



Financial Services & Products / Antitrust ADVISORY ■

SEPTEMBER 10, 2020

DOJ Antitrust Division Considers Changing Its Bank Merger Review Guidelines

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On September 1, 2020, the Department of Justice’s Antitrust Division [announced](#) that it is seeking public comments on whether the division should revise the [1995 Bank Merger Competitive Review Guidelines](#). For the last quarter century, the Banking Guidelines, along with a set of jointly issued responses to [Frequently Asked Questions](#) (FAQs), have provided the best available guidance on antitrust review for banks considering mergers and acquisitions. The contemplated revisions are meant to “reflect emerging trends in the banking and financial services sector and modernize its approach to bank merger review under the antitrust laws.”

Under the long-standing guidance, the division reviews bank merger applications using deposit market shares, market concentration thresholds, and other market facts and conditions. The purpose is to identify proposed mergers that do not have significantly adverse effects on competition and to allow them to proceed quickly. Notably, the division’s review of bank mergers is independent from review by the Federal Reserve (and other bank regulators), and a transaction that meets the Federal Reserve’s Herfindahl–Hirschman Index delegation thresholds (measures of deposit concentration in geographic markets) may still raise concern in the division’s review.

The division’s request for comment recognizes that banking markets and delivery of banking services have substantially evolved since the 1990s. Assistant Attorney General for the Antitrust Division Makan Delrahim noted that “innovative emerging technologies are disrupting traditional banking models and introducing new competitive elements to the financial sector. As part of the division’s increased attention to modernizing our competitive analysis of financial services markets, we are examining whether the 1995 Banking Guidelines need updating to reflect our evolving economy.” The announcement comes on the heels of [recent comments by Delrahim](#), who characterized the existing Banking Guidelines as a “bit formulaic” and noted that the division’s 2019 review of a recent large bank merger followed a more modern approach that resulted in fewer divestitures, while still enabling pro-competitive benefits from the transaction.

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In furtherance of its consideration of revisions, the division is seeking comments on the following key topics, which are found in the [Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide](#):

Guidance Generally

- To what extent, if at all, is it useful to have banking-specific merger review guidance, beyond the 2010 Horizontal Merger Guidelines?
- To what extent, if any, does the industry need greater clarity on how the Division applies the 2010 Horizontal Merger Guidelines in its investigations?
- To what extent, if any, is it helpful to have joint guidance from the Antitrust Division and the banking agencies, i.e., the Federal Reserve Board of Governors (FRB), the Office of Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC)?

Herfindahl–Hirschman Index (HHI) Threshold

- Should the screening thresholds in the 1995 Banking Guidelines be updated to reflect the HHI thresholds in the 2010 Horizontal Merger Guidelines? If so, please explain why with evidence, if available.

Relevant Product and Geographic Markets

- Depending on the transaction, the Division generally reviews three separate product markets in banking matters: (1) retail banking products and services, (2) small business banking products and services, and (3) middle market banking products and services. Are there additional product markets that the Division should include in its analysis?
- The 1995 Banking Guidelines specify that the Division screens bank merger applications using the FRB-defined geographic markets and/or at a county-level. Should there be other geographic market definitions used in the screening process? If so, what should they be and why?
- Should the geographic markets for consumer and small business products and services still be considered local?

Rural versus Urban Markets

- The dynamics of rural and urban markets can differ significantly. In what ways, if at all, should these distinctions affect the Division's review?
- Should the Division apply different screening criteria and HHI thresholds for urban vs rural markets? If so, how should the screening criteria and the thresholds differ?
- The Division often considers farm credit lending as a mitigating factor. Is there a more appropriate way to measure the actual lending done by farm credit agencies in rural markets?

Non-Traditional Banks

- Should the Division include non-traditional banks (e.g., online) in its competitive effects?
- Does the Division give appropriate weight to online deposits?
- Does the Division give appropriate weight to credit unions and thrifts?
- Given that the geographic dispersion of deposits from online banks is not publicly available (by market or branch), suggest how these institutions can be incorporated into screening and competitive effects analysis.

De Minimis Exception

- Should the Division implement an internal de minimis exception for very small transactions whereby the Division would automatically provide a report on the competitive factors of the transaction to the responsible banking agency but would not conduct an independent competitive effects analysis of these deals? If so, what would be an appropriate de minimis size of transaction?

We anticipate a subsequent advisory upon release of any revisions to the Guidelines. Comments on the Banking Guidelines can be emailed to ATR.BankMergers@usdoj.gov and must be submitted by October 1, 2020.

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