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Update on the Commentary on the DOJ Bank Merger Guidelines

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Bank mergers are reviewed jointly by the federal banking regulators—the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC)—as well as the Antitrust Division at the Department of Justice (DOJ), which conducts a separate competitive analysis. The DOJ's framework for analyzing bank mergers is reflected in its 1995 banking-specific merger guidelines (1995 Banking Guidelines).

The DOJ recently issued two requests for public comments on the 1995 Banking Guidelines, first in September 2020 and more recently in December 2021.[3] The most recent call for updated comments was made in the broader context of the Biden administration's reconsideration of antitrust policy—the Executive Order on Promoting Competition in the American Economy expressly "encouraged" the four agencies to "revitalize" oversight of bank mergers. In this article, we summarize the comments submitted to the DOJ in both rounds.

The topics covered by the requests for comments overlap across both rounds: The first round identified 15 questions across six broad topics (HHI thresholds, relevant product and geographic markets, rural versus urban markets, non-traditional banks, de minimis exceptions, and guidance generally); the second round welcomed commentators' updates to their previous comments, and also contained specific

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3 In March, the FDIC also issued a request for comments on its Rules, Regulations, Guidance, and Statement of Policy on Bank Merger Policy. Interested parties had to submit comments by May 31, 2022. *See* FDIC, Request for Information and Comment on Rules, Regulations, Guidance and Statements of Policy Regarding Bank Merger Transactions, 87 Fed. Reg. 18740 (Mar. 31, 2022). The FDIC request touched on many of the same themes raised in the DOJ's second request for comments, as well as other non-competition elements of bank merger review.

questions on data submissions and the scope of the DOJ's review. The DOJ received 27 comments in the first round and 23 in the second.

First Round

In the first round of comments, most submissions focused specifically on the questions raised by the DOJ:

- **General Antitrust Guidance for Banking Mergers:** In response to questions related to the need for banking-specific merger guidelines, most commentators agreed with the need for specific DOJ guidance that considers the systemic importance of banks to macroeconomic stability and the fact that banks are subject to unique regulations. Many commentators also agreed on the need to coordinate review by the DOJ and the banking regulatory agencies.
    - Though not in direct response to a question, certain commentators, such as the National Community Reinvestment Coalition, argued that the DOJ should consider expanded criteria, including increased public benefit commitments.
- **HHI Thresholds:** The 1995 Banking Guidelines set forth a screen whereby DOJ "further reviews" transactions that result in an HHI greater than 1800 and a change in HHI greater than 200. The DOJ requested comments on whether that is the appropriate screening threshold.
    - Commentators differed on whether this standard should be relaxed or made more stringent. While some commentators argued that the HHI screen should be tightened based on their views that mergers and consolidation have resulted in less competition, others argued that competition in the banking sector is robust, and that as a regulated

industry, any HHI threshold should be at least as lenient as those in the 2010 Horizontal Merger Guidelines.[4]

  - Many commentators noted that the appropriate definitions of product and geographic markets, as well as the identification of market participants, were as, if not more, important than the issue of appropriate HHI thresholds.

- **Product Markets:** The 1995 Banking Guidelines focus on product markets related to (1) retail banking products and services, (2) small business banking products and services, and (3) middle market banking products and services. The DOJ sought comments on whether these were the appropriate product markets for it to consider.

  - While commentators largely agreed with the relevance of these product markets, many suggested other products and services as being potentially relevant, including money market funds, residential mortgages, and health savings accounts. Ultimately, commentators differed on the types of products that should be considered.

- **Non-Traditional Banks:** The DOJ also asked about whether, and how, it should consider "non-traditional banks" (e.g., online banks, credit unions, thrifts, fintech companies, etc.) in its competitive analysis. The current guidelines consider local banks and thrifts as relevant market participants but exclude credit unions and online banks in most circumstances, and give thrifts lower weight than banks.

  - In general, commentators supported including non-traditional banks, especially online banks, in the competitive analysis. Certain commentators favored including online banks to the extent they actually do business in local communities, and suggested increased data reporting requirements to facilitate this inclusion. Others saw no need to limit consideration of non-traditional banks based on local deposits or loans,

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[4] U.S. Department of Justice and Federal Trade Commission (FTC), Horizontal Merger Guidelines (Aug. 19, 2010), available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010. In January 2022, the DOJ and FTC launched a joint review of the Horizontal Merger Guidelines and issued a request for public comment on the existing guidelines. *See* FTC, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), available at https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers. Any changes to the broader Horizontal Merger Guidelines will likely impact the DOJ's revisions to the 1995 Banking Guidelines.

but rather recommended the DOJ focus on the ability of consumers in a given geographic market to access those institutions and services.

  - Commentators also offered differing views on whether expanding the relevant product set would require incorporating credit unions, online banking services, online-only banks, and fintech companies into the analysis.

- **Geographic Markets:** The 1995 Banking Guidelines focus on geographic markets based on pre-established geographic areas defined by the Federal Reserve, as well as alternative (narrower) geographic markets based on Ranally Metropolitan Areas or counties. The DOJ invited commentary on whether these were the appropriate markets and whether there should be other geographic market definitions.

  - Commentators differed on the value assigned to existing geographic market definitions. While some argued for keeping counties or metropolitan areas as pre-defined market definitions, others pointed to the need to create broader areas, particularly for rural markets.

- **Urban and Rural Markets:** The DOJ invited commentary on how the different dynamics of urban and rural markets should affect its merger review.

  - Commentators agreed on the importance of preserving competition and services in rural areas, given the disproportionate role that small banks play in serving small businesses in these areas. They disagreed, however, on how to achieve this goal. Some, including the OCC, suggested loosening the HHI thresholds for rural markets as higher concentration may be warranted in those harder to serve markets. Others favored tightening merger review in rural markets. Commentators also noted that certain core urban markets may have a relatively lower number of bank branches per capita as compared with suburban areas, especially in more industrial urban areas where there may be lower demand for branch services.

- ***De Minimis* Exception:** The DOJ requested comments on whether it should implement a streamlined review process for "very small transactions."

  - Commentators had mixed reactions to this question. While certain commentators favored allowing for a de minimis exception for certain transactions, others argued against any exception based on transaction size.

Second Round

In the second round of comments, the DOJ requested further commentary on how to broaden the factors considered during bank merger review and whether to require additional data reporting. It also invited elaboration or updates to submissions in response to the original call for comments, including, specifically, how to consider non-traditional banks. While many of the second-round submissions touched on themes similar to those in the first round, they also covered additional areas, which we highlight below:

- **Adequacy of Merger Enforcement in the Banking Industry:** Commentators adopted widely different positions on this issue, which was raised in the context of how to adapt antitrust analysis to the banking industry. The second-round submissions echoed the ongoing debate surrounding whether the banking industry in the United States is over-concentrated or highly competitive, and whether consolidation in the banking industry has generally been positive (i.e., by increasing efficiencies) or negative (i.e., by reducing competition or limiting access to credit for small businesses).

- **Data Reporting:** In the second round, the DOJ asked what other information and data it should require banks to submit as part of their applications beyond the FDIC Summary of Deposits (SOD) data the DOJ currently considers, which reports deposit totals for each physical branch of FDIC-insured institutions. Certain commentators agreed that the DOJ should review additional data sources, and potentially leverage data reported under the Community Reinvestment Act Rule (which the DOJ currently considers for assessing small-business lending), the Home Mortgage Disclosure Act, or the more recent Paycheck Protection Program. Others also recommended that the DOJ update its requirements for SOD data submissions – for example, by requiring parties to assign online deposits to a local market based on customer location.

- **Underserved Markets:** While the DOJ did not specifically ask about the disparate impact of bank mergers on various communities in its request, several submissions highlighted such concerns.

    - **Low- and moderate-income (LMI):** Many commentators noted that people living in LMI areas, including certain rural and urban communities, may have access to fewer physical bank locations, and that mergers may lead to branch closures that ultimately harm these consumers.

    - **Labor market impact:** Certain commentators argued that a lack of local branches can harm low-income communities and communities of color, not just as consumers of financial services, but also as workers.

- **Small business lending:** Certain commentators argued that local branch presence is necessary for small local businesses to access credit.

- **Systemic Risk:** Again, while not a specific topic raised by the DOJ, some commentators discussed the effect of bank size on systemic risk and whether it should be considered as part of merger review. Commentators disagreed on this topic: While some argued that mergers result in banks that can be "too big to fail," others argued that consolidation of small banks can be an alternative to bank failure and improve stability.

The DOJ's multiple requests for comments on the 1995 Banking Guidelines, along with the FDIC's more recent request, suggest change is coming. In light of the current administration's rhetoric around antitrust enforcement more generally, and bank merger review specifically, it is likely we will see tightening of merger review policy from the DOJ and banking regulators. The strong commentary arguing against such tightening, however, may require the agencies to move slowly in implementing regulatory changes and could raise the risk of legal challenges to any new regulations. In the near term, practitioners and industry participants should expect bank merger review to remain in the spotlight.