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Provident/Lakeland approvals highlight agency divergence on bank merger

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On April 11, 2024, the Federal Reserve approved Provident Financial Services' proposed acquisition of Lakeland Bancorp. The Federal Reserve approval was the last regulatory approval required to consummate the proposed transaction and came 17 days after Provident received approvals from the FDIC and the State of New Jersey. Over the past several years, merger application processing has dramatically slowed amidst material policy shifts at the FDIC and OCC with respect to bank merger transactions. Provident's application is an extreme example of delay, with close to a 500 day agency review period.

Aside from the lengthy processing period, the FDIC included a number of unique conditions to its approval of the Provident application. Specifically, Provident disclosed that the FDIC required the bank to:

(1) complete a $200 million capital raise prior to completion of the merger (which Provident plans to satisfy with a subordinated debt offering);

(2) maintain a Tier 1 capital to total assets leverage ratio of at least 8.5% and a total capital to risk-based assets ratio of at least 11.25% for a period of three years following completion of the merger;

(3) maintain its ratio of commercial real estate loans to total capital and reserves at or below the levels set forth in the three-year projections supporting its regulatory applications; and

(4) develop an action plan, subject to FDIC approval, to improve home mortgage applications from and originations to all demographic populations within the combined bank's market area.

In contrast, the Federal Reserve approval included no explicit conditions. The Federal Reserve noted the capital raise in its review of the statutory financial factors but did not discuss whether that capital raise was viewed as significant to approval. The Federal Reserve declined to condition its approval on expanded mortgage lending or, as requested by commenters, the bank's compliance with a specific community benefits plan.

The approval order states that the Federal Reserve "consistently has found that neither the CRA nor the federal banking agencies' CRA regulations require depository institutions to make pledges or enter into commitments or agreements with any private party." The Federal Reserve also stated that the bank will be independently subject to an ongoing obligation to adhere to a 2022 consent order between Lakeland Bank and the DOJ related to alleged redlining (as would be expected).

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These approvals highlight diverging approaches to bank merger application review. The FDIC's approval reflects several of the policy shifts articulated in the agency's March 21, 2024 proposed Statement of Policy updating its approach to evaluating bank mergers and related transactions.[1] That proposal states that the FDIC will not use conditions or written agreements as a means of favorably resolving material concerns with any statutory factors.

> *Unlike the FDIC and the OCC, the Federal Reserve has not issued any policy statement outlining changes to its standards for bank merger reviews.*

However, the proposed Statement of Policy also notes that the FDIC may require non-standard conditions to enhance capital, liquidity or to address other supervisory needs (including through capital maintenance or funding support commitments from affiliates) and that the applicant's inability or unwillingness to enter into proposed conditions or written agreements will result in unfavorable findings on an application.

The Provident application approval highlights the natural tension between these statements. The FDIC proposal also states that applicants should be prepared to make commitments regarding "future retail banking services in the community to be served for at least three years following consummation of the merger," which is reflected in the bank's commitment to enhance mortgage lending. Clearly, this transaction (as well as other select transactions from the last several years) were front of mind for the FDIC in preparing the proposed Statement of Policy.

In contrast, the Federal Reserve's public approval order took a more moderate approach and followed its longstanding assessment practices for the statutory factors, including through the use of its standard financial stability safe harbor and analysis of antitrust considerations using the 1995 Bank Merger Guidelines, as well as a traditional review of the convenience and needs considerations, such as branch closures.

Unlike the FDIC and the OCC, the Federal Reserve has not issued any policy statement outlining changes to its standards for bank merger reviews. Last week, Federal Reserve Vice Chair for Supervision Michael Barr confirmed his view that the Federal Reserve's current review frameworks is "pretty robust" and that no such policy statement is likely forthcoming.

Barr did note, however, that the Federal Reserve continues to work with the other federal banking agencies and the DOJ to possibly update the 1995 Bank Merger Guidelines with respect to the antitrust analysis of bank mergers. He stated that the Federal Reserve is "thinking about that on an interagency basis rather than just us doing something [alone]."

Spurred by aggressive statements by CFPB Director (and FDIC Board member) Rohit Chopra, the FDIC's proposed Statement of Policy includes explicit provisions that move towards the open-ended antitrust analyses articulated by Assistant Attorney General Kanter last year in his Brookings Institute speech.[2] Acting Comptroller Hsu suggested a similar approach in his comments accompanying the OCC's separate bank merger proposal, but the OCC's proposal itself is silent on antitrust matters.[3]

Notes:

[1] See our client memo here: https://bit.ly/3yglna2

[2] See our client memo here: https://bit.ly/4bhZBl7

[3] See our client memo here: https://bit.ly/4dSks02

About the authors



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