

Memorandum

OCC, FDIC and DOJ Finalize Changes to Their Bank Merger Review Processes

September 18, 2024

On September 17, 2024, the [OCC](#) and [FDIC](#) both finalized their proposals reflecting an updated approach to evaluating bank mergers and related transactions. On the same day, the DOJ [announced](#) its formal withdrawal from the 1995 joint Bank Merger Guidelines and released [commentary](#) explaining how it plans to apply its general 2023 Merger Guidelines to the banking market. If retained by a new Administration, the DOJ and FDIC policy statements in particular represent significant changes from current practice in assessing bank merger transactions and the combined effect could result in significantly more burdensome application requirements and continue the current trend of very long processing periods. Notably, the Federal Reserve did not join any of these actions.

Key Takeaways

OCC

The final OCC Policy Statement, when read together with the OCC's accompanying preamble, eliminates some of the ambiguity contained in the proposed version and suggests that the OCC does not intend a radical departure from the approach it has taken to bank merger review over the past several years (see our prior client memorandum regarding the OCC's January 2024 proposal [here](#)).

- The final Policy Statement continues to list (i) 13 characteristics of an application that the OCC considers to be generally consistent with timely approval (*e.g.*, well-capitalized status and strong supervisory ratings) and (ii) 6 characteristics that raise supervisory or regulatory concerns and where the OCC is unlikely to find that the statutory factors under the BMA are consistent with approval (*e.g.*, G-SIB status and unsatisfactory CRA ratings or supervisory ratings).
 - Significantly, in the preamble to the final Policy Statement, the OCC has indicated that it had not intended for this list of 13 characteristics to be viewed as a bright-line rule that requires an application to include all of these characteristics to be approved. In recognition of the confusion the proposal caused on this point, the final Policy Statement now indicates that these 13 characteristics are indicative of an application that can “withstand scrutiny more easily” and is “more likely to be approved expeditiously.” The OCC repeatedly emphasizes this point in the preamble, including noting that it expects “most transactions” will fall in a middle category of not including all 13 characteristics and not having any indicators that raise supervisory or regulatory concerns. The OCC notes that “many of those transactions are likely consistent with approval.”

- While most of these two sets of characteristics are well established, the final Policy Statement continues to include some size-related factors that the OCC had not articulated prior to the initially proposed Policy Statement (*e.g.*, transactions where the resulting bank has less than \$50 billion in total assets and transactions where the target’s total assets are less than or equal to 50% of the acquirer’s assets as on the “consistent with approval” list). However, the final Policy Statement clarifies that the size-related factors are not dispositive and that many applications involving a resulting bank with total assets of \$50 billion or more, or a “merger of equals,” are consistent with approval but may require extra processing time.
- The OCC also notes that applications by foreign and domestic G-SIBs will be considered “on their individual merits” and not presumptively rejected.
- The final Policy Statement clarified that the OCC considers the financial and managerial resources and future prospects factors within the context of the prevailing economic and operating environment, meaning the OCC will take into account whether the combined bank’s financial resources and future prospects might be better than if no merger were to occur.
- The final Policy Statement continues to include language stating that the OCC:
 - would be less likely to approve applications involving an acquirer that has engaged in multiple acquisitions with overlapping integration periods, experienced rapid growth, or is functionally the target in the transaction.
 - will give greater consideration than we have seen in the past to systems compatibility and overall integration planning, including systems and information security processes, products, services, employees, and cultures.
 - views the Convenience and Needs factor as forward-looking and distinct from the bank’s record in complying with the Community Reinvestment Act, and also confirms that applicants will be expected to show prospective benefits to the communities served, rather than merely highlighting prior good deeds.
 - will more explicitly consider job losses or reduced job opportunities, community investment and development initiatives and efforts to support affordable housing and small business when reviewing an application.
 - The preamble to the final Policy Statement clarified that the individual considerations listed in the final guidance, such as job losses or reduced job opportunities, are not separate factors under the Bank Merger Act statute but rather considerations that may be relevant to the overall Convenience and Needs analysis depending on the impact to the specific community to be served.
- The final Policy Statement also contains guidance on when the OCC may decide to hold public meetings on a merger application. The criteria include the size of the transaction—for example, a resulting institution having \$50 billion or more in assets—and concentration in one or more markets.

- The OCC's action on September 17th also finalized the elimination of the streamlined Bank Merger Act application process. This process had generally been helpful for small, non-controversial transactions, asset purchases and internal reorganizations.
- Notably, the final Policy Statement does not address antitrust matters. In the preamble, the OCC states that “[g]iven complexities of the competition factor review and the involvement of the Department of Justice, the OCC does not believe that [the Policy Statement] is the appropriate vehicle for discussing [the OCC's] current approach to competition issues.”

FDIC

The FDIC final Statement of Policy is mostly unchanged from the initial proposal (see our prior client memorandum regarding the FDIC's March 2024 proposal [here](#)). The final Statement of Policy includes language stating that:

- Mergers resulting in a bank with over \$100 billion in assets will receive enhanced financial stability scrutiny. While Director Chopra has previously suggested that the “likelihood of approval” of mergers above this size threshold “will be low,” the FDIC's accompanying preamble noted that this \$100 billion threshold “is not a threshold for a presumptive denial.”
- Applications must demonstrate with “specific and forward-looking information” that the combined institution will “better” meet the convenience and needs of the applicable community.
- Applicants must provide a detailed three-year plan for all projected or anticipated branch expansions, closures or consolidations following the merger and must be prepared to make commitments for at least three years regarding future retail banking services in the relevant communities. Similar to the OCC's Policy Statement, the FDIC Statement of Policy notes that the FDIC will consider job losses resulting from branching changes. However, in contrast to the OCC's Policy Statement, the FDIC indicated that it will request that applicants quantify or provide information regarding anticipated job losses to the extent those are known or knowable.
- Unlike the OCC's Policy Statement, the FDIC discusses the competitive factor. While the FDIC will initially consider branch deposit data when evaluating traditional community bank mergers, the FDIC may also consider a broader range of product and geographic markets, as appropriate, and notes that the FDIC's analytical methods used in conducting its review of the competitive factor will continue to be informed by the DOJ's approach.
 - The final FDIC Statement of Policy notes that HHI calculations will still be viewed as an indicator of market concentration. The FDIC did not include specific HHI metrics or benchmarks.

- The FDIC also added a note indicating that competitors, including but not limited to credit unions, thrifts and Farm Credit System institutions, may be considered when reviewing the competitive factor. The FDIC did not give specific guidance regarding how those competitors would be factored into the analyses.
- Any branch or business divestitures must be *completed* before the bank merger closes.
- Applicants must submit with their FDIC application certain internal studies and reports related to the transaction.
- All transactions resulting in an over-\$50 billion institution, or which receive a “significant number” of adverse comments, will likely be subject to public hearings.
- If an applicant withdraws an application, the FDIC may release a statement regarding concerns the FDIC had with the application if it views such a statement as being in the public interest for creating transparency for the public and future applicants.

DOJ

- In its statement, DOJ announced that the 2023 Merger Guidelines issued by the DOJ and FTC (the subject of a previous [memorandum](#) published by Simpson Thacher) will now be the “sole and authoritative statement across all industries,” including banking. The DOJ’s September 17th issuance states that the announcement was the “result of a collaborative consultative process with the department’s close partners at the Federal Reserve, Federal Deposit Insurance Corporation and Office of the Comptroller of the Currency.”
- However, none of the Federal Reserve, the OCC or the FDIC have formally stated that they are completely abandoning the 1995 Bank Merger Guidelines.
 - Acting Comptroller Hsu has previously suggested that the OCC will take a similar approach as the DOJ in his comments accompanying the OCC’s bank merger proposal, but the OCC’s final guidance itself is silent on antitrust matters.
 - As noted above, the FDIC’s final Statement of Policy indicates that the analytical methods employed in conducting its review of the competitive factor will continue to be “informed” by the DOJ’s approach but also states that it will continue to use HHI deposit screens as a tool.
 - Federal Reserve Vice Chair for Supervision Michael Barr has stated that the Federal Reserve continues to work with the other federal banking agencies and the DOJ to possibly update the 1995 Bank Merger Guidelines with respect to the antitrust analysis of bank mergers. He stated that the Federal Reserve is “thinking about that on an interagency basis rather than just us doing something [alone].”
- At two and half pages, the newly released commentary generally sends readers to the DOJ’s 2023 Merger Guidelines and does not provide detailed discussion of how the DOJ will apply those Guidelines to the banking industry specifically.

- Overall, the extension of the 2023 Merger Guidelines to bank mergers reflects the Biden Administration’s commitment to a more rigorous and aggressive antitrust agenda. Consistent with the 2023 Merger Guidelines, DOJ will look to expand bank merger analysis beyond the traditional—and more predictable—assessment of local branch overlaps and HHI screens, into a “comprehensive and flexible framework” contained in the 2023 Merger Guidelines. DOJ will look to consider issues, such as the impact at the branch level with respect to individual lines of business, particular customer segments, or the quality/nature of customer service, and across broader geographic regions. This is consistent with the message AAG Kanter delivered in his 2023 speech at the Brookings Institution (summarized [here](#)) where DOJ also stated they will assess competitive concerns relating to factors such as interoperability and network effects.
- The commentary does not include any reference to the 1995 Bank Merger Guidelines’ HHI thresholds currently used to screen bank merger applications for possible competitive impacts or possible data sources for analyzing a wider array of product markets outside of the FDIC’s Summary of Deposits data. However, the 2023 Merger Guidelines do contain a HHI threshold (1800/100) and a market share threshold (30% plus change in HHI of 100) for establishing a rebuttable presumption of anticompetitive harm. Importantly, the commentary also specifically states that the “banking agencies may, at their discretion, use their own methods for screening and evaluating bank mergers.”
- The commentary does not mention the DOJ’s position on branch divestitures as a possible remedy for market concentration. Kanter has previously warned that “branch divestitures are not always adequate,” in particular where the competitive concerns relate to interoperability and network effects.

Perspectives

In what is clearly an attempt to show interagency coordination and consistency by finalizing their respective proposals on the same day and ahead of the upcoming election, the Acting Comptroller of the Currency (and FDIC Board member) Mike Hsu repeated previous statements that the FDIC’s final Statement of Policy is “broadly consistent” with the OCC’s revised bank merger guidance. Hsu also added a positive perspective on bank mergers, stating that the agencies should be “open to embracing and approving mergers where strong banks that have earned the trust of their communities and regulators seek to acquire weaker ones and have credible plans and capabilities to improve them.”

CFPB Director (and fellow FDIC Board member) Rohit Chopra’s comments at the FDIC Board meeting accompanying the agency’s final release, although slightly more tempered than prior statements on the topic, continued to emphasize the risk of concentration in the banking market and expressed a general level of distrust of the processes long used in processing merger applications (which manifest themselves in several of the provisions in the FDIC’s final Statement of Policy noted above). Director Chopra repeated his previous statements that the FDIC was “moving away from a pro-merger position,” and suggested that the final guidance was taking a more “neutral” stance on mergers.

Unlike the FDIC and the OCC, the Federal Reserve has not issued any policy statement outlining changes to its standards for bank merger reviews. In April 2024, Federal Reserve Vice Chair for Supervision Michael Barr confirmed his view that the Federal Reserve's current review frameworks is "pretty robust" and that no such policy statement is likely forthcoming (see our [client memorandum](#) discussing the divergence between the FDIC and the Federal Reserve on bank merger transaction).

Although 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," prior to the September 17th issuance, the DOJ and the bank regulatory agencies have shared little about any forthcoming changes to the 1995 Bank Merger Guidelines. However, there is now a significant disconnect between the new high-level DOJ commentary on bank mergers, the final OCC and FDIC bank merger guidance, and the current process used to screen and review transactions. There is also no indication of when or whether the Federal Reserve may adopt a new or modified approach to antitrust analysis. While the general lack of detail preserves ultimate flexibility for the agencies, it also suggests that they are not fully aligned on this revised approach for reviewing the competitive effects of bank mergers. Ultimately, the movement away from fixed competitive screens and the lack of direction with respect to the specific theories of competitive harm that the agencies may ultimately focus on, and what, if any, remedies may be deemed acceptable, may cause confusion and inconsistency within and between agencies, as well as for potential applicants.

These revised policies could be dramatically impacted depending on the leadership selected by the next Administration. In any case, these actions highlight the need for banking organizations looking to grow through acquisition to be well prepared and to consider a number of key issues much earlier in their planning process than has historically been necessary regardless of the processing agency.

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