

TRIO OF U.S. BANKING REGULATORS REVISE BANK MERGER GUIDELINES

On Tuesday, September 17, three of the federal agencies tasked with regulating the mergers of banks and bank holding companies under the U.S. banking and antitrust laws – the Antitrust Division of the U.S. Department of Justice (DOJ), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) – all published revised policy approaches to evaluating such combinations. For its part, the DOJ withdrew from the 1995 Bank Merger Guidelines, instead noting its reliance on the recently updated 2023 Merger Guidelines adopted by the DOJ and the U.S. Federal Trade Commission (FTC), which apply broadly across all industries,¹ along with a newly published 2024 Banking Addendum, together signalling the DOJ's intent to broaden the scope of its competitive review of bank and bank holding company tie-ups.

BRIEF BACKGROUND

Mergers involving banks and bank holding companies are analyzed by a number of federal agencies. These transactions generally do not require the submission of pre-merger notification and review forms (Hart-Scott-Rodino Act or HSR filings) to the DOJ and FTC, the two main federal agencies tasked with enforcing the U.S. antitrust laws. Instead, such mergers are governed by the Bank Merger Act and the Bank Holding Company Act, which require approval from the relevant U.S. federal banking agencies, such as the FDIC and OCC. Although prior notification to the DOJ and FTC is not required, the DOJ still analyzes whether proposed transactions involving banks or bank holding companies may lead to a substantial lessening of competition in violation of the substantive U.S. antitrust laws, after which the DOJ provides its competitive assessment to the reviewing banking agencies. Thereafter, even if the relevant banking agencies approve the transaction, the DOJ may challenge the transaction under the U.S. antitrust laws.

¹ U.S. Department of Justice, Press Release, Justice Department Withdraws from 1995 Bank Merger Guidelines (Sept. 17, 2024), at <https://www.justice.gov/opa/pr/justice-department-withdraws-1995-bank-merger-guidelines>.

DOJ

Thirty years ago, given the various federal agencies at play and complexities in banking mergers, the DOJ issued the 1995 Bank Merger Guidelines (1995 Guidelines) in consultation with the federal banking agencies. Pursuant to the 1995 Guidelines, [t]o speed this competitive review and reduce regulatory burden on the banking industry, the banking agencies and the Department have developed screens ..., to identify proposed mergers that clearly do not have significant adverse effects on competition and outlined the information that the DOJ found most useful in analyzing banking mergers.

Under the 1995 Guidelines, the DOJ's initial competitive review of a banking merger focused on Screen A, which calculates the HHI² in specified markets defined by the Federal Reserve. The screen focused on whether the HHI in any of these markets exceeded 1800 and whether the transaction would increase the index by more than 200 points, based on deposits. If a transaction exceeded those thresholds, the 1995 Guidelines encouraged parties to provide additional information for Screen B, which also focused on HHI based on deposits and also large commercial loans. Despite the focus on HHI, the 1995 Guidelines did state that, in limited instances, the DOJ would examine a transaction that falls below the screens.³

Last week, the DOJ withdrew from the 1995 Guidelines, emphasizing that the 2023 Merger Guidelines remains its sole and authoritative statement across all industries. The DOJ's new approach is to collapse all initial analyses of any transaction, regardless of sector, to the eleven core guidelines finalized in the 2023 Merger Guidelines. For a more comprehensive review of the 2023 Merger Guidelines, please see our previous briefings on the topic.⁴

In a Banking Addendum released by the DOJ simultaneously with the announcement of its withdrawal from the 1995 Bank Merger Guidelines, the DOJ said that the 2023 Merger Guidelines still reflect the most comprehensive and up-to-date framework to address competition in the context of the immense and multi-dimensional portion of our economy often referred to broadly as 'banking,' noting that the eleven core guidelines would still appropriately evaluate any banking transaction.⁵ For example, banking mergers with branch overlaps in a geographic market could implicate Guideline 1 (presumption of illegality when mergers significantly increase

² The Herfindahl-Hirschman Index, or HHI, is a commonly used metric for measuring the concentration level of a market, which is calculated by summing up the squares of the market shares for each participant in the market. The higher the HHI, the more concentrated the market. The 2023 Merger Guidelines consider a market with HHI greater than 1,800 to be highly concentrated with a change of 100 points to be a significant increase. See U.S. Department of Justice and Federal Trade Commission, *Merger Guidelines* (Dec. 18, 2023), at 5.

³ U.S. Department of Justice, *Bank Merger Competitive Review -- Introduction and Overview (1995)* (withdrawn), at <https://www.justice.gov/archives/atr/bank-merger-competitive-review-introduction-and-overview-1995>.

⁴ Clifford Chance, Briefing, *The FTC and DOJ Issue Final Merger Guidelines* (Dec. 18, 2023), at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/12/The%20FTC%20And%20DOJ%20Issue%20Final%20Merger%20Guidelines.pdf>; Clifford Chance, Briefing, *The FTC and DOJ Propose New Merger Guidelines* (July 19, 2023), at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/07/The%20FTC%20and%20DOJ%20Propose%20New%20Merger%20Guidelines.pdf>.

⁵ U.S. Department of Justice, *2024 Banking Addendum to 2023 Merger Guidelines* (Sept. 17, 2024), at <https://www.justice.gov/atr/media/1368576/dl> (Banking Addendum).

competition in a highly concentrated market), Guideline 2 (mergers can be illegal when they eliminate substantial competition between firms), and Guideline 3 (mergers can be illegal when they increase the risk of coordination). Similarly, Guidelines 8 and 9 could also easily apply to banking mergers that involve serial acquisitions or double-sided platforms.

The DOJ also said it believes that the new guidelines are better able to consider where there is appreciable harm to groups of customers specialized enough to demand appropriate ... analysis as a distinct product market such as customers with low credit scores, non-profit organizations or local stores in need of specific credit products or institutional expertise, and corporations with unique needs for large or bespoke financing.⁶

The withdrawal from the 1995 Guidelines is the latest in a series of moves by the antitrust agencies under the Biden Administration to reshape the federal approach to antitrust policy, especially with respect to evaluating mergers. In addition to the issuance of the 2023 Merger Guidelines, which replaced the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, the DOJ and FTC also withdrew in early 2023 from three policy statements on antitrust enforcement policy in healthcare markets.⁷

These maneuvers are further evidence of the agencies' efforts to explore a multitude of potential theories of harm, including harm to narrower customer markets, and to rely on market share information beyond deposits and large commercial loans (such as small business loans or home mortgage origination) in their deal analyses. The withdrawal also means eliminating previous screens and safe harbors more easily relied upon by banks and practitioners to predict how the DOJ may evaluate a transaction and the likely outcome of that review.

FDIC

The same day that the DOJ withdrew from the 1995 Guidelines, the FDIC's Board of Directors voted 3-2 to issue a comparatively moderate Final Statement of Policy on Bank Merger Transactions (the Final SOP), which was last revised in February 2008 during the early days of the global financial crisis, to account for the significant changes that have occurred in the banking industry and financial system since then.

These changes include:

- Confirming that the FDIC will expand the scope of its evaluative factors when looking at the competitive effects of a merger, such as the concentration of small business or residential loan originations in addition to the concentration of deposits, or the presence in rural markets of non-banking competitors like credit unions;

⁶ *Id* at 2.

⁷ U.S. Department of Justice, Press Release, *Justice Department Withdraws Outdated Enforcement Policy Statements* (Feb. 3, 2023), at <https://www.justice.gov/opa/pr/justice-department-withdraws-outdated-enforcement-policy-statements> (announcing withdrawal from the 1993 Antitrust Enforcement Policy Statements in the Health Care Area, 1996 Statements of Antitrust Enforcement Policy in Health Care, and 2011 Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program).

- Clarifying that the proposed merger should result in less financial risk than the risk posed by the merging parties on a standalone basis;
- The expectation that a merger will better meet the convenience and needs of the communities served by the merged parties;
- Public hearings for mergers resulting in an institution with over \$50 billion in total assets; and
- Higher scrutiny of financial stability factors for transactions resulting in an institution with \$100 billion or more in total assets.⁸

Martin Gruenberg, the FDIC Chairman, also noted in a separate statement that large bank mergers, such as those resulting in an institution with \$100 billion or more in total assets, are ultimately under the jurisdiction of the Federal Reserve Board.⁹ However, the Board has yet to comment on any of the revised agency approaches to banking mergers.

OCC

Like the FDIC, the OCC also took a more moderate approach in revising its approach to bank mergers than the DOJ did, issuing a final rule amending its procedures for reviewing bank mergers and adding a policy statement summarizing the general principles it would use to evaluate mergers (the OCC Rule).

Procedurally, the OCC amendments eliminate the 15-day expedited review process but expand the number of transactions eligible for the streamlined business combination application. The OCC said that they did not expect the elimination of the expedited review process to result in a significant change to the review period since any merger requiring an application to be filed to the OCC would be a significant corporate transaction requiring active OCC consideration and decisioning of the application.¹⁰

The policy statement, styled as Appendix A to the OCC Rule, sets out thirteen indicators that, if met by the merger, tend to withstand scrutiny more easily and are more likely to be approved expeditiously[.] These indicators are mostly financial or regulatory scores that indicate low compliance or financial risks (e.g., UFIRS/ROCA rating, no open enforcement or fair lending actions, etc.), but they also include:

- The resulting institution will have total assets less than \$50 billion;
- The target's total assets are less than or equal to 50% of acquirer's total assets, as opposed to a merger of equals transaction;

⁸ Federal Deposit Insurance Corporation, Press Release, *FDIC Board of Directors Approves Final Statement of Policy on Bank Merger Transactions* (Sept. 17, 2024), at <https://www.fdic.gov/news/press-releases/2024/fdic-board-directors-approves-final-statement-policy-bank-merger>; Federal Deposit Insurance Corporation, *Final Statement of Policy on Bank Merger Transactions*, at <https://www.fdic.gov/system/files?file=2024-09/final-statement-of-policy-on-bank-merger-transactions.pdf>.

⁹ Federal Deposit Insurance Corporation, Press Release, *Statement by Martin J. Gruenberg Chairman, FDIC Final Statement of Policy on Bank Merger Transactions* (Sept. 17, 2024), at <https://www.fdic.gov/system/files?file=2024-09/final-statement-of-policy-on-bank-merger-transactions.pdf> (citing 12 C.F.R. § 265.20(c)(12)(vii)).

¹⁰ Business Combinations Under the Bank Merger Act, RIN 1557-AF24 (Sept. 17, 2024) (amending 12 C.F.R. § 5.33), at <https://www.occ.treas.gov/news-issuances/federal-register/2024/nr-occ-2024-101a-federal-register.pdf>.

- The proposed transaction clearly would not have a significant adverse effect on competition; and,
- The OCC has not identified a significant legal or policy issue.¹¹

The OCC Rule is set to take effect on January 1, 2025.

KEY TAKEAWAYS

- While the DOJ's withdrawal from the 1995 Guidelines is a departure from its previous guidance to the banking industry, the new approach is not all that new. Rather, the DOJ appears to be applying its same approach to merger enforcement across all industries, rather than maintaining a patchwork approach.
- Banks and bank holding companies exploring mergers should be prepared for a broader antitrust analysis from the DOJ focusing well beyond HHIs based on deposits and large commercial loans in predetermined Federal Reserve markets, including narrower product offerings and customer bases.
- The 2023 Merger Guidelines are also not binding on the federal courts, and courts have no obligation to follow them, especially after the Supreme Court's overruling of the *Chevron* doctrine in *Loper Bright v. Raimondo*.¹²

¹¹ *Id.*

¹² See Clifford Chance, Briefing, *U.S. Supreme Court Reels in Federal Agency Interpretation Power, Overturning Chevron Doctrine, and Lengthens Deadline for Bringing Challenges* (July 3, 2024), at <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2024/07/US%20Supreme%20court%20reels%20in%20federal%20agency%20interpretation%20power.pdf>.

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