

Banking Reform: An Increase In Scrutiny

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On September 17, 2024, the DOJ's Antitrust Division withdrew from its [1995 Bank Merger Guidelines](#) and announced that, going forward, it will use the [2023 Merger Guidelines](#), along with a [2024 Banking Addendum](#), in evaluating the competitive impact of mergers and acquisitions in the banking industry. The DOJ's announcement comes roughly three years after President Biden issued an [executive order](#) encouraging the DOJ to enhance the enforcement standards set forth in the previous Bank Merger Guidelines. In a [fact sheet](#) accompanying that order, the Biden administration explained that over the past four decades, the United States has seen the number of operating banks decline by roughly 70%, a trend that has disproportionately impacted communities of color, particularly those in rural areas. The fact sheet tied this growing consolidation to administrative complacency, noting that "federal agencies [had] not formally denied a bank merger application in more than 15 years." We discussed Biden's 2021 order and its implications for commercial banking in a [prior Competition Corner post](#).

Below, we provide a brief, high-level summary of what stakeholders can take away from the Banking Addendum, along with where it fits into the larger framework of the 2023 Merger Guidelines and the antitrust regulatory scrutiny of mergers more generally.

1. The 2024 Banking Addendum

The 2024 Banking Addendum reflects a number of policy concerns with increased banking concentration, notes that various types of transactions are subject to scrutiny, emphasizes the importance of protecting marginalized groups, and previews a continued focus on defining narrow markets. More specifically, the Addendum:

- **Lowers the Herfindahl-Hirschman Index (HHI) threshold for banking mergers.** Under the 1995 Bank Merger Guidelines, a bank merger that did not increase the HHI (a measure of market concentration) by more than 200 points or result in a postmerger HHI over 1,800 would generally not receive further review. The Addendum eliminates the different thresholds for bank mergers and other mergers, clarifying that all mergers, including those between banks, would trigger a rebuttable presumption of harm to competition where they increased the HHI by more than 100 points in a market where the HHI is greater than 1,800 or where the merged bank's market share is greater than 30%.
- **Broadens the DOJ's scope of analysis.** Whereas the previous guidelines were chiefly concerned with analyzing deposit market share in predefined geographic banking markets, the Addendum expresses concern

with mergers implicating a number of different issues. These include the merging banks' operation of or involvement in financial networks or platforms, the overlap between branches in a given geographic area, and the products and services offered by competing banks.

- **Emphasizes the importance of protecting underprivileged individuals.** Consistent with the Biden administration's 2021 order, the Addendum notes that economically underserved individuals or customers with low credit scores have unique demands for products and services and may thus warrant analysis as a distinct (and narrower) market. The 1995 Guidelines were silent on this point.
- **Directs the Antitrust Division to evaluate all potentially relevant markets.** Unlike the prior guidelines, which did not discuss the possibility of defining multiple antitrust markets when evaluating a banking merger, the Addendum reflects the explicit understanding that a single bank merger may have implications across a range of distinct and definable product and geographic markets, and makes clear that the DOJ should evaluate the impact on competition in each of those relevant markets.

Given its three-page length, the Addendum unsurprisingly paints in broad strokes and offers little specific guidance as to how the DOJ is likely to apply the guidance summarized above, let alone enough detail to predict the Antitrust Division's likely reaction to a given proposed merger. It stresses the importance of working with the DOJ, including by presenting rebuttal evidence when appropriate, but does not identify the evidence or data that would be most useful to the DOJ. Overall, the Antitrust Division's new guidance increases the uncertainty facing stakeholders considering a bank merger and highlights the importance of engaging with federal regulators early to address any concerns they might have.

2. Corresponding FDIC and OCC Policy Statements

On the very same day the DOJ published its 2024 Banking Addendum, the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) also issued policy statements with respect to their reviews of transactions under the Bank Merger Act. These statements were intended to formalize the FDIC's and OCC's future cooperation with the DOJ on bank mergers and previewed an enhanced degree of enforcement, particularly with respect to larger, more complex transactions. (Notably, the Federal Reserve (Fed) did not issue its own corresponding policy statement, suggesting that it does not intend to alter its approach to bank merger reviews.) Indeed, FDIC Chairman Martin J. Gruenberg recognized the limitations on the FDIC's authority in a public statement, noting that decisions related to mergers resulting in an insured depository institution of over \$100 billion are reserved for the Federal Reserve Board.

Although the timing of the announcements was clearly coordinated, each agency continues to have its own policy prerogatives, which may not always dovetail and might even conflict with one another as applied to specific mergers. The Antitrust Division is primarily concerned with transactions that substantially lessen competition or tend to create a monopoly, while the FDIC, the OCC, and the Fed consider other statutory factors, such as financial solvency of the surviving institution, the risk to the stability of the U.S. banking system, and the effectiveness of any involved insured depository institution in combatting money laundering activities, in their reviews. The Antitrust Division reviews mergers concurrently with the respective banking agencies and has the authority to challenge a transaction even if it has been approved by the other regulators.

KEY TAKEAWAYS:

- The DOJ, the FDIC, and the OCC have formalized their guidance for a new era of bank merger enforcement. While the Fed has yet to release a statement, this guidance points to an increase in coordination and in scrutiny by many of the federal agencies responsible for reviewing mergers in the banking industry.
- The federal antitrust agencies have become more aggressive under President Biden's administration and have not hesitated in pursuing actions under novel legal theories even when they are unlikely to succeed. Although this strategy may change after the upcoming election, the Antitrust Division is likely to continue its enforcement approach in the immediate future.
- The federal agencies have given themselves broad discretion with respect to regulating banking mergers. This discretion has increased the uncertainty surrounding application of their new standards and regarding the

interplay between the approaches the different agencies are likely to take. Stakeholders should continue to follow guidance from the federal agencies, including statements from leaders like Jonathan Kanter of the DOJ and Michael Hsu of the OCC, for more clarity on the transactions they find most problematic, the standards they may use to evaluate them, and the rebuttal evidence they would consider most effective.

- Bank merger stakeholders should engage with regulators early when negotiating a deal and should be prepared to present procompetitive justifications for all aspects of their proposed transaction. Parties should ensure that they are coordinating with all relevant federal agencies as failing to address an agency's concerns may result in a delay in approval or even in a regulatory challenge to a merger that would otherwise be approved.

Please contact a member of the Winston & Strawn Antitrust/Competition Practice or your Winston relationship attorney for further information.

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