DOJ Requests Comment on Revision of Bank Merger Guidelines

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On September 1, 2020, the Department of Justice (DOJ) Antitrust Division requested comments on whether it should update its 1995 Bank Merger Competitive Review guidelines (Banking Guidelines). As Assistant Attorney General Makan Delrahim recently recognized, “Innovative emerging technologies are disrupting traditional banking models and introducing new competitive elements to the financial sector.” Accordingly, comments are requested on a number of questions regarding the revision of the Banking Guidelines “to reflect emerging trends in the banking and financial services sector and modernize [the Antitrust Division’s] approach to bank merger review under the antitrust laws.” The request for comments may be found at this link.

Public comments on possible revisions to the Banking Guidelines must be received by DOJ no later than October 1, 2020. It should be noted that this process does not involve a formal rulemaking but rather the adoption of a revised supervisory policy, and thus DOJ is not constrained by Administrative Procedure Act requirements and could implement new Banking Guidelines as early as the fourth quarter.

The DOJ release invites comments generally on whether and how it should change its bank merger review process and also requests comments on a number of specific issues relating to the Banking Guidelines. Among notable issues for comment are the following:

- Whether it is necessary or useful to continue to have banking-specific merger review guidelines apart from the Antitrust Division’s 2010 Horizontal Merger Guidelines
- Whether, and to what extent, it would be helpful to have the Antitrust Division and federal banking agencies (the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation) to issue joint merger guidance
- Whether the 1995 Banking Guidelines, which provide for the Antitrust Division to screen bank merger applications using the Federal Reserve–defined geographic markets and/or at a county level, should be revised to include other geographic market definitions in the screening process
- Whether the geographic markets for consumer and small-business products and services

should continue to be considered local

- Whether the competitive analysis and screening criteria for rural markets should be different from those for urban markets
- How farm credit lending should most appropriately be measured and considered as a mitigating factor in the competitive analysis
- Whether and how to give weight to competition from online banks in the competitive effects analysis
- Whether the Antitrust Division should implement a *de minimis* exception for very small transactions, and if so, the appropriate *de minimis* transaction size that would not require a competitive effects analysis

It is possible that the inclusion of online bank and fintech competitors in the Antitrust Division's analysis of competitive factors may make the standards for bank mergers generally more lenient. However, the revision of the Banking Guidelines to reflect technological change could be primarily technical, and neutral in effect on the competitive analysis of large bank mergers.

Community banks, especially rural banks, may well be the principal beneficiaries of any Banking Guidelines revision. Under the current guidelines, banks in smaller markets that wish to pursue an in-market merger are often unable to do so because — as a result of a narrow banking market definition — the merger would result in too high a level of concentration in the market. In these situations, the ability of small local banks to combine and increase in size sufficiently to compete against out-of-market competitors is often impeded. If DOJ revises the Banking Guidelines both to make competitive analysis for rural banking markets more flexible and to implement a *de minimis* exception for small transactions, the effect may be to enable expanded merger possibilities for small-market community banks.

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