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DOJ withdraws 1995 bank merger guidelines as FDIC, OCC make regulatory changes

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OCTOBER 1, 2024

Key takeaways

- Changes to federal agencies' bank merger review policies have shifted the landscape for financial institutions, raising questions and introducing new uncertainties to the review process.
- Agency leadership and the policies of the next administration could significantly affect the practical implementation of these policies; in the meantime, merging parties may wish to prepare for potentially longer review periods.

On September 17, 2024, the Department of Justice Antitrust Division (DOJ) shut the vault doors on its 1995 Bank Merger Guidelines (https://bit.ly/4eFu4L0), leaving the 2023 Merger Guidelines (https://bit.ly/3zIGHGn) as its sole authoritative statement on the topic of mergers across all industries.

Although the impact of these updates will take time to reveal, it is likely that U.S. financial institutions will face new challenges in seeking to consummate mergers as a result.

Concurrently, two regulatory agencies that oversee U.S. financial institutions — the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) — announced the adoption of final policy statements that make significant changes to the agencies' frameworks for evaluating bank mergers.

These changes stem from a "collaborative process" by the three agencies and are consistent with the Biden administration's whole-of-government approach to regulation and enforcement and President Biden's 2021 Executive Order on Promoting Competition in the American Economy (https://bit.ly/3CVtg2J), which encouraged "the revitalization of [bank] merger oversight."

Although the impact of these updates will take time to reveal, it is likely that U.S. financial institutions will face new challenges in seeking to consummate mergers as a result. Importantly, the Federal Reserve Board — the lead regulator for regulating bank holding companies and other member banks — did not join in the statements and did not withdraw from the 1995 Bank Merger Guidelines.

DOJ

With the announcement of its withdrawal from the 1995 Bank Merger Guidelines — guidelines that had been relied upon for almost three decades — DOJ issued a 2024 Banking Addendum to 2023 Merger Guidelines (https://bit.ly/3ZEGPRU), stating that the 1995 Guidelines "contain modes of analysis that do not accurately reflect how the Antitrust Division currently reviews bank mergers."

Instead, DOJ will rely on its 2023 Merger Guidelines, which it views as a "more comprehensive and flexible framework to assess antitrust and competition considerations" in bank mergers. This change underscores DOJ's continuing efforts to widen the universe of potential competitive concerns that the agency may consider with respect to a particular merger.

Rather than tailor guidance to specific economic or industry sectors, DOJ has opted to promote the 2023 Merger Guidelines as a broad, one-size-fits-all model. Additionally, the 2024 Banking Addendum provides that, while other agencies may analyze bank mergers independently using their own criteria, DOJ's assessment of a merger's competitive impact can influence other agencies' reviews.

For example, if DOJ raises competition concerns in its review, that review could come to bear on the FDIC's or OCC's evaluation of the merger's convenience and impact on the community served by the merged firm.

FDIC

The FDIC approved a Final Statement (https://bit.ly/4eq0OrX) of Policy on Bank Merger Transactions that supersedes its prior statement from 2008. The new statement notes that the FDIC will emphasize a transaction's "substance over its form when determining whether it constitutes a merger transaction subject to FDIC approval" and will account for nonbank entities such as credit

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unions, thrifts, and Farm Credit System institutions when assessing the competitive effects of a merger, particularly in rural markets.

Under the FDIC's new framework, the agency will seek to "carefully balance the competitive effects" of mergers "with the public interest served by the capacity of the resulting [combined firm] to meet the convenience and needs of the community."

How the FDIC will achieve such a balance remains to be seen. The FDIC's analytical methods for evaluating bank mergers will continue to be informed by DOJ's evaluation of a merger's competitive effects. This means that, for mergers that draw scrutiny from both agencies, merging parties can expect the FDIC and DOJ to collaborate.

Indeed, the FDIC's Final Statement of Policy on Bank Merger Transactions recognizes explicitly its coordination with DOJ "in modernizing bank merger oversight," as directed by the president's July 2021 executive order, and states that when DOJ notifies the FDIC of the potential anticompetitive effects of a merger, the FDIC will undertake an evaluation.

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Additionally, the FDIC can and may independently evaluate the competitive effects of bank mergers where the merging parties "operate in the same geographic market(s)," even if DOJ does not give notice of potential competition-related issues.

In either case, the FDIC states that, before it will approve a merger, the merging financial institutions must show that any anticompetitive effects of the merger would be outweighed in the public interest by the probable effect of the merger in meeting the convenience and needs of the community served — a burden reminiscent of the obligation merging parties may face under the Clayton Act.

OCC

The OCC issued a final rule and policy statement (https://bit.ly/47OMqai) on its regulations for business combinations involving national banks and federal savings associations. Under the final rule, the OCC removed the expedited and streamlined review processes by which qualified merging parties could apply for expedited approval of a transaction and, if no issues arose, obtain approval 15 days after the close of the public comment period on the application.

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According to the OCC, this change is consistent with the agency's view that any business combination subject to a filing under the Business Mergers Act is a significant corporate transaction that requires close OCC consideration and should not be permitted to proceed based solely on the passage of time.

However, the OCC opted not to adopt a new or expanded competition-evaluation framework as part of its review process, choosing instead to rely on its "partnership with DOJ" in addressing competitive concerns.

Takeaways

- Financial institutions seeking to merge face uncertainty as a result of regulatory changes from DOJ, the FDIC, and the OCC. DOJ, consistent with prior practice, has adopted an addition-by-subtraction approach, removing long-standing industry-specific guidelines and, rather than replacing them, pointing instead to general guidance and case law and committing to evaluate mergers holistically. The FDIC, in contrast, has added to the scope of its competition-related review of bank mergers, aligning largely with the frameworks employed by DOJ and the Federal Trade Commission. The balance between the FDIC and the agencies traditionally tasked with evaluating competition-related issues will be important to monitor going forward, as will the extent of interagency collaboration on antitrust questions. And the OCC's regulatory changes, while largely procedural, signal that it will scrutinize bank mergers more closely in the future and that its partnership with DOJ on merger evaluation remains active and intact.
- It is unknown whether this updated approach to evaluating bank mergers will be maintained by the new administration; the revised policies could be substantially impacted by new leadership decisions. These changing policies highlight how important it will be for banking entities looking to acquire other banking organizations, to design and implement their planning process to consider these new issues, and to prepare for potentially longer merger review periods.

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This article was published on Westlaw Today on October 1, 2024.

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