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Memorandum

DOJ's Antitrust AAG Kanter Announces New Approach to Antitrust Enforcement in Bank Mergers

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DOJ announces that it has departed from its prior framework for the antitrust analysis of bank mergers (in place since 1995) and will be considering a wider range of factors and potential competitive harms, bringing bank merger reviews in line with the Biden Administration's aggressive antitrust enforcement in other areas of the economy.

President Biden's expansive July 2021 Executive Order on promoting competition instructed DOJ to adopt a plan for "the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956" to ensure that "Americans have choices among financial institutions and to guard against excessive market power." In a speech at the Brookings Institution yesterday, DOJ's Assistant Attorney General for antitrust Jonathan Kanter provided details regarding DOJ's revised approach for assessing the competitive effects of a bank merger.

As background, under the Bank Merger Act and the Bank Holding Company Act, the bank regulatory agency reviewing a merger must solicit and consider DOJ's views regarding the proposed merger's competitive effects, and DOJ must submit its views to the banking agencies in the form of a non-public competitive factors report. Once the banking agency approves the proposed transaction, the banking statutes provide for a 30-day period (which is typically shortened to 15 days with DOJ's consent) during which DOJ may decide either to challenge the transaction in federal court to stop the merger (different procedures apply in emergency situations) or permit the transaction to close. However, in practice, DOJ has not initiated a lawsuit to block a bank merger since 1990, as DOJ had adopted a practice of resolving competitive concerns by entering into branch divestiture settlements (known as a Letter of Agreement) with parties to a merger in advance of providing its competitive factors report to the banking agencies. Parties have had transparency into the likely scope of any DOJ required divestitures based on guidance provided in the interagency Bank Merger Guidelines issued in 1995. The 1995 Guidelines, which focus on local banking markets, employ a methodology using branch deposits to calculate market shares, and included safe harbors for transactions that did not exceed certain defined concentration levels.

In yesterday's speech, AAG Kanter announced that DOJ has moved away from the 1995 Guidelines. The following are some key takeaways from the speech:

- **DOJ Using a Broader, More Flexible, Approach to Bank Mergers**: DOJ views the 1995 Bank Merger Guidelines as outdated and no longer reflective of its current approach to reviewing the competitive effects of a merger. Instead, DOJ will begin immediately applying a broader, more flexible, analytical framework that considers a wider range of competitive factors on a case-by-case basis, including across different geographic markets, product markets, and customer segments, and utilizing additional data metrics beyond just local deposits and branch overlaps. Additional factors DOJ will now consider that are novel in the context of the review of bank mergers include a bank merger's impact on fees, interest rates, branch locations, product variety, network effects, interoperability and customer service.[1] DOJ will also consider the types of banks proposing to merge in order to preserve a diversity of choices for different segments of customers.
  - DOJ's updated approach will be a significant shift away from the current framework of analysis that views transactions from a purely local competition lens that is heavily reliant on local branch overlaps and deposit shares[2] as a proxy for competition, towards an analysis focused on "all relevant dimensions of competition." AAG Kanter suggested that "modernizing" its approach will allow DOJ to evaluate "the full range of competitive factors involved in a bank merger" by, among other things, "augment[ing] the data sources we use when calculating market concentration." What those factors are and how they will be measured remains uncertain. Finding data for banking activities other than branch deposit tracking (which is published by the FDIC) has in practice been extremely challenging and it is unclear what additional data sources DOJ plans to use in the future.
- **Less Amenable to Branch Divestiture Settlements**: AAG Kanter warned that DOJ will set a "high bar" for remedies and that "branch divestitures are not always adequate," in particular where the competitive concerns relate to interoperability and network effects. This approach is in line with DOJ and FTC's broader shift away from remedies in all industries, and there are likely to be more scenarios where DOJ does not consider branch divestitures as a sufficient remedy to address the broader range of competitive concerns that DOJ is now analyzing.
  - DOJ is revising its bank merger review procedures to no longer provide negotiated settlement agreements to the banking agencies, and DOJ will instead narrow its focus to providing advisory opinions to banking regulators on the competitive effects of a proposed merger, while still reserving DOJ's authority to challenge a bank merger in court following approval from the banking agencies. It is

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[1] "Network effects" and "interoperability" are concepts used in antitrust analysis of other industries, particularly technology and digital platforms, and generally relate to a market feature whereby a product achieves significant competitive advantages as its number of users increases compared to a similar product with a smaller number of users, and the ability of a product to operate in conjunction with another provider's product.

[2] In addition to reviewing deposit shares, DOJ on occasion also reviews small business loan origination data and, very occasionally, medium to large loan lending data.

not clear how this revamped DOJ position will work in combination with the simultaneous review of the competitive effects of a transaction by the banking agencies, who will presumably continue to operate under the 1995 Guidelines and use branch divestitures to address local banking market concentrations.

- DOJ's revised approach of no longer providing negotiated divestiture agreements in advance of banking agency approval may also have significant timing implications. Unlike in other industries where to prevent a merger from closing DOJ must obtain a court ordered injunction, in the bank merger context the banking statutes provide that DOJ simply filing a complaint will stay the effectiveness of the bank regulatory approval indefinitely. This gives DOJ additional timing leverage and DOJ may have no incentive to move quickly in the litigation process.

- **Unclear When New Bank Merger Guidelines Will Be Released**: DOJ noted that it is in active discussions with the Federal Reserve, FDIC, and OCC regarding revisions to the 1995 Bank Merger Guidelines. While AAG Kanter said he is "optimistic that we will develop new guidelines," he did not provide any specifics on the timeframe for issuance. Additionally, the bank regulators have not indicated to what extent any new joint guidelines would follow DOJ's newly-announced approach. This lack of coordination suggests that the agencies may not be fully aligned on the details of this revised approach for reviewing bank mergers.

The above developments will add to the current unpredictability in the regulatory review process for parties considering a bank merger, particularly with respect to the specific theories of competitive harm that DOJ may ultimately focus on, and what, if any, remedies DOJ may deem acceptable.

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