



Federal Reserve Issues Guidance on Pre-Filing Reviews of Bank and Nonbank Acquisitions and Other Proposals

July 11, 2012

On July 11, 2012, the Board of Governors of the Federal Reserve System (the “Federal Reserve”) issued supervisory guidance outlining a new process for banking organizations to formally request feedback on potential bank or nonbank acquisitions or other proposals prior to the submission of a formal application or notice.¹ The so-called “pre-filing” process is completely optional and is intended to be of particular benefit to applicants that are not frequent filers, such as smaller banking organizations, or that seek feedback on a specific area of a novel proposal that requires the Federal Reserve’s approval or non-objection under the Bank Holding Company Act of 1956 (“BHC Act”) or the Home Owners’ Loan Act of 1933 (“HOLA”). In addition, the process will be helpful to individuals and other entities, such as family trusts and certain limited partnerships, where there is uncertainty on whether they need to make a filing under the Change in Bank Control Act of 1978.

This memorandum summarizes the Federal Reserve’s new pre-filing process, which resembles, at least in part, the Federal Reserve’s approach toward “draft applications,” which were accepted until 1997.

COMPONENTS OF A PRE-FILING

Pre-filing submissions are inquiries that relate to a potential application or notice and may include a wide range of information and documentation, including the following:

- information about a specific aspect of a proposal or a potential issue;
- business plans or *pro forma* financial information;
- presentations outlining specific potential proposals (*i.e.*, not just proposal concepts); and
- draft transactional and structural documents, such as:
 - shareholder agreements;
 - purchase agreements;
 - voting agreements;
 - side letters;
 - offering documents;
 - partnership agreements; and
 - qualified family partnership agreements.

¹ See Federal Reserve Supervision and Regulation Letter (SR 12-12), dated July 11, 2012, available at <http://www.federalreserve.gov/bankinfo/srletters/sr1212.pdf>.

In addition, a pre-filing may include detailed questions regarding:

- the type of filing required, if any;
- the individuals or entities that would need to join a filing; and
- whether an entity would be considered to be a “company” or have “control” under the BHC Act or the HOLA.

The Federal Reserve recognizes that applicants (or, more appropriately, potential applicants) may have communications through brief phone conversations or limited e-mail correspondence with staff at the Federal Reserve or the appropriate Federal Reserve Bank. However, such communications will generally not constitute pre-filings, nor will the submission of biographical and financial information needed to commence background investigations on, for example, proposed directors and officers. Instead, as the guidance suggests, the submission of written materials for feedback, prior to the submission of a formal filing, will trigger the pre-filing process.

THE FEDERAL RESERVE’S EXPECTATIONS FOR PRE-FILINGS

The Federal Reserve does not expect the pre-filing review process to be used by banking organizations that frequently file proposals with the Federal Reserve, although there is no elaboration as to what “frequently” means in this regard. As to the frequency of pre-filings themselves, only one pre-filing will generally be permitted for a potential application or notice.

Parties submitting pre-filings should bear in mind that a pre-filing is intended as a means of getting targeted feedback on discrete points. Staff will not identify or resolve all issues or concerns related to a future application, nor will they review a fully complete application or notice. Furthermore, a pre-filing is “not intended to be a forum for negotiating the structure of a potential proposal or for resolving significant issues of policy or law.”

SUBMISSION, TIMING, AND CONFIDENTIALITY CONSIDERATIONS

Pre-filings should be submitted to the appropriate Federal Reserve Bank, not to Federal Reserve legal or other staff. Submissions will be reviewed on a best efforts basis, with top priority going to pending formal applications and notices. A pre-filer will be notified within 60 days from the date of receipt of a pre-filing, although the Federal Reserve anticipates that responses to most types of pre-filings will take well less than the full 60-day period.

Under the Freedom of Information Act, written inquiries and documents submitted in connection with a pre-filing become public records of the Federal Reserve (not the relevant Federal Reserve Bank). Accordingly, unless an exemption from disclosure applies, the Federal Reserve is obligated to publicly disclose submitted materials. Parties making pre-filings can, and should, make customary confidentiality requests. Also, the guidance notes that pre-filings will not be referenced in the Federal Reserve’s weekly H.2 report, which summarizes, among other things, applications and notices submitted to the Federal Reserve and its Federal Reserve Banks.

RELATIONSHIP TO FORMAL FILINGS

A pre-filing is not part of the formal review period of an application or notice. A final filing needs to stand on its own and be accompanied by all relevant documentation. The guidance states that final filings “are expected to be more quickly reviewed and acted upon when previously identified issues or concerns are fully addressed.”

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