DOJ scraps 1995 Bank Merger Guidelines, overhauling antitrust review and increasing uncertainty

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The US Department of Justice (DOJ) announced on September 17, 2024 that it has withdrawn its 1995 Bank Merger Guidelines (the 1995 Guidelines), effectively overhauling how it reviews M&A transactions involving banks and bank holding companies.

According to the DOJ, the 2023 Merger Guidelines are its sole authoritative statement across all industries that identify the factors and framework that the DOJ considers when investigating mergers.

In conjunction with the withdrawal of the 1995 Guidelines, the DOJ also released a Banking Addendum (the Banking Addendum) explaining the application of the 2023 Merger Guidelines to the banking industry. According to the DOJ, the Banking Addendum was the product of collaboration with banking industry regulators (the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency) that share jurisdiction with the DOJ for review of bank mergers.

The 1995 guidelines and DOJ's past enforcement focused on the concentration of branch deposits within local geographic markets defined by the Federal Reserve. Jonathan Kanter, the head of the DOJ's Antitrust Division, had already criticized that approach as dated and announced in a speech last September increased antitrust enforcement of bank mergers as well as a plan to reexamine how the DOJ assesses bank mergers. According to Kanter, the DOJ was seeking to modernize its approach to investigating bank mergers to take into account "the many dimensions of competition in the modern banking sector." In his speech, Kanter identified several areas of focus for the DOJ that previewed the announcement of the Banking Addendum, including:

- Mergers that increase risks associated with coordinated effects and multi-market contacts;
- Transactions that threaten to entrench power of dominant banks by excluding disruptive threats or rivals;
- How a proposed bank merger will affect competition for various customer segments, recognizing that different segments have different needs and substitution across types of banks may be limited.

According to the Banking Addendum, the DOJ's new approach will look at competition among banks at every level. Examples of such competition provided by the DOJ include competition for:

- Large or bespoke financing provided to corporations;
- Credit products or institutional expertise provided to non-profit organizations; and
- Specialized financial products designed for economically underserved individuals or customers with low credit scores.

On the same day, the FDIC also withdrew from the 1995 Guidelines, and issued a Final Statement of Policy on Bank Merger Transactions. The OCC also recently issued its updated bank merger review rules. The Federal Reserve has not explicitly or formally changed its merger review guidelines.

Under existing law, the federal banking agencies have the primary authority to review bank mergers. Indeed, bank mergers are generally not subject to reporting to the DOJ and the Federal Trade Commission under the Hart-Scott-Rodino Act. Instead, the Bank Merger Act and the Bank Holding Company Act require that the DOJ serve in an advisory capacity to the banking agencies and provide the agencies with a report on the "competitive factors" involved in a bank merger.[1] The statutes prohibit those agencies from approving any bank merger that violates the antitrust laws unless the agency finds that the merger's anticompetitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.[2] In addition to its advisory capacity, Congress also provided DOJ with the authority to challenge in court any bank merger that is anticompetitive.[3]Approval by bank regulators is paused pending any antitrust challenge to the transaction by the DOJ.

The updated DOJ approach, which to some extent already reflects recent practice in the current administration, is likely to result in greater scrutiny of bank M&A transactions. For example, under the 1995 Guidelines, a bank merger generally did not raise competitive concerns if the resulting market concentration as measured by local market deposits using the HHI did not increase by more than 200 points and exceed 1800 after taking into account the proposed merger. Under the 2023 Guidelines, an increase of 100 points in a resulting market of 1800 or more will raise a concern. Moreover, as noted above, the scope of potential theories of harm will be expanded such that many more aspects of a merger may raise competitive concerns.

In addition, there may be increased scrutiny of mergers involving nonbank financial services firms, for example, private equity and fintech companies that act as lenders. Theoretically, the revised approach could potentially benefit smaller, more regional financial firms that would have come under greater scrutiny under the prior guidelines due to a focus solely on an overlap in local branches and/or deposits.

Although what theories of harm the DOJ may explore in future bank mergers is unclear, it is almost certain that the withdrawal of the 1995 Guidelines and the move away from the DOJ's long-established and coordinated approach with bank regulators will increase uncertainty.

Adding to that uncertainty is the Federal Reserve's silence in the midst of the recent activity on the part of the DOJ, FDIC and OCC. The Federal Reserve plays the leading role in approving mergers involving bank holding companies. At present, the Federal Reserve has given no indication that it is planning to alter its existing approach to bank merger reviews, which makes it difficult to assess the standards that will be applied among the agencies when processing merger applications that historically have been approved on a consensus basis.

Footnotes

[1] 12 U.S.C. §§ 1828(c)(5), 1842(c)(1).

[2] 12 U.S.C. §§ 1828(c)(7), 1849(b)(1).

[3] 12 U.S.C. § 1828(c)(4)(A)(i).