October 2024

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Ch…Ch…Ch…Changes for Reviewing Bank Mergers Adopted

By Lawrence D. Kaplan, Jason Shafer, Stephanie Cannuli & Peter Kuri

On September 17, 2024, the Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC") issued final "statements of policy" for transactions subject to the Bank Merger Act ("BMA")[1]. On the same day, the Department of Justice ("DOJ") announced its adoption of the 2023 Merger Guidelines as the new analytical framework under which the DOJ will review antitrust issues in the bank merger context. Notably, the Board of Governors of the Federal Reserve System—the bank regulatory agency responsible for approving transactions involving bank holding companies and certain banks—has remained silent to date.[2]

At a high-level, the FDIC statement of policy:

- Requires an evaluation of a merger's competitive effects beyond deposits concentrations, including effects on small business loans and mortgage loans.
- Requires that a proposed merger should result in less financial risk than the risk posed by the separate institutions.
- Requires that the merged institution will better meet the convenience and needs of the community to be served.
- Signals additional scrutiny for transactions resulting in an institution with $100 billion or more in total assets.
- Signals public hearings for transactions that would result in an institution with more than $50 billion in assets.

The OCC policy statement includes general principles for that agency's review of applications under the BMA and introduces "favorable" and "unfavorable" indicators. Applications with all of the "favorable" indicators are more likely to withstand scrutiny and be approved expeditiously. By contrast, applications with "unfavorable" indicators raise supervisory or regulatory concerns that most likely need to be resolved prior to OCC approval. In addition to these general indicators, the OCC's policy statement discusses the agency's approach to evaluating the following statutory factors under the BMA—financial stability, managerial and financial resources and future prospects, and convenience and needs—and describes the OCC's decision process for extending the public comment period or holding a public meeting.

In principle, the FDIC, OCC, and DOJ have had the authority to review bank merger applications in the manner described in their respective guidance documents. Nonetheless, by memorializing heightened expectations for bank merger transactions, these comprehensive updates mark a significant shift in the bank merger review process.

We discuss five key takeaways from the revised policies:

I. The respective changes by the DOJ and FDIC to their review of competition issues creates uncertainty for transactions that involve complex banks or banks that are not community banks.

In announcing its withdrawal from the 1995 Bank Merger Guidelines, the DOJ stated that those guidelines "contain modes of analysis that do not accurately reflect how the Antitrust Division reviews bank mergers." Instead, the DOJ will evaluate bank merger proposals according to its 2023 Merger Guidelines, which "sets forth a comprehensive approach to merger review in every industry, including banking." The 2023 Merger Guidelines are stricter than the 1995 Bank Merger Guidelines (and previously trans-industry merger guidelines) in that there is a rebuttable presumption that a transaction harms competition when a transaction increases the Herfindahl-Hirschman Index (HHI) by more than 100 points in a market where either the HHI is greater than 1,800 or where the merged firm's market share is greater than 30 percent. In addition, the DOJ's "2024 Banking Addendum to the 2023 Merger Guidelines" describes the agency's statutory role in reviewing bank mergers and provides that the DOJ may evaluate the competitive effects of a proposed merger in the context of the following areas:

- Competing lines of business (*e.g.,* branch overlaps in geographic areas)
- Products or services used by competing banks
- Patterns or strategies of serial bank mergers
- Mergers involving financial networks or platforms

While the DOJ's announcement that it will rely on the 2023 Merger Guidelines is not surprising given statements from DOJ principals over the past five years, the application of the 2023 Merger Guidelines to bank mergers adds uncertainty to the bank merger review process. The 2023 Merger Guidelines contain significant ambiguities relative to the 1995 Bank Merger Guidelines and to previously-issued trans-industry merger guidelines. Under the DOJ's new framework, the outcome of the DOJ's analysis becomes less predictable and potentially could lead to delays in reviewing BMA applications due to a lack of coordination between the DOJ and the reviewing federal banking agency(ies). The lack of coordination could lead the DOJ to more aggressively exercise its authority to litigate bank mergers on federal antitrust law grounds.[3]

In addition, the FDIC's updates to its evaluation of competitive issues creates uncertainty for those transactions that involve complex banks or banks that are not community banks. The FDIC will consider both geographic and product markets when evaluating competitive issues presented by a proposed transaction subject to the BMA and "*will* consider concentrations beyond those of based on deposits." Potentially helpful to applicants, the FDIC statement makes clear that the agency will consider all relevant market participants, which may include other financial service providers (e.g., credit unions, thrifts, Farm Credit System institutions), including "providers located outside the geographic market when it is evident that such providers materially influence the market." Some have raised questions about whether the FDIC has access to the data necessary to perform the comprehensive review of competition issues contemplated in its final policy (which raises the question: will the FDIC place the onus on the applicants to provide such data and analysis?). The FDIC states that it "may require divestitures of business lines, branches, or portions thereof" as a condition of approval.

II. "Larger" bank mergers likely will face heightened scrutiny.

While federal law already imposes size limitations on bank mergers,[4] the policy statements publicly state that the FDIC and OCC will apply heightened scrutiny to a transaction that would result in an institution that exceeds specific asset thresholds. Under the OCC policy statement, a proposed transaction in which the resulting institution will have total assets of less than $50 billion will be viewed by the OCC as a "positive" indicator that an application may be approved expeditiously. Meanwhile, under the FDIC policy statement, a proposal in which the resulting institution will have total assets of $100 billion or more will be viewed as more likely to present financial stability concerns and therefore will receive additional scrutiny. In addition, the FDIC policy provides that an application where the combined bank would have greater than $50 billion in total assets will generally be subject to a public hearing.

Although each policy statement clarifies that these asset thresholds will not be the dispositive issue in evaluating if an application is approvable, the inclusion of these specific asset thresholds in the final policy statements raises questions about whether mergers involving larger banks can secure regulatory approval in the ordinary course.

III. The FDIC expects applicants to meet a high*[er]* standard to satisfy the convenience and needs factor of the BMA.

For a proposed merger between two insured depository institutions ("IDIs") for which the FDIC is the reviewing agency (i.e., the resulting bank is a state-chartered nonmember bank), the FDIC emphasizes that applicants are expected to demonstrate that the resulting bank will be able *to better* meet the convenience and needs of the community to be served than would occur absent the merger.[5] The FDIC's policy statement places greater emphasis on the resulting institution's ability to demonstrate how the proposed transaction will benefit the public in the future—by providing "specific and forward-looking information to enable the FDIC to evaluate the expected benefits of the merger on the convenience and needs of the community to be served." Additionally, the FDIC's policy statement noted that "any claims and commitments made to the FDIC to support the evaluation of the expected benefits" may be included in any approval order issued and enforced by the FDIC.

The FDIC's policy statement may lead to a potential divergence between the federal banking agencies in their analysis of the same factor under the BMA, adding further uncertainty to the likely outcome of an application. The risk of misalignment between federal banking agencies in their evaluation of this factor is heightened by the absence of guidance or criteria for what an applicant must demonstrate to meet the FDIC's "better" threshold. If the FDIC applies a more stringent standard than the OCC or Federal Reserve, market participants may find it beneficial to structure the transaction to avoid the FDIC's review (for example, by structuring a merger transaction so that the resulting bank is a national bank).

IV. The FDIC affirms a broad interpretation of its jurisdiction under the BMA.

Emphasizing "substance over form," in its assessment of whether a transaction is subject to the BMA, the FDIC's policy statement asserts the agency's jurisdiction over a wide range of transactions. Such transactions include: (i) acquisitions by an IDI (regardless of charter) of a non-insured entity; (ii) transactions when an IDI absorbs all (or substantially all) of a target entity's assets and the target entity dissolves (or otherwise ceases to engage in the acquired line(s) of business such that the target is no longer a viable competitor), (iii) transactions involving an IDI's assumption of deposits (from another IDI or a non-insured entity), even in the absence of an express agreement for a direct assumption, and (iv) a transfer of deposits from any IDI to a non-insured entity. In addition, the FDIC states that FDIC approval may be required if a proposed merger occurs through a series of related transactions (such as transactions effected through interim institutions) or through a single transaction. A bank contemplating a transaction (or potentially a series of transactions) involving a non-bank will need to consider whether a BMA application with the FDIC is required and, if potentially so, whether there are alternative ways to structure the transaction that would achieve the goals of the organization that would not trigger a BMA application.

V. National Banks should expect to dedicate significantly more time and resources to filing BMA applications with the OCC, even for "simple" transactions.

The OCC eliminated its expedited review procedures and streamlined application forms, which previously could be used in certain specified situations involving less complex transactions, including mergers of affiliates. As a result, all bank merger applicants will need to complete the full interagency BMA application, even for "simple" transactions (for example, branch acquisitions involving deposit assumptions). Although the OCC may, in principle, tailor the information it requests as part of the BMA application, the preamble to the OCC policy offers little comfort that applicants will be expected to provide anything less than a complete BMA application and supplementary information.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Washington, D.C.

Lawrence Kaplan
1.202.551.1829
lawrencekaplan@paulhastings.com

Peter Kuri
1.202.551.1919
peterkuri@paulhastings.com

Jason Shafer
1.202.551.1700
jasonshafer@paulhastings.com

New York

Stephanie Cannuli
1.212.318.6763
attorney@paulhastings.com

1 The OCC Policy Statement will be codified as appendix A to Part 5, subpart C. The FDIC's Statement of Policy on Bank Merger Transactions supersedes the agency's existing Statement of Policy, which was last revised in 2008. In addition, as discussed below, the OCC adopted a final rule changing its procedures related to the availability of expedited procedures and the streamlined bank merger application form.

[2] We note that the DOJ's announcement that it is relying on the 2023 Merger Guidelines for bank mergers states that the decision "was the result of a collaborative consultative process with . . . the Federal Reserve, [FDIC], and [OCC]."

[3] Under the BMA, the DOJ is authorized to commence an action under federal antitrust laws (*i.e.*, the Clayton Act and Sherman Antitrust Act) to stay a merger after the responsible federal banking agency approved the transaction.

[4] *See*, *e.g.*, The BMA generally prohibits interstate mergers in which the resulting IDI would control more than 10 percent of the deposits of IDIs in the United States, 12 U.S.C. § 1828(c)(13); Mergers of banks generally are prohibited if the ratio of the resulting financial company's liabilities to the aggregate consolidated liabilities of all financial companies exceeds

10 percent aggregate consolidated liabilities of all financial companies at the end of the calendar year preceding the transaction. 12 U.S.C. § 1852(b).

[5] Commenters raised several concerns with the "better than" standard, including that it is not supported by the statute. In addition, FDIC Vice Chair Travis Hill "oppose[d] imposing an affirmative burden on applicants to demonstrate the merger would better meet the convenience and needs of the community" because he remains "unpersuaded by the preamble's suggestion that Congress intended a mandate that the FDIC 'take into consideration' the convenience and needs of the community to impose an affirmative burden on applicants." Statement by Vice Chairman Travis Hill on the FDIC's Final Statement of Policy on Bank Merger Transactions (Mar. 21, 2024).