The FDIC's Proposed Bank Merger Guidance: *Proposing a Perilous Path for Large Bank (and Nonbank) Merger Transactions*

March 27, 2024

On March 21, 2024, the Federal Deposit Insurance Corporation ("FDIC") issued, after a 3-2 party-line vote of its Board, a proposal to update its Statement of Policy on Bank Merger Transactions (the "Proposal").[1] The preamble explains that, among other things, the reduced number of smaller banks and increased number of large banks (with a particular focus throughout the Proposal on banks with $100 billion or more in assets) over the past several decades "contributed to the need for a review of the regulatory framework that applies to bank merger transactions subject to the [Bank Merger Act] ("BMA")."[2] The Proposal also confirms the broad scope of the FDIC's perceived authority in transactions involving "mergers" of nonbank entities. Comments on the Proposal will be due 60 days after publication in the Federal Register.

Like the recently released notice of proposed rulemaking on bank mergers from the Office of the Comptroller of the Currency ("OCC"),[3] the FDIC's Proposal eschews "bright line" favorable standards or presumptions with respect to the BMA's statutory factors. Instead, the Proposal sets forth what the FDIC describes as a more "principles-based" approach. As a result, long-standing standards, such as the 1800/200 Herfindahl-Hirschman Index ("HHI") approach to competitive review of bank merger transactions, would be a less significant component of an evaluation including a multitude of factors.

Neither the OCC's nor the FDIC's proposal provides the recognition of market realities or certainty desired by the banking industry. Nonetheless, the tone of certain members of agency leadership of the OCC and FDIC was strikingly different in connection with release of their bank merger proposals. Acting Comptroller of the Currency Michael Hsu said in relation to the OCC's proposal that "[w]e need a system that enables mergers, but we want good ones"[4] while Consumer Financial Protection Bureau ("CFPB") Director Rohit Chopra (also an FDIC Director by virtue of his CFPB role) said that he was "glad that [the FDIC was] moving away from a pro-merger posture" by

---

1 FDIC, Request for Comment on Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024), available *here*.

2 Proposal at 5.

3 See our Debevoise In Depth on the OCC's proposal *here*.

4 Politico Pro, Q&A Acting Comptroller of the Currency Michael Hsu (Mar. 11, 2024), available *here*.

adopting the Proposal. Still, despite this potentially different outlook as to mergers generally, Hsu voted in favor of the Proposal saying that the FDIC's Proposal "is broadly consistent with the proposed policy statement issued by the OCC in January."[5]

Section I below discusses that given the size of most banks for which it has primary federal supervisory authority, the FDIC is unlikely to be the arbiter of many large bank M&A transactions. However, as discussed in II.A., the FDIC's stance nonetheless could influence how other banking agencies apply the BMA's statutory factors and may provide some insight into how the Department of Justice ("DOJ") would evaluate competitive factors with respect to bank mergers. Such a result would have a more material impact on large bank M&A.

Moving beyond bank M&A, Section II.B. discusses the reach of the Proposal to transactions in which nonbanks "merge" into insured depository institutions ("IDIs") (of any charter type), all of which are transactions the FDIC asserts jurisdiction over. Finally, Section III then discusses in greater detail some specific elements of the Proposal that may be particularly worthy of industry focus and comment.

* * *

Key Takeaways

- The Proposal should not have a significant *direct* impact on large bank M&A, given that the FDIC is not the primary federal regulator for many large banks.
- Despite this limited direct impact, the potential of the Proposal to influence the approach of the other agencies and DOJ (none of which have yet finalized revised bank merger guidelines) nonetheless suggests that banking organizations and their trade groups may wish to consider commenting on the FDIC's Proposal.
- Based on current proposals, larger banks that wish to pursue bank deals should prepare for increased scrutiny of their merger diligence and expect to prepare significantly more detailed merger applications about the transaction's lack of material anticompetitive effects and the benefits it would provide to the resulting institution and to the communities it would serve.

---

[5] OCC, Acting Comptroller Issues Statement on the FDIC's Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024), available *here*.

- As to nonbank "mergers" into banks, the Proposal confirms the FDIC views the scope of its jurisdiction broadly.

I. The Proposal Will Have Limited Direct Impact on Large Bank M&A.

Under the BMA, the principal federal regulator of the acquiring or resulting bank is the banking agency responsible for review and decisioning regarding a bank merger transaction.[6] As such, the FDIC is responsible for evaluating bank merger transactions in which the resulting institution is an insured state nonmember bank. However, of the 29 insured U.S. commercial banks with assets over $100 billion, only 3 are state nonmember banks; the remaining are national banks or state member banks. And of the 12 additional banks with between $50 billion and $100 billion in assets, only 2 are state nonmember banks.[7] Accordingly, the direct application of the FDIC's Proposal to large bank mergers likely would be limited.

II. The Proposal Nonetheless May Have Significant Implications on Large Bank M&A and Will Govern Nonbank "Mergers" into Banks.

A. Possible Indirect Influences on Large Bank M&A

As discussed further in Section III below, the FDIC's Proposal would replace long-standing historical practices and favorable presumptions used by the federal banking agencies to evaluate the BMA's statutory factors and replace them with more bespoke analyses. For example, in line with the banking agencies' and DOJ's practice since the release of their 1995 Bank Merger Competitive Review Guidelines (the "1995 Guidelines"), the FDIC's current policy statement on bank mergers provides that it "normally will not deny a proposed merger transaction on antitrust grounds" so long as, by virtue of the merger, concentration (primarily of deposits) in relevant markets (typically defined by branches) does not both exceed an HHI of 1800 and result in an HHI increase of 200 in the market.[8]

By contrast, while still referring to concentration measured by HHI, the Proposal does not include any metrics or benchmarks under which a merger would be presumed not to be anticompetitive; instead, the FDIC would retain "flexibility to appropriately

---

6 12 USC 1828(c)(2).

7 FRB, Insured U.S.-Chartered Commercial Banks That Have Consolidated Assets of $300 Million or More (Dec. 31, 2023), available *here*. One of the three state nonmember banks is Discover, leaving only two of its transactions with Capital One closes.

8 FDIC Statement of Policy on Bank Merger Transactions at 3 ("Current FDIC Statement"), available *here*.

evaluate the facts and circumstances of each application filed."[9] Similarly, while the banking agencies have historically relied on the merging parties' Community Reinvestment Act ("CRA") ratings as a strong basis to evaluate the BMA's convenience and needs factor,[10] the FDIC, under the Proposal, would conduct a more forward-looking analysis focusing on how the "merger . . . will enable the resulting IDI to *better* meet the convenience and the needs of the community to be served than would occur absent the merger."[11]

Given the limited direct application of the Proposal as set forth in Section I, the larger concern is that the other federal banking agencies and the DOJ also may apply all or part of the approach outlined in the FDIC's Proposal. For example, the FDIC's discussion of the BMA competitive factors appears to be largely in the same spirit as the DOJ's view as set forth in DOJ Assistant Attorney General for Antitrust Jonathan Kanter's speech on the topic in summer 2023.[12] Moreover, when releasing the OCC's proposal, Hsu mentioned the "need to develop modes of analysis for banking competition that go beyond retail deposits as a proxy for market power."[13] Similarly, with respect to the convenience and needs factor, the OCC's proposal emphasizes that it would conduct a "forward-looking evaluation."[14] All of these concerns are heightened by the procedural fact that neither of the other banking agencies nor the DOJ has yet finalized any revisions to the bank merger guidelines.

That said, it is notable that the federal banking agencies reportedly considered releasing,[15] but ultimately did not release, a bank merger proposal on an interagency basis. This agency-specific proposal departs from the agencies' otherwise coordinated approach under the Biden administration on final rules, proposals and guidance related to major regulatory priorities that apply to banks regardless of their charter, including the CRA, capital, long-term debt and climate-related financial risk. This may be attributable to various agency leaders having taken a different rhetorical tone with respect to bank mergers, with Acting Comptroller Hsu saying "[h]ealthy bank

---

[9] Proposal at 27.

[10] *See, e.g.*, FRB, Order No. 2019-16 (BB&T Corporation) at 29 (Nov. 19, 2019) (noting that the FRB places "particular emphasis on the records of the relevant depository institutions under the CRA" in evaluating the convenience and needs factor) ("FRB Truist Order"), available *here*.

[11] Proposal at 82 (emphasis in original).

[12] See our blog on Kanter's speech *here*.

[13] Acting Comptroller of the Currency Michael J. Hsu, "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced" at 16 (Jan. 29, 2024), available *here*. As noted above, Acting Comptroller Hsu described the FDIC's Proposal as "broadly consistent" with the OCC's proposal. OCC, Acting Comptroller Issues Statement on the FDIC's Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024), available *here*.

[14] 89 Fed. Reg. at 10018.

[15] Bankers Descend on Washington as 'Regulatory Tsunami' Grows, Capitol Account ("An effort to draft joint [bank merger] guidelines stalled . . .") (Mar. 19, 2024), available *here*.

mergers—i.e., those that benefit communities, support bank resilience and financial stability, and enhance competition—should be approved"[16] while Director Chopra said "the rubber stamp is out of ink,"[17] referring to his view that bank merger policy has been too permissive. As to the Federal Reserve Board ("FRB"), while the agency has not yet published a proposal on bank mergers, its General Counsel, Mark Van Der Weide, said at an event in January 2024 that mergers were a healthy feature of most economic sectors as they improve allocative efficiency.

These rhetorical distinctions coupled with the differences in opinions evidenced by the lack of an interagency proposal may make it more important for the industry to comment on both the FDIC's and the OCC's proposals and suggests there is room to influence the agencies' ultimate views on these issues. In any event, the absence of an interagency approach would make it easier for any single agency to amend its guidelines after a change in agency personnel.

B. Bank "Mergers" with Nonbanks

Though much of the discussion surrounding the Proposal has understandably been focused on bank M&A, it should not be overlooked that the BMA also gives the FDIC broad jurisdiction over *all* transactions in which an insured bank (1) merges or consolidates with any noninsured bank or institution; (2) assumes liability to pay any deposits or similar liabilities of any noninsured bank or institution; and (3) transfers assets to a noninsured bank or institution in consideration of the assumption of deposit liabilities of the IDI.[18] In part because the FDIC takes a broad view of the term "merge" this would "encompass all transactions that result in an IDI substantively and effectively combining with a non-insured entity, regardless of whether the transaction is structured as a merger or asset acquisition," or result in an IDI acquiring deposits even if not mandated by an agreement.

For example, the Proposal states that even transactions without an express agreement for direct assumption of deposits (e.g., a transfer of custody relationships only) may come within the scope of the Proposal if the transaction also results in the transfer of deposit relationships to an IDI, and similarly, even without an agreement, if a nonbank entity and a bank coordinate to transfer deposits of the nonbank to the bank, "the FDIC

---

16 OCC, Acting Comptroller Issues Statement on the FDIC's Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024), available *here*.

17 CFPB, Prepared Remarks of CFPB Director Rohit Chopra at the Peterson Institute for International Economics Event on Revitalizing Bank Merger Review ("Chopra Peterson Speech") (Mar. 21, 2024), available *here*.

18 12 USC 1828(c); Proposal at 13–14.

will generally consider such an orchestration to constitute an assumption of deposits" requiring a BMA application.[19]

The Proposal fails to specify whether the FDIC would apply the Proposal's framework with the same level of scrutiny to nonbank transactions as to bank mergers. Heightened scrutiny of nonbank mergers could be problematic if the FDIC's treatment of even transactions such as a subsidiary's merger into a parent bank are subject to such scrutiny.

III. The FDIC's Proposal Creates a Minefield of Uncertainty and Delays

When the FDIC has jurisdiction over a merger (particularly a bank merger), several of the provisions set forth in the Proposal could create uncertainty and delays.

In this regard, the BMA itself requires that the responsible banking agency evaluating a merger application consider: (1) competitive factors; (2) the financial and managerial resources and future prospects of the combining and resulting institutions; (3) the convenience and needs of the community to be served; (4) the financial stability risk to the U.S. banking or financial system; and (5) the effectiveness of the anti-money laundering programs of the insured depository institutions party to the merger.[20] The FDIC's guidelines for considering these statutory factors are discussed in its current Statement of Policy on Bank Mergers, which was adopted in 1998 and last updated in 2008. The Proposal would make the most significant changes in relation to analysis of the competitive factors and the convenience and needs of the community to be served, while also adding a discussion of the financial stability analysis required by the Dodd–Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").

A. Competitive Factors

As noted above in Section II.A, the Proposal would replace the FDIC's current approach under which it "normally will not deny a proposed merger transaction on antitrust grounds" if the transaction does not exceed the 1800/200 HHI standards in relevant local markets, per the 1995 Guidelines.[21] Reflecting Chopra's view that these guidelines are "infamously outdated,"[22] the Proposal is instead designed to give the FDIC

---

[19] Proposal at 17.

[20] 12 USC 1828(c)(5).

[21] Current FDIC Statement at 3; *see* FDIC, Order and Basis for Corporation Approval (Branch Banking and Trust Company) ("FDIC Truist Order") at 5 (focusing competitive analysis on deposit shares), available *here*.

[22] Chopra Peterson Speech.

"flexibility to appropriately evaluate the facts and circumstances of each application filed."[23]

Accordingly, the Proposal states that the FDIC would use "deposits as an initial proxy for commercial banking products and services" but would "consider concentrations beyond those based on deposits" to best analyze the transaction's impact on different customer segments and ensure customers retain meaningful choice in the relevant markets.[24] Though the FDIC (as well as the DOJ and other banking agencies) may consider products other than deposits as part of their current merger analysis, the Proposal indicates that the FDIC would place greater emphasis on other products than it has in the past.

Aside from mentioning loans, the Proposal does not specify other products the FDIC may consider or when it would consider these additional products. Instead, it notes that "the analysis may incorporate other products offered by the merging entities with consideration given to whether consumers retain meaningful choices."[25]

Finally in an effort to formalize the agencies recent departure from their historical approach of allowing banks to divest branches after the consummation of a merger, the Proposal provides that the FDIC may require divestitures "before allowing the merger to be consummated," and would generally prohibit the divesting bank from enforcing noncompete agreements against employees of divested branches or business lines.[26] The need to complete a whole separate process, for example, a BMA process, to divest branches and the associated deposits before closing, could substantially extend the period to close a transaction.

B. Financial and Managerial Resources; Future Prospects

The Proposal underscores that "[g]enerally, the FDIC will not find favorably on the financial resources factor if the merger would result in a weaker IDI from an overall financial perspective,"[27] which could be problematic with acquisition of weaker banks. The Proposal notes that "[a] critical component" of the FDIC's analysis of this factor is the resulting entity's ability to meet capital standards, with a focus on appropriate

---

[23] Proposal at 27.

[24] Proposal at 76.

[25] Proposal at 76.

[26] Proposal at 77 (emphasis added). The reference to noncompetes, which Hill thought to be "far outside the FDIC's jurisdiction and expertise," may be one of the clearest examples of Chopra's influence on the Proposal, hearkening back to issues Chopra has been involved with since his time as a Federal Trade Commissioner. *See, e.g.,* Alexei Alexis, FTC Democrat Urges Rulemaking on Noncompete Agreements, Blomberg Law (Sept. 10, 2018), available *here*.

[27] *Compare* Proposal at 78 *with* Current FDIC Statement at 4 ("The FDIC does not wish to create larger weak institutions.").

allowances for loan and credit losses, in evaluating financial resources.[28] In addition, and especially given the attention on liquidity following the spring 2023 regional bank crisis, the Proposal reiterates the FDIC's attention to the resulting institution's liquidity and funding strategies. The Proposal also notes that the FDIC would consider the financial impact of the transaction on the merging parties' parents and key affiliates.

With respect to both the managerial factors and the future prospects of the resulting institution, the Proposal places great emphasis on the resulting institution's ability to integrate the target as demonstrated by historical acquisitions. Finally, the FDIC's evaluation of future prospects of the resulting institution would, among other things, "consider the economic environment," which is wholly outside the parties' control and thus could add significant uncertainty to the process.

C. Convenience and Needs

In evaluating the convenience and needs factor, the banking agencies have historically placed significant emphasis on the merging parties' CRA ratings.[29] The Proposal, similar to the OCC's proposal and in line with the priorities of the Biden Administration, provides that the FDIC would consider the merging parties' CRA ratings, but also would conduct a more extensive and focused forward-looking analysis. The FDIC's Proposal echoes the OCC proposal's focus on branch closures affecting LMI communities and the potential for job losses or lost job opportunities.[30] However, the FDIC Proposal appears to go even further than the OCC's and current practice by stating that "[t]he FDIC expects that a merger between IDIs will enable the resulting IDI to *better* meet the convenience and the needs of the community to be served than would occur absent the merger."[31]

Specifically, the FDIC would "expect[] applicants to provide specific and forward-looking information to enable the FDIC to evaluate the expected benefits of the merger on the convenience and needs of the community to be served."[32] The elements the FDIC would consider as benefiting the public include, among others, "greater access to existing products and services, introduction of new or expanded products or services, reduced prices and fees, [or] increased convenience in utilizing the credit and banking

---

[28] Proposal at 78.

[29] *See* FDIC Truist Order at 8–10, 15; FRB, Truist Order (noting that the FRB places "particular emphasis on the records of the relevant depository institutions under the CRA" in evaluating the convenience and needs factor) ("FRB Truist Order").

[30] *Compare* Proposal at 84 (noting the FDIC would closely evaluate information regarding "any job losses or lost job opportunities from branching changes") *with* 89 Fed. Reg. at 10018 (noting OCC's review would include "job losses or reduced job opportunities from branch staffing changes, including branch closures or consolidations").

[31] Proposal at 82 (emphasis in original).

[32] Proposal at 83.

services and facilities of the resulting IDI."[33] Though the FDIC's existing policy statements refers to these elements as examples of ways a "proposed merger transaction is likely to benefit the general public,"[34] the discussion from agency leadership surrounding release of the Proposal indicates the FDIC would place an increased emphasis on tangibly demonstrating how a resulting institution would provide these or other benefits.

Moreover, the FDIC would evaluate information related to projected or anticipated branch expansions, closures or consolidations for three years following consummation of the merger, including the effect of such changes on LMI communities. In describing these provisions of the Proposal, Chopra cautioned that "[c]onsultant-drafted puffery regarding how savings will trickle down to families and small businesses will not suffice" to satisfy the Proposal's requirements.[35] Accordingly, these provisions may require merging parties to provide significantly more information in connection with an application and devote considerable time, attention and other resources to develop a comprehensive case outlining a proposed merger's benefits to the relevant communities.

The Proposal also notes that commitments made by the applicant with respect to the convenience and needs factor may be included as enforceable conditions in the FDIC's approval order.[36] This may result in binding commitments to maintain branches, products or other operations, or employment for at least three years after consummation of the merger. The FDIC would evaluate adherence with these commitments as part of its supervisory efforts.[37]

Finally, in connection with the convenience and needs factor, the Proposal notes that the FDIC would "generally expect[]" to hold a public hearing for any transaction resulting in an institution with over $50 billion in assets, bringing most large bank transactions into scope, similar to the approach to public meetings proposed by the OCC.[38]

---

[33] Proposal at 82–83.

[34] Current FDIC Statement at 4.

[35] Chopra Peterson Speech.

[36] Proposal at 39.

[37] Proposal at 39–40.

[38] 89 Fed. Reg. at 10018 (providing that the resulting institution having $50 billion or more in assets would inform the OCC's decision to hold a public meeting); *see also* Acting Comptroller of the Currency Michael J. Hsu, Bank Mergers and Industry Resilience (May 9, 2022) ("For example, for mergers involving larger banks, the OCC is considering adopting a presumption in favor of holding public meetings."), available *here*.

D. Risks to Financial Stability

The Proposal also sets forth the criteria the FDIC would use to analyze the BMA's financial stability factor. Though the FDIC has applied this factor in the past, it is not discussed in the FDIC's existing policy statement because the current policy statement was last updated prior to the Dodd-Frank Act's addition of the financial stability factor to the BMA.

Consistent on its face with the current practice of the FDIC and other banking agencies, the Proposal provides that in evaluating the financial stability factor, the FDIC would consider (1) size; (2) substitutability; (3) interconnectedness; (4) complexity; (5) cross-border activity and (6) other elements impacting financial stability.[39] As part of the complexity criterion, the FDIC would consider the resolvability of a resulting institution. Though it provides that size alone would not be a basis to determine financial stability risk, the Proposal specifies that transactions resulting in institutions with total assets over $100 billion are "more likely to present financial stability concerns" and would be subject to heightened scrutiny.[40]

Significantly, the FDIC would take a broader view of the "complexity" criterion than the agencies have previously taken. In discussing this criterion, and in connection with the resolvability of the resulting institution, the Proposal's preamble notes that "many regional IDIs present complexities such as large branch networks, substantial information technology systems, millions of account holders, and heavy reliance on uninsured deposits."[41] These considerations do not appear in the agencies' previous orders involving large regional banks;[42] they do, however, echo concerns FDIC Chairman Gruenberg has raised over the last several years, including in a 2019 speech at the Brookings Institute on the resolution of large regional banks, which called for these banks to hold unsecured long-term debt, and in a statement he released in connection with the FDIC's approval of the merger between BB&T and SunTrust.[43]

---

39 FDIC Truist Order at 10–14.

40 Proposal at 87.

41 Proposal at 50.

42 *See, e.g.,* FDIC Truist Order at 12–13 ("Truist Bank would not be a highly complex organization"); FRB Truist Order ("BB&T and SunTrust do not engage in complex activities").

43 Martin J. Gruenberg, An Underappreciated Risk: The Resolution of Large Regional Banks in the United States at 5 ("regional banks . . . have large branch networks, substantial IT systems, and millions of account holders. This complexity . . . would make the management of a bridge bank a significant operational challenge for the FDIC.") (Oct. 16, 2019), available *here*; FDIC, Statement by Martin J. Gruenberg (referring to "large branch network, . . . substantial IT systems, millions of account holders, and heavy reliance on uninsured deposits" as "indicators of complexity and challenge to resolvability."), available *here*.

E. Process Issues

In addition to the substantive issues discussed above, the Proposal also raises significant process issues which would result in applicants having to submit considerably more detailed merger applications. For example, the FDIC is proposing revisions (that are yet to be published) to its supplement to the Interagency Bank Merger Application Form that would "require production of the analyses of the deal conducted for the banks' directors and officers," which analyses Chopra notes are required by the DOJ and Federal Trade Commission under the Hart-Scott-Rodino Act for nonbank mergers.[44] In addition, the Proposal provides that even if an applicant withdraws an application, which historically has resulted in no agency comment, the FDIC may "release a statement regarding the concerns with the transaction if such a statement is considered to be in the public interest," requiring applicants to consider potential fallout from such a statement.[45]

Conclusion

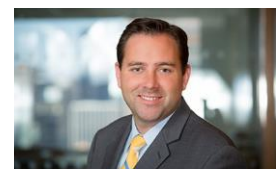
The FDIC's Proposal would not *directly* apply to many large bank M&A transactions. However, the Proposal may influence the other banking agencies, as they have not yet finalized their approach to reviewing bank merger applications, and the DOJ, as it has not finalized its approach to reviewing competitive factors under the BMA. Given this possibility and the political climate surrounding bank mergers, the Proposal may warrant attention from either or both of banks and their trade groups.

* * *

Please do not hesitate to contact us with any questions.

Gregory V. Gooding
Partner, New York
+1 212 909 6870
ggooding@debevoise.com

Ted Hassi
Partner, Washington, D.C.
+1 202 383 8135
thassi@debevoise.com



Morgan J. Hayes
Partner, New York
+1 212 909 6983
mjhayes@debevoise.com

[44] Chopra Peterson Speech.

[45] Proposal at 74.

Matthew E. Kaplan
Partner, New York
+1 212 909 7334
mekaplan@debevoise.com

Gregory J. Lyons
Partner, New York
+1 212 909 6566
gjlyons@debevoise.com

Benjamin P. Collins-Wood
Counsel, New York
+1 212 909 6724
bpwood@debevoise.com

Tejas N. Dave
Associate, New York
+1 212 909 6155
tndave@debevoise.com

Clare K. Lascelles
Associate, New York
+1 212 909 6628
cklascelles@debevoise.com

Alexandra N. Mogul
Associate, New York
+1 212 909 6444
anmogul@debevoise.com

Adam C. Saunders
Associate, New York
+1 212 909 6761
asaunders@debevoise.com

Gabriela Urias
Law Clerk, New York
+1 212 909 6755
gurias@debevoise.com

This publication is for general information purposes only. It is not intended to provide, nor is it to be used as, a substitute for legal advice. In some jurisdictions, it may be considered attorney advertising.