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DRAFT RECOMMENDATION 88 - ____

The Federal Reserve Board's Handling of Applications Under the Bank Holding Company Act

Among the Federal Reserve Board's (FED's) responsibilities is implementation of the Bank Holding Company Act (BHCA) (12 U.S.C. §§1841 *et seq.*). The BHCA's principal purposes are to ensure the safe and sound operation of bank holding companies (BHCs), to promote competition within the banking industry, and to separate banking from commerce.

Under the BHCA, the FED has also been authorized to determine the extent to which BHCs may engage in "non-banking" activities in the parent BHC and in non-bank subsidiaries. Because the banking industry has undergone rapid changes in the face of new technologies, the line between banking and other financial activities has been blurred.

Under Section 3 of the BHCA, the FED receives applications for the formation of or acquisition of banks by BHCs. The statutory factors which the Board must apply in acting on Section 3 applications include an evaluation of the competitive impact of the transaction, the convenience and needs of the community to be served, and the financial and managerial resources of the applicant.

Under Section 4(c)(8) of the Act, the FED receives applications by BHCs to acquire non-banking interests. Such applications are to be approved only when the activities involved are "closely related" to and a "proper incident" to banking. These questions have become of particular significance most recently in applications involving proposed securities and insurance activities of BHCs.

Applications under both sections are generally resolved without the need for an evidentiary hearing, although informal hearings and meetings are sometimes held. Both

sections do, however, provide for an overall 91-day time limit on the FED's action on individual applications "beginning on the date of submission to the Board of the complete record on the application." The FED routinely processes well over 90 percent of the applications received by the FED within 60 days of "acceptance" of the application by the Reserve Bank (the Bank is permitted to request information, but otherwise must adhere to a short deadline in accepting the application and forwarding it to the FED). The FED's regulations specifically provide that, in every case in which an application has not been considered by the FED within 60 days of acceptance, the applicant will be notified and provided a written explanation for the delay.

In its regulations, the FED defines when the record on a particular application is complete for purposes of determining when the statutory 91-day period has begun. Under the FED's regulations, the 91-day period begins on the the latest of four dates: 1) the date of acceptance of the application; 2) the last day of the public comment period (which is usually after acceptance of the application, and is the date upon which the 91-day period begins in the majority of cases); 3) the date of receipt of any relevant material information regarding the application; and 4) the date of completion of any hearing or other proceeding regarding the application.

Because the statute provides that the 91-day period does not begin until the complete record has been submitted to the FED, the courts have determined that the 91-day period may be tolled or retriggered after the close of the public comment period if new material information is submitted during the processing of the application. Examples of this type of information include comments or protests from interested parties, changes in the financial condition of the applicant, proposed efforts by the applicant to raise additional capital, or proposed divestiture plans to accommodate competitive problems.

Because there is always the possibility that submission of additional material information may toll or retrigger the 91-day period, the 91-day period is rendered rather uncertain in

practice. Therefore, the Conference suggests that the FED's regulations on this issue ensure that there is a point in the application process at which the FED will declare that the applicant's file is deemed to be informationally complete, thus triggering the 91-day rule, unless additional information of a highly significant nature relating to the application is received.

The nature of the regulatory process established under the BHCA encourages a participatory approach to decisionmaking on the part of applicants and the FED. Various kinds of conditional order are used by the FED to tailor its regulatory decisions to the specific applicant before it. These regulatory conditions appear or are referenced in the FED's final order, and such conditions are subject to judicial review. Other decisions, however, reflect voluntary commitments made by the applicant. Such commitments often are the result of a decision by the applicant to expedite processing of a particular application by committing to resolve questions that might otherwise result in denial of the application. These commitments usually do not appear in the FED's order and, while reviewed by the Board in every case, are not subject to judicial review at the instance of the applicant.

The Conference believes that conditions and commitments are important regulatory tools used by the FED that, for the most part, add flexibility to and encourage efficiency in the consideration of applications to individual cases, providing a wide range of regulatory choices between unconditional approval and complete denial of an application.

RECOMMENDATION

The Board of Governors of the Federal Reserve System should take the following actions with respect to the FED's handling of applications under the Bank Holding Company Act.

1. *Clarification of the 91-day rule.* When acting on such applications, the FED should ensure by regulation that there is a point when an applicant's file is deemed informationally

complete, thus triggering the 91-day rule, unless additional information of a highly significant nature relating to the application is received.

2. *Conditions and Voluntary Commitments.* Conditions established by the FED regarding applications and voluntary commitments offered by applicants should be unambiguous and reasonably related to an articulated policy of the Federal Reserve Board. Voluntary commitments, when offered by applicants, should, consistent with the Freedom of Information Act, ordinarily be made part of final orders of the Board. Moreover, the Board should, from time to time, summarize the thrust of these commitments and publish and disseminate these summaries.