

## **Stimulating Bank Investment By Simplifying Review**

*Law360, New York (July 23, 2012, 12:27 PM ET)* -- The Board of Governors of the Federal Reserve System on July 12, 2012, issued supervisory guidance, effective immediately, to enable applicants to obtain a prefiling review of a potential bank acquisition or other proposal before the submission of a formal application or notice. The Federal Reserve expects this program to be particularly helpful for community banking organizations, which typically do not file applications or notices on a frequent basis, and for investors with novel proposals.

This program could shorten and simplify the review of many formal filings. It would also provide a mechanism for investors to obtain feedback from the staff on critical issues before committing to a formal filing, which is subject to public notice and comment.

### **Scope of Prefiling Review**

Under the program, an applicant that has questions regarding a proposed filing may, on a purely voluntary basis, submit prefiling materials to the Federal Reserve Bank at which its application or notice is to be filed. There are no requirements with regard to the form of a filing. Submitted materials will be reviewed by Federal Reserve Bank staff, which may consult with Washington staff as appropriate. A prefiling review is intended to address questions related to specific aspects of a proposal or potential issues that may be raised.

Thus, applicants may submit items such as business plans, pro forma financial statements and drafts of shareholder agreements, purchase agreements and other corporate and transactional documents. Prefilers may also seek guidance on such issues as a person's status as a "control" party or as a "company" under the Bank Holding Company Act (BHC Act) or the Home Owners' Loan Act, the type of filing, if any, that is required and the persons required to join a filing.

The pre-filing review process may be particularly helpful for the following types of investors or institutions:

- Investors such as private equity or hedge funds that seek to participate in the recapitalization of a bank but require confirmation that their investment would not be viewed as “controlling” for purposes of the BHC Act;
- Savings and loan holding companies (SLHCs) that have limited experience in filing applications with the Federal Reserve. While similar in many respects, the rules and processes of the Federal Reserve differ in significant ways from those that were followed by the Office of Thrift Supervision before the responsibility for supervising SLHCs was transferred to the Federal Reserve;
- Investment managers that propose to acquire 10 percent or more of a bank on a passive basis. In particular, investment managers may wish to seek guidance about the circumstances in which shares acquired through mutual funds or other managed accounts may be attributed to them for control purposes; and
- Holding companies of community banks, which may have limited experience in acquisitions or other extraordinary transactions.

During its review, the Federal Reserve Bank will focus on the specific items for which feedback is requested by the filer. A pre-filing review is not intended to identify or resolve all issues or concerns related to a possible future application or to be predictive of the final outcome of a filing. A pre-filing review is not part of the formal review period for an application and does not trigger the public notice and comment process that accompanies a formal filing.

## **Timing**

The Federal Reserve anticipates reviewing pre-filing materials in no more than 60 days, and expects that most reviews will be completed in much less time. Some pre-filings may require additional time. All reviews will be performed on a best efforts basis, with staff giving priority to pending formal applications. Applicants are not required to wait for the Federal Reserve Bank to complete its pre-filing review before making a formal filing, and they are encouraged to make a formal filing as soon as practicable after the pre-review period is completed.

## **Confidentiality**

All materials submitted as part of a pre-filing review will become public records of the Federal Reserve. Under the Freedom of Information Act, Federal Reserve records generally must be disclosed to the public upon request, unless they fall within the scope of an exemption. Persons may seek confidential treatment of any portion of the materials they submit for a pre-filing review in accordance with the procedures set forth in the Federal Reserve’s regulations. Pre-filings will not be published in the Federal Reserve’s weekly report of applications received.

## Conclusion

The Federal Reserve's pre-filing review process should be a welcome development to investors and other banking industry participants. The process should provide an informal opportunity to clarify gray areas of the law and Federal Reserve policy that sometimes discourage investments and other transactions. It should particularly help smaller and less experienced filers to navigate the application process and avoid unnecessary delays and cost.

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