI metrics may overstate competitive concerns.

<u>Additional Key Reforms</u>:

- *Mergers in Substance*. The proposed rule would replace the FDIC's current qualitative, facts-and-circumstances approach with a transparent 80% asset threshold. Any transaction or series of transactions over a rolling 12-month period in which an insured depository institution acquires 80% or more of another institution's assets would be deemed a merger in substance.
- *Significant Asset Transfers*. A new notice-and-non-objection process would be established for significant asset transfers, *i.e.*, transactions that are not mergers but that increase an FDIC-supervised acquirer's assets by 25% or more over a rolling 12-month period. The FDIC would issue a decision within 30 days, extendable by a maximum of 60 days. The process would be materially less burdensome than a full merger application filing.

- *Statutory Factors*.
    - Financial stability: A safe harbor would conclusively resolve this factor where (i) the resulting institution is not a Category I–IV banking organization, (ii) the target has less than $20 billion in total consolidated assets, (iii) the transaction is a qualifying corporate reorganization, or (iv) the transaction is a de minimis merger.
    - Managerial resources: The FDIC would place greater weight on the resulting institution's management and provide more credit for remediation plans and past merger experience.
    - Convenience and needs: If the resulting institution would have more than $50 billion in assets, the FDIC would review whether the parties have engaged in politicized or unlawful "debanking" activities.

- *Adverse Comments and CRA Protests*. The proposed rule would clarify that an adverse comment or CRA protest would not automatically result in the application's removal from expedited processing.

<u>State Bank Parity</u>

Under the proposed rule, for purposes of Section 24(j) of the Federal Deposit Insurance Act, the laws of a host State apply to any branch located, or any services provided, in the host State by an out-of-State State bank to the same extent such laws would apply to an out-of-State national bank. For example, a bank chartered in State A that provides services in State B would enjoy the same rights under State B's banking laws as a national bank headquartered in State A that provides services in State B. On the flip side, when a host State law does not apply to a national bank, it would similarly not apply to an out-of-State State bank offering services in the host State — with or without a physical branch.

The key is the extension of existing interstate banking rules to State banks operating *without* a branch in the host State. The rulemaking is driven by recent litigation involving the Illinois Interchange Fee Prohibition Act ("IFPA"), which has created significant uncertainty regarding whether host State laws apply to State banks operating across state lines without a physical branch in the host State.

The proposed rule would not constitute a determination by the FDIC that any particular host State law is preempted by federal law. Rather, it would clarify the application of State law under Section 24(j) in instances where a State bank provides services in a host State. Further, the proposed rule would not affect interest rates that State banks may charge on loans.

Takeaways

- The deemed-approval pathway for *de minimis* merger transactions is expected to significantly reduce processing times (on average, approximately 75 days for qualifying corporate reorganizations and at least 49 days for other *de minimis* transactions).
- The inclusion of nonbanks (especially credit unions) in the HHI competitive effects analysis is a particularly noteworthy development for bank merger transactions, as it has the potential to reduce measured market concentration in many geographies.
- Consistent with FDIC policy regarding the evaluation of the impact on product and service offerings as part of the convenience and needs statutory factor for credit union-bank transactions, the proposed rule specifies that the FDIC would view a reduction in the products and services offered by the resulting institution negatively.
- The 80% asset threshold for mergers in substance provides welcome clarity compared to the prior qualitative approach, but bankers should monitor the rolling 12-month lookback period for potential structuring implications.
- The parity rule directly addresses the competitive imbalance between State-chartered banks and national banks arising from uncertainty around host State law application.
- In addition to Illinois, 11 other states have begun pursuing legislation similar to the IFPA, which indicates that the legal uncertainty the proposed parity rule seeks to resolve may become a more widespread concern.
- The parity rule, if adopted, would also be relevant in the context of bank mergers when determining the surviving charter, as the proposed parity framework may reduce pressure on State-chartered banks to convert to federal charters, or to establish branches solely to gain protection from host State laws.

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