



FedFin Client Report

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DOJ Contemplates Innovative Financial-Sector M&A Antitrust Construct

Client Report: **MERGER5**

Executive Summary

This report analyzes yesterday's [request for comment](#) from the Department of Justice on antitrust considerations related not only to bank mergers, but now also to those with nonbanks. This is a break-through development revising 1995 standards that of course fail to reflect the significant evolution of U.S. financial markets over more than two decades. However, the issues Justice contemplates – i.e., if consumer-finance competitiveness should be judged nationally rather than locally – have significant implications also for regional-bank transactions and, depending on how the Antitrust Division chooses to measure competitiveness in rural areas, also for community banks and credit unions. The questions also probe competitiveness considerations where a government agency is also a competitor; although the case on which comment is sought is farm credit, comments may well also address mortgage finance given the evolving nature of Fannie Mae and Freddie Mac. Although only a short list of questions, the Antitrust Division's request will spark furious policy and political debate also discussed in this report. As detailed below, Justice appears intent on easing competitiveness measures that now impede not just intra-bank mergers and business relationships, but also the far broader array of transactions liberalized in the Fed's recent "control" standards ([see FSM Report TAKEOVER10](#)). Indeed, in [remarks made late last month](#), Antitrust Division head Delrahim made it clear that this new policy is designed to incorporate fintech into competitiveness analyses.

Nothing in this statement or any final DOJ action restricts the Federal Reserve or other banking agencies in the way they review mergers and other controlling relationships. Conversely, DOJ is not bound by the banking agencies; if, for example, the OCC approved a new activity in conjunction with an existing banking company under its pending expanded-activity and digital-finance policies ([see FSM Reports CHARTER26](#) and [DIGITAL5](#)), the Antitrust Division could overrule it. Comments are due by October 1.

Analysis

Advocates of the Division's attempt to facilitate innovative transactions will surely applaud standards that would facilitate the Federal Reserve's newly flexible approach.

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Those opposed to what they already see as concentration in the banking system and the broader U.S. economy will just as surely oppose any new policy on grounds that cross-ownership in the financial sector adversely affects the cost of banking services in ways now ill-captured by the Fed's HHI measurement. Studies have for example asserted that mergers undermine credit availability, slow innovation, and create systemic risk. While these conclusions were in large part premised on barriers to entry into regulated banking, opponents of cross-sectoral integration will surely cite it along with much of the work recently addressed in Congressional hearings about the antitrust issues raised by large telecommunications and e-commerce mergers. However, nothing in the request touches on whether the traditional consumer-welfare guide to pricing and competitiveness analysis warrants the review demanded by many Democrats. There are also no questions about community impact although HFSC Chairwoman Waters (D-CA) has also opposed both large-bank mergers and cross-sectoral integration, most recently taking strong issue with the Truist merger ([see Client Report MERGER4](#)).

The Antitrust Division seeks views on:

- the need for bank-specific merger standards beyond overall 2010 horizontal-merger guidelines;
- the need for clarity;
- the need for merger guidance to be joint between the Justice Department and some or all of the banking agencies;
- the need to update HHI-screening thresholds;
- the need to revise product categories and geographic criteria in merger analysis. In particular, should the consumer market be measured at only the local level? The Antitrust Division also seeks views on whether analysis should be refined to differentiate urban and rural areas. A question posed about farm lending and the role of a government agency could be extrapolated by commenters also to apply to other areas with government or agency participants;
- the weightings for online deposits, credit unions, and thrifts;
- how best to consider the geographic distribution of online banks; and
- the need for a *de minimis* exemption.