

Board Interlocks and Investment in the Banking Sector—The Federal Banking Regulators Propose to Raise the Asset Thresholds

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The Federal Reserve, FDIC and OCC (the Banking Agencies) recently published a [proposal](#) to increase the thresholds associated with the “major assets” prohibition governing management official interlocks contained in the Depository Institutions Management Interlocks Act (DIMIA)¹ and implemented by Regulation L. DIMIA permits the Banking Agencies to raise the statutory thresholds from time to time to take into account inflation or market changes.² The thresholds have not been raised since 1996.³

The proposal would increase the major assets prohibition thresholds in Regulation L to apply only to depository organizations with \$10 billion or more in total assets, although a depository organization that did not benefit from the revised major assets threshold would still have to apply to seek an exemption, typically from more than one regulator and with a significant delay, if it sought to have an individual with a director or management interlock. The proposal would make no changes to the geographically based community or metropolitan statistical area prohibitions that continue to apply to all depository organizations regardless of size.

The Banking Agencies also seek comment on three alternative methods for further updating the thresholds based on percentage of depository organizations covered, asset growth, and inflation. Each of these alternatives has its strengths and weaknesses, but automatic indexing of the threshold amounts is sensible to account for changes in inflation and markets. The examples given by the Banking Agencies start from the 1996 thresholds of \$2.5 billion and \$1.5 billion to illustrate where an automatic increase would have been today. Most of these illustrative numbers are less than \$10 billion although one is more than \$10 billion. If used only for further increases, the alternatives provide a view on how further raises would take place using history as a guide. In a question, the Banking Agencies ask whether the \$10 billion threshold is appropriate and leave themselves the theoretical flexibility to come up with another amount. Notably, when the Banking Agencies indicated to Congress in 2017 that they would increase the Regulation L asset thresholds, they did not commit themselves to any specific number.⁴

Statutory limits on management and director interlocks in the banking sector were first put in place by Congress in 1978. The core purpose of these limits is to prevent director and management interlocks where they would have an anticompetitive impact but, unlike other sectors where director interlocks are judged by general antitrust principles, in the banking sector a specific statute prevents them, subject to exemptions and waivers. The geographic focus of the two main interlock prohibitions, those for communities and metropolitan statistical areas, reflects the local nature of the banking sector both in the era before interstate banking was permissible and today in the smaller community banking sector with its local focus. In the digital era, however, the prohibition on interlocks, especially at the director level, can stand in the way of investment into the banking sector. Thus, raising the thresholds is one method to encourage more investment into those fintech business models that chose a banking charter and, when combined with the Federal Reserve’s expected modernization of the control rules, may encourage more innovation.

The comment period on the interlocks proposal runs through April 1, 2019.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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- ¹ DIMIA applies to both management and director interlocks. As a practical matter, however, only the director interlocks are typically of concern because it is not realistic for most individuals to work in management at two separate organizations.
- ² The current statutory thresholds prohibit a management official of a depository organization with total assets exceeding \$2.5 billion (or any affiliate thereof) from serving at the same time as a management official of an unaffiliated depository organization with total assets exceeding \$1.5 billion (or any affiliate thereof). 12 U.S.C. § 3203.
- ³ [Thresholds Increase for the Major Assets Prohibition of the Depository Institution Management Interlocks Act Rules](#), 84 Fed. Reg. 604, 606 (Jan. 31, 2019).
- ⁴ [Federal Financial Institutions Examination Council, Joint Report to Congress: Economic Growth and Regulatory Paperwork Reduction Act](#), 82 Fed. Reg. 15900, 15903 (Mar. 30, 2017).