which would be owned or controlled by a domestic governmental entity (such as, for example, a state, county or a municipality) will be reviewed very closely.[6] The FDIC is of the opinion that due to their public ownership, such depository institutions present unique supervisory concerns that do not exist with privately owned depository institutions. For example, because of their ultimate control by the political process, such institutions could raise special concerns relating to management stability, their business purpose, and their ability and willingness to raise capital (particularly in the form of true equity rather than governmental transfers). On the other hand, such institutions may be particularly likely to meet the convenience and needs of their local community, particularly if the local community is currently un- or under-served by depository institutions. In view of such considerations and the policy issues they embody, the FDIC will closely evaluate such applications to ensure that the required statutory factors are met.

Proposed Depository Institutions Formed for the Sole Purpose of Acquiring Assets and Assuming Liabilities of an Insured Institution in Default

Because of the urgent nature of this type of transaction, the procedures described above for insuring proposed depository institutions are modified when the institution is being formed for the sole purpose of acquiring assets and assuming liabilities of an institution in default. Such institutions are approved based on the statutory factors contained in section 6 of the Act; however, the procedures for resolving these factors are modified significantly.

The evaluation of the statutory factor ''financial history and condition'' will be based to a great extent on the quality of assets purchased and the types of liabilities assumed in the transaction.

The minimum capital requirement for these transactions is such that the acquiring depository institution would be ''adequately capitalized,'' as defined in the capital regulations of its primary federal regulator, which should be augmented by an adequate allowance for loan and lease losses. It is emphasized that this is a minimum standard, and a higher capital level may be required. The initial capital requirements may be based on a realistic projection of the estimated retained deposits. However, the proposed depository institution will be required to provide a written commitment to achieve the minimum capital position shortly after consummation if the volume of deposits is underestimated.

Proponents should contact the appropriate FDIC regional office (DOS) as soon as possible if they are interested in acquiring assets and/or assuming liabilities of an institution in default. Due to the time constraints involved with this type of transaction, information submissions and applications will be abbreviated. Generally, a letter request accompanied by copies of applications filed with other federal or state regulatory authorities will be sufficient. Other information will be requested only as needed by the appropriate FDIC official.

Relationships With Other Federal Regulators

Nothing in these guidelines is intended to relieve the applicant of any requirements imposed by a depository institution's primary federal regulator. Any differences in requirements of the FDIC and the institution's primary federal regulator will be resolved during the investigation process.

By order of the Board of Directors.

Dated at Washington, D.C., this 7th day of July, 1998.

Federal Deposit Insurance Corporation.

James LaPierre,

Deputy Executive Secretary.

[FR Doc. 98–21488 Filed 8–19–98; 8:45 am]

BILLING CODE 6714–01–P

[6] Banks that are owned by foreign governments and their subdivisions and banks that are owned or controlled by Native American tribes or bands are distinguished from conventional governmental units and will continue to be reviewed in the same manner as in the past. Banks that are owned by foreign governments and their subdivisions are entitled to ''national treatment.'' (*See* International Banking Act of 1978, 12 U.S.C. 3101 *et seq.*). National treatment requires that all foreign depository institutions, whether publicly- or privately-owned, receive consistent treatment with domestic entities when operating in the United States. This includes eligibility for deposit insurance which is often a condition of either a state or federal charter. Native American tribes or bands that own or control depository institutions can also be distinguished from a conventional governmental unit that seeks to open or acquire a depository institution. This is because under federal law, Native American tribes and bands function as both governmental and economic, for-profit entities. The Indian Reorganization Act of 1934 (the IRA) (25 U.S.C. 461 et seq.) authorizes not only the creation of tribal governments (see section 16 of the IRA, 12 U.S.C. 476), but also provides for the creation of tribal business corporations pursuant to section 17 of the IRA (25 U.S.C. 477). At the same time, however, a tribal government organized under section 16 of the IRA is not precluded from engaging in business activities. See S. *Unique Ltd.* v. *Gila River Pima-Maricopa Indian Community*, 138 Ariz. 384, 674 P.2d 1376 (Ct. App. 1984). These legal and policy considerations unique to these two categories of insurance applicants outweigh any concerns that the FDIC may have regarding the ownership of such depository institutions by governmental entities.

FEDERAL DEPOSIT INSURANCE CORPORATION

Bank Merger Transactions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Statement of policy.

SUMMARY: The FDIC is revising its Statement of Policy on Bank Merger Transactions (Statement of Policy) by updating it to reflect legislative and other developments that have occurred since the Statement of Policy was last revised in 1989. The revision also gives added guidance by including new provisions and clarifying some existing provisions. The revision is a part of the FDIC's systematic review of its regulations and written policies under the Riegle Community Development and Regulatory Improvement Act of 1994. The revised Statement of Policy is intended to be read in conjunction with the merger provisions of the FDIC's revised regulations governing applications filed with the FDIC, which also appear in this issue of the **Federal Register**.

EFFECTIVE DATE: October 1, 1998.

FOR FURTHER INFORMATION CONTACT: Kevin W. Hodson, Review Examiner, Division of Supervision, (202) 898–6919; Martha Coulter, Counsel, Legal Division, (202) 898–7348, Federal Deposit Insurance Corporation, Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION: On October 9, 1997, the FDIC issued for a public comment a proposal to revise the existing Statement of Policy (62 FR 52877). The proposal was issued in connection with section 303(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), 12 U.S.C. 4803(a), which required that each of the federal banking agencies conduct a review of its regulations and written policies, for two general purposes. These purposes were: (1) To streamline and modify the regulations and policies in order to improve efficiency, reduce unnecessary costs, and eliminate unwarranted constraints on credit availability; and (2) to remove inconsistencies and outmoded and duplicative requirements.

As part of this review, the FDIC determined that the Statement of Policy should be revised. The primary purpose of the revision was to update the Statement of Policy to reflect statutory changes and other developments since its last revision in 1989. In addition, certain clarifications and refinements were proposed, as well as new provisions intended to give guidance in areas not addressed by the existing Statement of Policy.

The recent developments reflected in the proposed revisions included those resulting from statutory changes, such as changes made by the CDRI Act; the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994; and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[1] Changes in each of those statutes caused related references in the existing Statement of Policy to become out-dated or incomplete.

Also reflected in the proposed revision were such other developments as the discontinuation of FDIC collection of data on ''IPC'' deposits (deposits of individuals, partnerships, and corporations), previously used as a measure in FDIC merger analysis. The proposal also reflected amendments to certain FDIC regulations, such as the 1995 amendment of the FDIC's regulations implementing the Community Reinvestment Act (*see* 60 FR 22156 (May 4, 1995)) and, more recently, the proposed amendments to the FDIC's regulations governing merger applications (*see* 62 FR 52810 (October 9, 1997)).

In addition to the updates discussed above, the proposed revision expanded the Statement of Policy to include elements not previously covered, such as references to optional conversion transactions, branch closings in connection with merger transactions, and interstate and interim merger transactions. The proposed Statement of Policy also included a number of clarifications and refinements, such as a clarification that 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 FDIC received two letters specifically commenting on the proposed revisions. Both letters were from depository institution trade associations and both expressed support for the revisions. No unfavorable comments were received. No changes were made as a result of comments received; however, a reference to the recently adopted Interagency Statement on Branch Names was added to the section discussing related considerations. The Interagency Statement, which addresses the potential for customer confusion about deposit insurance when an insured institution operates a branch under a trade name different from that of the institution, was adopted May 1, 1998, with an effective date of July 1, 1998. See FDIC, Financial Institution Letter 46–98, (May 1, 1998).

With this exception, and with the exception of a few minor editorial changes, the Board is adopting the revised Statement of Policy as proposed. The revised Statement of Policy is intended to be read in conjunction with the revised merger provisions of newly-amended part 303 (Applications) of the FDIC's regulations, which is published elsewhere in this issue of the **Federal Register**.

The Statement of Policy is revised by the Board to read 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 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. 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, and the convenience and needs of the community to be served.

II. Application Procedures

1. *Application filing.* Application forms and instructions may be obtained from any FDIC Division of Supervision (DOS) regional office. Completed applications and any other pertinent materials should be filed with the appropriate regional director as specified in § 303.2(g) of the FDIC rules and regulations (12 CFR 303.2(g)). The application and related materials will be reviewed by regional office staff 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 regional director pursuant to the delegations of authority set forth in § 303.66 of the FDIC rules and regulations (12 CFR 303.66) or the application will be forwarded to the FDIC's Washington office for processing and decision.

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 regional director (DOS) 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

[1] The citations for these statutes are, respectively, Pub. L. 103–325, 108 Stat. 2160; Pub. L. 103–328, 108 Stat. 2338; and Pub. L. 101–73, 103 Stat. 183.

reports on the competitive factors involved in a proposed merger transaction from the Attorney General, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Director of the Office of Thrift Supervision. These reports 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 reports.

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 or an emergency exists requiring expeditious action, 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 Office of Corporate Communications, Room 100, 801 17th Street N.W., Washington, D.C. 20434.

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 [1] 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) [2] 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 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

[1] 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.

[2] 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: $20^2 + 20^2 + 20^2 + 20^2 + 20^2 = 2,000$.

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 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 only reasonable alternative to the probable failure of an insured depository institution, the FDIC may approve an otherwise anticompetitive merger transaction. The FDIC usually will not consider a less anticompetitive alternative that is substantially more costly to the FDIC to be a reasonable alternative, unless the potential costs to the public of approving the anticompetitive merger transaction are clearly greater than those costs likely to be saved by the FDIC.

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.

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. *Optional conversion.* Section 5(d)(3) of the Federal Deposit Insurance Act, 12 U.S.C. 1815(d)(3), provides for "optional conversions" (commonly known as Oakar transactions) which, in general, are merger transactions that involve a member of the Bank Insurance Fund and a member of the Savings Association Insurance Fund. These transactions are subject to specific rules regarding deposit insurance coverage and premiums. Applicants may find additional guidance in § 327.31 of the FDIC rules and regulations (12 CFR 327.31).

4. *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 2 FDIC Law, Regulations, Related Acts 5391.

5. *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.

6. *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).

By order of the Board of Directors.

Dated at Washington, D.C., this 7th day of July, 1998.

Federal Deposit Insurance Corporation.

James LaPierre,

Deputy Executive Secretary.

[FR Doc. 98–21489 Filed 8–19–98; 8:45 am]

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FEDERAL DEPOSIT INSURANCE CORPORATION

Liability of Commonly Controlled Depository Institutions

AGENCY: Federal Deposit Insurance Corporation (FDIC).