

HUSCH BLACKWELL

manatt

Anti-Trust Scrutiny in Mergers and Navigating Recent Policy Statements Under Bank Merger Act

Arthur Coren, Partner
Chair – Bank M&A and Compliance Practice Group
Husch Blackwell LLP
arthur.coren@huschblackwell.com

Craig Miller, Partner
Chair – Financial Services Group
Manatt, Phelps & Phillips LLP
cmiller@manatt.com

Introduction

Policy statements were issued in late 2023 and 2024 by Department of Justice, (DOJ), Federal Deposit Insurance Corporation (FDIC) and Office of Comptroller of the Currency (OCC) covering the agency's involvement in evaluating proposed bank mergers.

This presentation will cover:

- 1 The 2023 DOJ Merger Guidelines
- 2 FDIC and OOC recent policy statements under Bank Merger Act (BMA)
- 3 Take aways/recommendation for banks considering a merger

DOJ – Under Anti-Trust Act

- Clayton Anti-Trust Act empowers DOJ to consider competitive effects of all mergers including banks
- Bank regulator forwards merger application to DOJ for DOJ to evaluate proposed merger - will “cause a substantial lessening of competition” in relevant market?
- DOJ issues report to bank regulator – findings can “stop a deal in its tracks”
- Historically DOJ followed 1995 Bank Merger Guidelines focused on deposit share of overall deposits – Herfindahl-Hirschman Index (HHI)
- December 2023 DOJ withdrew and adopted new 2023 Merger Guidelines and 2024 Addendum
- Enforcement under 2023 Merger Guidelines not clear under new administration
- New Assistant Attorney General of DOJ Anti-Trust Division expected – Spring 2025

DOJ – Under Anti-Trust Act

DOJ 2023 Merger Guidelines

- **Guiding Principal** – “banks are indispensable to a healthy national economy” so DOJ (Antitrust Division) will act to “protect competition in banking at every level and for every American”
- Up to date framework and uses a more “**holistic review of proposed merger**”
- Establishes rebuttable presumption of anti-competitive harm **if** merger increases the HHI by more than 100 points in a market where HHI is greater than 1800 **or** results in over 30% deposit market share for resultant bank but otherwise DOJ will look at facts of each application (enforcement of this presumption not likely by new administration)

DOJ – Under Anti-Trust Act DOJ Will Consider if Merger:

- Increases concentration in highly concentrated market
- Increases risk of anti competitive coordination
- Eliminates potential entrant to market
- Risks rivals cannot access market
- Reinforces already dominant position of merger party
- Part of pattern of multiple acquisitions
- Substantially lessens competition for workers, suppliers or other providers (*new administration not likely to emphasize this factor*)
- Substantially lessens needed credit products – including needs of underserved or low credit score customers
- Likely to restore presumptions that vertical mergers add to competition

FDIC and OCC under BMA

- **BMA empowers bank regulators to review, consider and approve/disapprove all bank mergers**
 - FRB – bank holding companies and member banks
 - FDIC – state non-member banks and merger with non-insured institutions
 - OCC – national banks and federal savings banks
- **BMA requires bank regulators consideration of five factors:**
 - Effect on competition
 - Financial, managerial resources and future prospects
 - Effect on convenience and needs of relevant community
 - Effectiveness in combating money laundering
 - Risk to stability of US banking system
- FDIC (under Section 18(c) of Federal Deposit Insurance Act) adopted Final Statement of Policy on Bank Merger Transactions – effective - **October 17, 2024**
- OCC (under 12 CFR Section 5.33) adopted Final Policy Statement - effective – **January 1, 2025**
- FRB did not take any action to revise its merger application process – considers current process “robust”

FDIC and OCC Guidance on Evaluation of Statutory Factors: Competition

- FDIC and OCC reassert right to determine monopolistic/anti-competitive factors independent of DOJ
- Evaluation relevant to each transaction
- Considers relevant market participants
- Considers other financial service providers: Credit Unions, Thrifts, Farm Credit Institutions, Neighboring Geographic Metrics
- Considers special lines of business and non-traditional products, services or delivery methods
- Considers geographic market
- Considers share of total deposits (HHI)
- Considers concentrations in specific products including volume of small business or residential loan activity
- Can consider divestiture of lines of business or branches but completed prior to closing
- FDIC jurisdiction over mergers between banks and non-insured entities
- Rural areas
- FDIC will weigh information to reach decision
- OCC policy statement does not address its approach to analyzing competitive effects but does list the factors it considers that are more likely to result in quicker approval

FDIC and OCC Guidance on Evaluation of Statutory Factors: Financial and Managerial Resources and Future Prospects

- Financial and Managerial Resources and Future Prospects
- Resulting bank will have sound financial performance/safe and sound financial condition
- Resulting bank should present less risk than two banks on stand-alone basis
- UFRIS rating
 - Capital adequacy – funding sources
 - Asset quality/credit compliance
 - Management ratings
 - Earning/financial performance
 - Liquidity
- Risk profile
- Regulatory compliance history
- Board governance and capacity
- Internal controls/audit coverage
- Adequacy of operating systems and integration
- Information technology
- Addressing weaknesses of target bank
- Financial projections – proformas realistic and supported by reasonable assumptions
- Physical locations
- Personnel

FDIC and OCC Guidance on Evaluation of Statutory Factors: Convenience and Needs

- Resulting bank meets convenience and needs of community better than two banks without merger
- Considerations:
 - Higher lending limits
 - Greater access to existing products/services (branch network/mobile banking)
 - New or expanded products
 - Reduced customer fees/leverage costs
 - Increased convenience of customers to banking services
 - CRA history and service to low- and moderate-income customers
 - Compliance management systems
 - Job losses/effects on community
 - Public comments to application/banks response
 - May allow for additional time to develop factual information/delay in processing
 - Public hearings/meetings may be held
 - Resultant bank's assets greater than \$50.0 billion/\$100.0 billion
 - OCC criteria to hold public meetings
 - Public interest
 - Needed to clarify issues
 - To provide useful information to OCC
 - Significance of merger to banking industry or to affected communities
 - CRA and consumer compliance and fair lending records

FDIC and OCC Guidance on Evaluation of Statutory Factors: Effectiveness in Combating Money Laundering

- Evaluate each bank's anti money laundering and counterfeiting financing of terrorism programs
- Will consider:
 - Policies and procedures in place
 - Risk management program
 - Supervisory records
 - History of BSA compliance
 - Completion of any remediation programs

FDIC and OCC Guidance on Evaluation of Statutory Factors: Risk to Stability of US Banking System

- Evaluate if merger “materially increases risk of stability of US Banking System”
- Will consider:
 - Size of banks – greater than \$50.0 billion for FDIC/\$100.0 billion for OCC more likely to result in risk
 - Inter connectedness of resultant bank to other banks
 - Complexity of resultant bank operation
 - Cyber security record
 - Off balance sheet activities
 - Business lines/products and services
 - Branch network
 - Volume, number, and nature of risk of deposits
 - Cross border activities
 - Stress testing
 - Interstate mergers – 12 USC 1831 u
 - Prohibits if resulting bank (or affiliate) controls more than 10% of US deposits or 30% or more of deposits in state

FDIC and OCC Guidance on Evaluation of Statutory Factors: Mergers of Banks and Non-Banks

- FDIC will use same five BMA statutory factors
- Decision made by Washington office of FDIC Board
- Need 3 years audited financial statements of target
- Will consider
 - Intangible assets
 - Contingent liabilities
 - Legal action
 - Complexity, scale, current condition and historic performance of target

Takeaways & Recommendations

- Not clear how new administration DOJ will apply and enforce 2023 Merger Guidelines
 - DOJ will not rely solely on deposit share analysis
 - DOJ will be more active in its anti-trust analysis using the 2023 Merger Guidelines with a “holistic” review
 - DOJ will use additional factor and data sources
 - Not likely to enter into LOA
 - Retains ability to challenge bank regulatory finding under anti-trust statutes
- FDIC and OCC will consider DOJ report but retain power under BMA to make independent decision
- Mergers requiring greater scrutiny – result in longer processing times and not being handled under delegated authority - being referred to Washington

Takeaways & Recommendations

- Public comments and applicant's response taken seriously – potential for public hearing – delay process/more questions/ jeopardize approval
- Critical that acquiring bank fully review and consider all factors and ability of resultant bank to satisfy all DOJ and bank regulatory items to be considered before signing definitive agreement
 - Prepare full presentation of merger for regulators and in application addressing:
 - all five factors
 - weaknesses – anti-money laundering, fair lending, consumer compliance
 - unresolved MRAs and/or enforcement actions
 - include integration plans covering technology and human capital issues
 - include specific and forward looking information
- Have pre filing meetings (even pre-pre filling meetings) with regulators (both banks) to review and get feedback of proposed merger

Takeaways & Recommendations

- Because regulators have differing approaches on evaluation of competitive factors – banks may want to consider which charter should survive
- Expedited processing merger by OCC has been eliminated
- Any potential remediation (divestitures of branches or product lines) may have to be accomplished before deal closes while DOJ indicates it will not enter into LOAs – may lead to conflicts between DOJ and bank regulator on competition factor with DOJ reserving right to use its powers under anti-trust statutes
- Mergers of large institutions not precluded, but subject to greater scrutiny - so appears regulators are more favorable to community bank and regional institution mergers

HUSCH BLACKWELL

manatt