



Financial Services Management

Bank-Merger Policy Review

Cite

Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues

Recommended Distribution:

Corporate Strategy, Policy, Legal, Government Relations

Website:

<https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide>

Impact Assessment

- Justice is signaling significant skepticism about all but small-bank mergers, threatening the ability of larger banks to merge and/or expand via acquisition into new sectors.
- Although focused on bank mergers, DOJ's release addresses "financial institutions," with the questions now also reaching more deeply into fintech. The new competition policy thus might extend beyond transactions between banks within the perimeter of the consumer, community, and financial-stability purview of federal banking agencies to assess these issues along with competitiveness. This would also adversely affect the prospects for these transactions.
- Reduced market power is likely to enhance economic welfare, innovation, and financial stability.

Overview

Just days after the FDIC chair refused to advance a request for comment on bank-merger policy,¹ the Department of Justice released one signaling agreement with many of the concerns Democrats aired in concert with the RFI. Justice did so by reopening a 2020 inquiry on which neither the Trump nor Biden Administrations acted,² reiterating the questions then and adding new ones indirectly addressing the competitiveness, community service, and consolidation questions highlighted in President Biden's executive order on overall U.S. competition.³

¹ See **MERGER9**, *Financial Services Management*, December 16, 2021.

² See *Client Report MERGER5*, September 2, 2020.

³ See *Client Report MERGER6*, July 9, 2021.

Impact

In 2020, DOJ appeared to be focusing on an issue also of concern to large banks: the extent to which HHI and other market-competition tools effectively judged the actual industry landscape given the sharply increased role of nonbank and fintech firms. Although the 2021 request broadens the inquiry to include online banking conducted without brick-and-mortar facilities, its overall approach follows the President's order by questioning the extent to which consolidation benefits bank customers. DOJ now wants to ensure that Americans have choice with regard to financial institutions, guarding against the "accumulation of market power." The release also congratulates the FDIC Democrats, implying that DOJ is sympathetic to the RFI's analysis presuming an array of consumer and community risks related to larger-bank M&A.

Still, the Department of Justice does have limited jurisdiction in some arenas. For example, it appears to defer to the FDIC and other banking agencies when it comes to the safety-and-soundness issues highlighted in the FDIC RFI. These include the extent to which current processes adequately account for financial stability and address the extent to which a resulting company could be readily resolved by the FDIC. In recent years, Justice has also deferred to the banking agencies on consumer issues, leaving it to the banking agencies to assess penalties as they sit or, in more recent years, decided if any matters before the CFPB warranted M&A-related consideration. DOJ also left community considerations to the agencies pursuant to the Community Reinvestment Act.

However, it need not do so. To the extent Justice believes that consumer, community, or other concerns reflect or could lead to market concentration, it could veto a deal otherwise approved by the banking agencies. The reference to "market power" in its release also suggests that DOJ will not rely solely on traditional concentration metrics or even on any new ones it constructs in the wake of this policy review. "Market power" might, for example, be discerned if one party to a transaction is deemed by DOJ to have set prices or otherwise behaved in a way in its current market areas as to suggest it would deploy greater size or scope with adverse competition impact.

In addition to this market-power question, perhaps the most critical one facing DOJ is how it assesses the financial-sector's competitive landscape. If competitors are measured in ways that reflect the sharp increase in fintech and bigtech competition, then larger-bank mergers might be approved on grounds that they ensure competitiveness and enhance policy concerns by providing banking within the regulatory perimeter. As noted, the release refers to "financial institutions" – not just banks – perhaps suggesting that DOJ might do so. Conversely, financial-institution M&A with or without banks might face DOJ disapproval if issues related to financial stability, consumer protection, community service, or other policy concerns lead DOJ to use its antitrust mandate in the sweeping fashion congressional Democrats have suggested with regard to bigtech-platform firms.

What's Next

DOJ released its request on December 17; comments are due by February 15. On the same day, the FRB approved three relatively-large bank mergers. These are now pending at DOJ under the thirty-day review period during which DOJ can veto a prior approval. Although Gov. Brainard – a foe of a prior super-regional deal – voted

for these transactions, DOJ may differ. If it does, that will be an early indication of future Biden Administration policy.

When the FDIC Democrats released their RFI, Congressional response split sharply on partisan lines. Much of this was due to procedural disputes, with Republicans alleging that the Democratic demand for public release was a "coup" or otherwise improper under applicable FDIC governance standards. Congressional Democrats sided with the FDIC officials on procedural grounds, but they also supported a new approach to bank M&A. For example, Sen. Warren (D-MA) cited her legislation redesigning bank-regulatory procedures for M&A approval⁴ and HFSC Chairwoman Waters (D-CA) called on the banking agencies quickly to issue a new policy along the lines she inferred the officials favored for bank M&A resulting in a company with assets over \$100 billion.

Analysis

A. New Questions

DOJ is now seeking views on:

- specific factors that should be considered beyond those applicable under Section 7 of the Clayton Act when scrutinizing bank mergers and if additional remedies should be considered;
- additional data banks should submit with their review applications;
- whether and how Summary of Deposits and CRA data-submission requirements should be updated;
- additional information or data that should be routinely collected by banking regulators to better analyze the competitive effects of bank mergers; and
- whether and how "internet-only" banks (e.g., fintechs) should factor into bank merger competitive review.

B. Retained Questions

DOJ also seeks comment 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;

⁴ See **MERGER8**, *Financial Services Management*, October 8, 2021.

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- 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.