Davis Polk

Key takeaways from bank merger policy updates

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The DOJ, FDIC and OCC have revised their bank merger review standards. The new standards are a major shift for bank M&A and will require a careful, detailed analysis to evaluate the viability of any proposed transaction.

The Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC) and the U.S. Department of Justice (DOJ) announced changes to their bank merger review policies on the same day. Although the timing of these releases is a clear sign of interagency coordination, the diverging approaches of the three federal banking agencies and the DOJ to bank M&A will require careful and detailed analysis to successfully execute transactions, particularly those that are strategically transformational.

The agencies took the following actions:

- The DOJ withdrew from the 1995 Bank Merger Guidelines, announced that it will assess bank mergers using its 2023 Merger Guidelines (2023 Guidelines), and released a new 2024 Banking Addendum to the 2023 Guidelines (the Addendum).
  - The DOJ's shift in approach towards a more holistic review of bank mergers had been previewed by Assistant Attorney General (AAG) Jonathan Kanter in a June 2023 speech, as well as a March 2024 public discussion between Kanter and Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra, who is a member of the FDIC Board.
  - The DOJ described its announcement as "the result of a collaborative consultative process with the department's close partners at the Federal Reserve, [FDIC] and [OCC]," but also noted that "those agencies may at their discretion use their own methods for screening and evaluating bank mergers."
- The FDIC adopted a final statement of policy regarding its review of Bank Merger Act (BMA) applications.
  - The final version is substantially similar to the FDIC's March 2024 proposal, which we analyzed in a previous client update.
  - BMA applications to the FDIC will now require additional information and will be subject to heightened scrutiny, particularly for transactions that would result in a bank with $100 billion or more in total consolidated assets.
- The OCC adopted a final rule changing its standards for review of BMA applications.
  - While the final rule is substantially similar to the OCC's February 2024 proposal, which we summarized in a client update earlier this year, it does reflect some important clarifying changes.
  - Like applications to the FDIC, BMA applications to the OCC will now require additional information and will be subject to heightened scrutiny, particularly for transactions that would result in a bank with $50 billion or more in total consolidated assets.

- Unlike the FDIC statement of policy, the OCC rule does not address its approach to analyzing competitive effects.
- The rule also eliminates the expedited review process and streamlined application form that were available for certain BMA applications, including internal corporate reorganizations, to the OCC.

– The Federal Reserve has not released any update to its policies for the review of BMA or other bank merger applications.

Key takeaways

1. The DOJ withdrew from the 1995 Bank Merger Guidelines and provided limited guidance as to how the 2023 Guidelines will apply to bank mergers.

The DOJ announced that it was withdrawing from the 1995 Bank Merger Guidelines, which focused on analysis of the acquirer's and target's deposit shares. Going forward, the DOJ will assess bank mergers through the 2023 Guidelines, which is the general merger review framework the DOJ now uses to evaluate transactions in all segments of the economy. While under the 1995 Bank Merger Guidelines the DOJ still "ultimately" applied its general merger guidelines (at the time, the 1992 Horizontal Merger Guidelines) to bank mergers,[1] the DOJ's latest announcement makes clear that the 2023 Guidelines will be the sole framework that the DOJ applies to banking sector transactions. The Federal Reserve, OCC and FDIC have not formally stated they are abandoning the 1995 Bank Merger Guidelines.

The 2023 Guidelines contain rebuttable presumptions of harm to competition for "transactions that increase the HHI [i.e., the Herfindahl Hirschman Index, a widely used index of market concentration] by more than 100 points" in either (1) highly concentrated markets (e.g., those with an HHI greater than 1,800) or (2) where the merger will create a firm with over 30 percent market share. This reflects a stricter approach than the 1995 Bank Merger Guidelines, under which a bank merger generally would not receive further review unless it increased the HHI by more than 200 points and resulted in a post-merger HHI over 1,800 points. DOJ and Federal Trade Commission (FTC) challenges of transactions with this minimal increase in concentration are rare, however, and adoption of the 2023 Guidelines and their related presumptions by the courts has been mixed. For additional details on the 2023 Guidelines, please see our client update.

The DOJ also issued a three-page Addendum that aims to identify competition issues that may commonly arise in the banking sector and which specific 2023 Guidelines correspond to those issues. This nonbinding Addendum reveals that the DOJ will consider theories of harm and relevant markets that the 1995 Bank Merger Guidelines did not address. In particular, the DOJ will:

– Continue to analyze traditional horizontal overlaps, but will also analyze bank M&A transactions for whether:
  - there is any ability and incentive to foreclose competitors from access to inputs in the distribution chain or raise rivals' costs;
  - the transaction is the latest in a series of acquisitions that have led to concentration in a particular product or geographic market; and
  - there are any network or multisided platform effects.

– Consider potential harms beyond the concentration of branches or deposits, such as the impact on interest rates for depositors, the variety of mortgages available, and the convenience and quality of customer service at branches.

– Evaluate harm to narrower markets of customers, such as corporations, small businesses, and low credit customers, who have different financing or credit product needs.

The Addendum does not explain how the DOJ will weigh these various factors or what evidence and data the DOJ will use in its analyses. While AAG Kanter's June 2023 speech stated that the DOJ and federal banking agencies were "augment[ing] the data sources [they] use when calculating market concentration … and using state-of-the art tools to assess all relevant dimension of competition," the Addendum provides no details on these data or tools. Ultimately, the Addendum's discussion of "substantive considerations in bank merger review" does not provide clarity on how the 2023 Guidelines will be applied in practice.

Despite this lack of clarity and the general perception that the 2023 Guidelines are more stringent than the 1995 Bank Merger Guidelines, the holistic approach taken in the 2023 Guidelines may, in requiring parties to address a larger set of

potential issues, also provide wider opportunities for advocacy by parties to proposed transactions. At a minimum, however, a broader and more detailed analysis will be needed prior to concluding a transaction is viable under the 2023 Guidelines than might have been the case under the 1995 Bank Merger Guidelines.

2. Banks considering M&A might have to look to other sources to predict the impact of the DOJ's shift in approach.

The March 2024 public discussion between AAG Kanter and Director Chopra may offer some insight into what this broader analysis might entail for transacting parties.

- In that discussion, Chopra stated that the multifactor review under the broader guidelines should analyze more than local deposit markets, which are not "grounded in modern market realities," and should instead focus on "the deal rationale and market dynamics."
- Chopra also said the antitrust analysis should evaluate "the impact of the transaction on different customer segments" to ensure "customers retain meaningful choices in the relevant markets."

We believe that the approach to competition analysis that the FDIC described in its final policy statement aligns with Chopra's view and therefore might offer a preview of the DOJ's approach.

- The FDIC stated that its competition analysis would include consideration of "all relevant market participants," such as "any other financial service providers that the FDIC views as competitive with the merging entities, including providers located outside the geographic market when it is evident that such providers materially influence the market."
- The FDIC noted that its consideration of concentrations would "begin with measuring concentrations based on local deposit shares," but will also consider "concentrations in any specific products or services," such as small business or residential lending or "activities requiring specialized expertise."
- For mergers in rural areas involving local community banks, the FDIC added that its analysis would "balance the competitive effects of such a merger with the public interest served by the capacity of the resulting IDI [insured depository institution] to meet the convenience and needs of the community." This analysis would also consider a wider range of non-bank competitors, such as "credit unions, thrifts, and Farm Credit System institutions."

3. The overlapping competition reviews of the DOJ and banking agencies will create additional uncertainty.

The DOJ and banking agencies have overlapping and distinct roles in reviewing the competitive effects of a transaction. While federal banking laws require the banking agencies to review competition, the DOJ also retains enforcement authority under the antitrust laws. Federal banking laws also require the reviewing banking agencies to obtain a report on competitive factors from the DOJ. The reviewing banking agencies are not bound by the DOJ's analysis, and they may approve a transaction despite negative findings in the DOJ's report.

If the DOJ disagrees on competition grounds with the banking agencies' approval of a transaction, the DOJ could challenge the transaction under Section 7 of the Clayton Antitrust Act (Clayton Act). The DOJ highlighted this role in its press release, stating that "the department's enforcement decisions will necessarily depend on the facts in any case and will continue to require prosecutorial discretion and judgment."

Unlike the DOJ, which is bound by Section 7 of the Clayton Act to focus on whether a merger will cause a substantial lessening of competition, the competition reviews performed by the banking agencies are a balancing test: if substantial anticompetitive effects are present, the transaction can only be approved if those effects are **clearly outweighed** in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community. While the DOJ's Clayton Act analysis can consider offsetting efficiencies resulting from the transaction, the DOJ has historically been skeptical of claimed efficiencies. Before the DOJ will credit efficiencies, it must determine that they are verifiable, cognizable, merger-specific, prevent a reduction in competition, and not anticompetitive. A court considering a challenge by the DOJ of a transaction that has been approved by a banking agency reviews the merger *de novo* applying the banking agency's standard, and may or may not find agency statements like the 2023 Guidelines or the 2024 Addendum to be persuasive.

4. The DOJ is likely to continue to move away from remedies in bank merger transactions.

For at least the last two decades, when the DOJ has identified likely anticompetitive effects of a bank M&A transaction, it has accepted behavioral and structural remedies (e.g., branch divestitures) to remedy those effects before it issues a competitive factors report. The remedies are implemented in a Letter of Agreement (LOA) in which the merging banks agree to certain terms and conditions to obtain DOJ approval. The DOJ then submits the signed LOA alongside a brief competitive factors report noting the DOJ's approval of the transaction.

In his 2023 speech, Kanter announced that the DOJ would shift away from the practice of entering into LOAs with parties and focus on providing the DOJ's opinion as to the transaction's impact on competition. Kanter stated that the carve-out divestitures the Antitrust Division had entered into often failed to address all of a transaction's competitive concerns, such as "interoperability and network effects." The DOJ explained this shift will allow the DOJ to focus on its "limited … statutory role in bank antitrust enforcement" by issuing advisory opinions and will allow the federal banking agencies to holistically evaluate potential remedies with their "unique supervisory experience and powers." Accordingly, the new Addendum is silent as to remedies or LOAs. This shift away from requiring divestiture remedies is an unusual decision by a law enforcement agency to cede some power over bank merger review back to the federal banking agencies. In his speech, Kanter was clear that the DOJ retains its ability to challenge a transaction under the Clayton Act, at which time the DOJ may still consider a remedy, as it has done as recently as 2023 despite the DOJ's statements regarding the inadequacy of remedies.

Although the FDIC's final statement of policy clearly refers to the possibility of requiring divestitures as a condition to FDIC approval, it is unclear whether the Federal Reserve and OCC will continue the DOJ's practice of accepting divestiture remedies or will instead move away from remedies like the FTC and DOJ have sought to do in their other merger reviews.

5. Uncertainty is likely in the near term because the DOJ and the three banking agencies could apply differing approaches.

Although the DOJ stated that it had consulted with the three federal banking agencies in developing its announcement, that consultation did not result in an updated version of the 1995 Bank Merger Guidelines. It is not clear that all three of the federal banking agencies intend to adopt the DOJ's preferred approach in conducting their own bank merger competition reviews.

- The Federal Reserve has not indicated any change in its approach, which historically has focused on thresholds tied to the concentration of deposits in geographic markets where the target and acquirer have overlapping branches, consistent with the 1995 Bank Merger Guidelines.
- The OCC did not outline its analytical approach to the statutory competition factor in its final policy statement. It specifically rejected comments that called on the OCC to do so: "Given complexities of the competition factor review and the involvement of the [DOJ], the OCC does not believe that appendix A is the appropriate vehicle for discussing its current approach to competition issues."
- The FDIC, on the other hand, made clear in its final policy statement that it is inclined to conduct a nuanced, multifactored competition review in line with the DOJ's Addendum.

If the reviewing banking agencies apply an approach that aligns with the 1995 Bank Merger Guidelines rather than the 2023 Guidelines and the Addendum, that will heighten the risk of a DOJ challenge under the Clayton Act. As a result, it will be necessary to take the DOJ's framework into account in all bank mergers, both in evaluating potential deals and preparing the competitive analysis in applications.

If the reviewing banking agencies apply an approach that aligns with the 1995 Bank Merger Guidelines rather than the 2023 Guidelines and the Addendum, that will increase the risk of divergence from the DOJ's own analysis and conclusions.

6. The OCC's new indicators are not a bright-line test for approving or denying a BMA application.

The OCC's proposal outlined positive and negative indicators that reflect the OCC's general principles for reviewing BMA applications, as detailed in our client update. The proposal implied that an application with all of the positive indicators and no negative indicators would be approved, while an application with any negative indicator likely would not be approved. The proposal offered no guidance on how the OCC would view applications that fell between the two extremes.

The OCC clarified in its final rule that the indicators merely "reflect the likelihood of an expeditious approval."

- An application does not need to feature all 13 positive indicators to be approved, and having one or more negative indicators does not preclude OCC approval.
- A greater number of positive indicators increases the likelihood of OCC approval without additional information requests or other enhanced scrutiny. A greater number of negative indicators decreases that likelihood.
- The OCC said that "most" applications will have some, but not all, of the positive indicators, and no negative indicators. According to the OCC, "many" of the transactions in that middle category are "likely consistent with approval."
- With respect to the indicator of a resulting institution having less than $50 billion in total consolidated assets, the OCC reiterated that the indicator is intended to reflect the likelihood of expeditious approval. The OCC noted that national banks and federal savings associations with $50 billion or more in total consolidated assets "tend to be more complex" and that they are subject to the OCC's heightened standards for risk management and related controls. The OCC specifically stated that "many transactions where the resulting institution will have total assets of more than $50 billion are consistent with approval."

Other notable changes in the OCC final rule include:

- **Mergers of equals not discouraged**: The OCC clarified that the positive indicator related to the target being smaller than the acquirer is not intended to discourage mergers of equals. Instead, the OCC explained that in its experience, if the acquirer is significantly larger than the target, the resulting bank is more likely to be subject to the acquirer's existing policies, procedures and control framework "with which the OCC is already familiar." An integration of two similarly sized institutions is "more likely to result in more changes to [the] resulting institution, which the OCC will need to review." As a result, this indicator reflects that mergers between institutions of similar size "may require additional time to assess but does not indicate that the applications will not be approved."
- **Economic context considered**: The OCC clarified that it will evaluate the financial and managerial resources and future prospects factors "within the context of the prevailing economic and operating environment." The OCC recognized that the combined institution's resources and prospects "may in some cases be significantly greater than those of the individual institutions if no merger were to occur."
- **Broader enforcement actions indicator**: The OCC expanded the scope of the negative indicator related to enforcement actions beyond anti-money laundering or fair lending to include all types of consumer compliance enforcement actions.

7. The FDIC clarified that banks are not precluded from acquiring a financially weaker target.

The FDIC's proposal stated that, generally, the FDIC will not find favorably on the financial resources statutory factor "if the merger would result in a larger, weaker IDI from an overall financial perspective." The FDIC acknowledged that this language suggested that stronger banks could not acquire weaker banks during periods of economic stress. It also noted that the fair valuing of assets under purchase accounting principles could lead nearly all combined institutions to be viewed as "weaker."

The final policy statement clarifies that "a favorable finding on the financial resources factor would be appropriate only in cases where the merger results in a combined IDI that presents less financial risk than the financial risk posed by the institutions on a standalone basis." The FDIC explained that it removed the original proposed language to "avoid the suggestion that an IDI that reflects a very strong financial condition would be precluded from absorbing a weaker target." It also stated that its revised statement was consistent with its historical approach to this factor: "while a resultant IDI may be weaker post-acquisition, the FDIC broadly considers the long-term financial impacts over the near-term implications of a merger."

8. The FDIC continues to assert a broad interpretation of its BMA jurisdiction.

Consistent with the proposal, the FDIC's final policy statement asserts a very broad view of which transactions require FDIC approval under the BMA. IDIs engaging in transactions with non-insured entities will need to consider carefully whether the FDIC will insist upon a BMA application because it views the transaction as a merger in substance. Banks may need to engage with the FDIC, and potentially even file a BMA application, to confirm whether FDIC approval under

the BMA is in fact required.

In the final statement of policy, the FDIC provided as an example of a merger in substance an acquisition of all or substantially all of a target's assets in which the target either dissolves or "otherwise ceases to engage in the acquired lines of business *such that the target is no longer a viable competitor*" (emphasis added). The FDIC said it added "language related to the target no longer being a viable competitor in order to reflect the BMA's emphasis on competitive considerations."

9. The FDIC Board emphasizes its role in the review of BMA applications.

The FDIC's final policy statement also reflects an assertion of authority by the FDIC Board.

- The policy statement notes that any application that "do[es] not warrant a favorable finding on one or more statutory factors" must be elevated to the FDIC Board for review and final disposition. This requirement is already reflected in the FDIC Board's resolution governing delegations of authority. It is also consistent with the FDIC Board's June 2024 resolution requiring the full FDIC Board to be briefed on merger applications outstanding for more than 270 days.
- The policy statement also asserts FDIC Board authority to act on any application in which (1) the entities operate in the same relevant geographic markets and (2) the DOJ has not made a positive written finding on competitive effects.
- As in the proposal, the FDIC also asserted the "FDIC Board's prerogative to release a statement regarding withdrawn transactions if such a statement is considered to be in the public interest for creating transparency for the public and future applicants." The FDIC explained that the publication of such a statement "is not expected for most transactions" and that such a statement would be consistent with applicable laws and regulations relating to confidentiality and would not disclose "confidential business information of applicants."

10. Acquisitions by large banks will be subject to heightened scrutiny.

The FDIC and OCC both make clear in their policy statements that BMA applications involving large banks will face additional hurdles to approval. Under the OCC's review framework, having combined assets under $50 billion is a positive indicator, while status as a global systemically important banking organization (G-SIB) or a G-SIB subsidiary is a negative indicator.

- Large regional bank mergers will be subject to heightened scrutiny and a lengthier review process as compared to smaller transactions. The OCC signaled its openness to such deals, however, stating that "many transactions where the resulting institution will have total assets of more than $50 billion are consistent with approval."
- For G-SIBs, the message was more negative. The OCC acknowledged the obvious fact that "G-SIB status is unlikely to be remediated," which raises the question of whether and how any G-SIB will be able to overcome this negative indicator. The OCC did go on to state that "it will evaluate all applications from foreign and domestic G-SIBs on their individual merits and undertake a fulsome analysis under the BMA and other applicable law," but its skepticism of G-SIB deals is apparent.

The FDIC expects to hold public hearings on any transaction resulting in an IDI at or above the $50 billion asset threshold and will apply additional scrutiny of the financial stability factor in transactions resulting in an IDI at or above the $100 billion asset threshold.

- For example, transactions resulting in a bank with combined assets of $100 billion or more will "likely engender additional information requests, more frequent discussions and correspondence with application parties, and supplementary meetings and discussions with regulators and community groups."
- Chopra stated in prepared remarks released alongside the proposal: "By codifying this [$100 billion threshold], boards of directors and management at large firms can understand that the likelihood of approval of megamergers will be low."
- In the preamble to its final policy statement, the FDIC stated that, although it was not adopting metrics or thresholds to identify transactions that did not present financial stability risks, it had clarified in the policy statement that the financial stability evaluation "considers the implications for the industry if the transaction is not approved or does not consummate." It is not clear which part of the policy statement clarifies this point, unless it is the statement that the FDIC will "evaluate any additional elements that may affect risk to the U.S. banking or financial system's stability." In contrast, the OCC's final rule explicitly applies a balancing test to the financial stability factors, "including weighing the financial stability risk posed by the proposed transaction against the financial stability risk posed by a denial of the

proposed transaction, particularly if the proposed transaction involves a troubled target."

11. The OCC eliminated the expedited review process and streamlined application form that were available for certain BMA applications to the OCC.

Even national bank internal corporate reorganizations will now be required to complete the more burdensome interagency BMA application form. In defending this change, the OCC stated that removal of the streamlined form should not significantly increase the burden on applicants because the initial submission of the interagency BMA application "may decrease the likelihood the OCC requests additional information from applicants." Neither the Federal Reserve nor the FDIC provides a streamlined BMA application form for state member or non-member banks.

The OCC also noted that its existing regulations permit it to tailor the information requirements in the interagency BMA form as appropriate. But the only example the OCC identified as meriting such treatment was a purchase and assumption transaction from an IDI in FDIC receivership. As a result, national banks should not necessarily expect leniency in the application requirements for internal corporate reorganizations.

12. Additional FDIC changes are expected.

The FDIC noted that Section 4 of its Applications Procedures Manual is "currently being revised to reflect" the FDIC's final policy statement. The FDIC previewed that the "revised Section 4 addresses the review process and the dynamic between regional and Washington office staffs, and the prospective timeframes for processing."

When it proposed its policy statement, the FDIC also proposed revisions to its FDIC-specific supplement to the interagency BMA application form. The FDIC did not release a final revised version of this supplement alongside the final policy statement. It remains to be seen if final revisions will be made, potentially at the time the final policy statement is published in the Federal Register.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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[1] *See, e.g.,* DOJ Assistant Attorney General Anne Bingaman, Antitrust and Banking (Nov. 16, 1995) ("[W]e have developed a bank merger screening approach that makes it clear to the industry how the three agencies will approach a bank merger. The agencies have prepared what amount to work sheets that enable prospective merger partners to anticipate what parts of their contemplated merger will attract the interest of the bank regulators and the Department of Justice. Ultimately, our review of bank mergers is governed by the 1992 Merger Guidelines that we apply throughout our merger program.").