

## **2024 Banking Addendum to 2023 Merger Guidelines**

The Antitrust Division reviews bank mergers under the antitrust laws to ensure the preservation of competition in all aspects of banking and financial services. In December 2023, the Antitrust Division issued comprehensive Merger Guidelines that describe the procedures and enforcement practices the Division most often uses to investigate whether mergers violate the antitrust laws. Informed by modern market realities, the 2023 Merger Guidelines set forth a comprehensive approach to merger review in every industry, including banking.<sup>1</sup> At the same time, the 1995 Bank Merger Guidelines contain modes of analysis that do not accurately reflect how the Antitrust Division currently reviews bank mergers. The Antitrust Division is therefore withdrawing from the 1995 Bank Merger Guidelines and relying on the 2023 Merger Guidelines and its comprehensive and flexible framework to assess antitrust and competition considerations in connection with bank mergers.

This commentary identifies portions of the 2023 Merger Guidelines that the Antitrust Division considers to be frequently relevant when evaluating the competitive consequences of a bank merger. For the avoidance of doubt, references to the 2023 Merger Guidelines in this commentary are illustrative and not exhaustive.

This commentary focuses on how the Antitrust Division assesses competition in bank mergers in exercising its law enforcement authority under the Clayton Act and in formulating its report to the banking agencies pursuant to 12 U.S.C. § 1828(c)(4). As with the 2023 Merger Guidelines, this commentary aims to promote transparency into the Antitrust Division’s merger review process but does not create rights or obligations of any party under the laws governing mergers of banks and bank holding companies. Nor does this commentary bind the discretion of the Antitrust Division or any other agency reviewing a bank or bank holding company merger. As with the 2023 Merger Guidelines, this commentary has been refined through an extensive public and interagency consultation process.

### **1. Substantive Considerations in Bank Merger Review**

The Supreme Court has explained that “[c]ompetition among banks exists at every level”<sup>2</sup> and that because every market and every sector of the economy depends on banking,<sup>3</sup> “the proper discharge of [banks’] functions is indispensable to a healthy national economy...”<sup>4</sup> Accordingly, the Antitrust Division enforces the law to protect competition in banking at every level and for every American. The 2023 Merger Guidelines reflect the most comprehensive and up-to-date framework to address competition in the context of the immense and multi-dimensional portion

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<sup>1</sup> See Dep’t of Justice & Fed. Trade Comm’n., *2023 Merger Guidelines*, (Dec. 18, 2023), available at <https://www.justice.gov/atr/2023-merger-guidelines>.

<sup>2</sup> *United States v. Philadelphia National Bank*, 374 U.S. 321, 368 (1963) (listing as examples “price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, [and] miscellaneous special and extra services”).

<sup>3</sup> *Id.* at 370 (explaining that because businesses rely on access to competitive banking services, “concentration in banking accelerates concentration generally”).

<sup>4</sup> *Id.* at 327.

of our economy often referred to broadly as “banking.” For example, mergers involving banks with competing lines of business (e.g., branch overlaps in a geographic area) may raise concerns pursuant to Guidelines 1, 2, or 3. Similarly, mergers involving products or services used by competing banks may implicate Guideline 5. Patterns or strategies of serial bank mergers may implicate Guideline 8. Mergers involving financial networks or platforms may benefit from analysis pursuant to Guideline 9, and so on.

As with any merger, the Antitrust Division begins bank merger review by analyzing market realities to determine how competition presents itself in the context of the particular transaction. For example, banks may compete in the interest rates they offer depositors, the variety of mortgages they offer borrowers, the convenience and quality of service at branch locations, and customer service, among many other things. As part of its analysis, the Antitrust Division identifies the distinct products and services that the bank merger may affect, before assessing the potential for competitive harm.

Similarly, many groups of customers benefit from competition in banking. Corporations may have unique needs for large or bespoke financing. Small businesses like non-profit organizations or local stores may need specific kinds of credit products or institutional expertise. In some cases, economically underserved individuals or customers with low credit scores may likewise have specialized demand appropriate for analysis as a distinct product market. Accordingly, the Antitrust Division considers whether there is appreciable harm to identifiable and distinct groups of customers. (See Merger Guidelines Section 4.2).

As it does with all types of mergers it reviews, the Antitrust Division evaluates competition in banking on a market-by-market basis with particular attention to protecting competition in every relevant market. And as with other types of mergers, even when evidence suggests that a merger may substantially lessen competition in a relevant market, the Antitrust Division also evaluates rebuttal evidence. (See Merger Guidelines Section 3).

## **2. Bank Merger Review Procedures**

The Antitrust Division’s bank merger review process is only one part of the statutory scheme for analyzing the legality of bank mergers. Mergers of banks and bank holding companies generally are not subject to the Hart-Scott-Rodino Act procedures.<sup>5</sup> Instead, the Bank Merger Act and Bank Holding Company Act govern bank mergers,<sup>6</sup> and in addition to the Antitrust Division, the merging parties’ banking regulators review mergers pursuant to all relevant authorities.<sup>7</sup>

The Antitrust Division’s review focuses only on the competitive factors involved in a bank merger. This competitive factors analysis does not independently address the other statutory

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<sup>5</sup> These mergers can be subject to the Hart-Scott-Rodino Act in some circumstances. *See* 15 U.S.C. § 18a(c).

Companies must determine for themselves whether a merger or acquisition involving the purchase or sale of a bank or bank holding company, or any assets thereof, are subject to the Hart-Scott-Rodino Act.

<sup>6</sup> *See* 12 U.S.C. § 1828(c); 12 U.S.C. § 1841 *et seq.*

<sup>7</sup> *See* 12 U.S.C. § 1828(c); 12 U.S.C. § 1841 *et seq.*

factors considered by the banking agencies.<sup>8</sup> Nonetheless, competition concerns may impact other factors such as the convenience and needs of the community, and bank regulators may choose to take these competitive considerations under advisement when assessing these other factors.

Once the Antitrust Division has concluded its competition review of a merger, it provides its views to the respective banking agency reviewing the banks' merger application.<sup>9</sup> The banking agencies may then consider the Antitrust Division's competitive factors report as part of their respective review processes. The Antitrust Division may, at its discretion, challenge the legality of a merger transaction pursuant to relevant enforcement authorities following approval by the relevant banking agency. Filing of a legal challenge by the Antitrust Division pauses the effectiveness of a banking agency's approval of the deal pending federal court review.<sup>10</sup>

Throughout the review process, the Antitrust Division works closely with the relevant bank regulators to ensure the complementary and consistent application of the laws within each agency's area of expertise. The banking agencies may, at their discretion, use their own methods for screening and evaluating bank mergers.

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<sup>8</sup> See 12 U.S.C. § 1828(c)(5)(B) (statutory factors). When conducting its competitive factors analysis, the Antitrust Division will consider whether a merger may increase systemic risk insofar as a transaction increases the risk of a single point of failure for a specific group of customers, but the banking agencies are the sole reviewers of whether a transaction creates such risk for reasons unrelated to competition.

<sup>9</sup> See 12 U.S.C. § 1828(c)(4). The Antitrust Division provides this report to the banking agencies under authority delegated to it by the Attorney General. See 28 C.F.R. 0.40(d). In certain circumstances, the banking agencies may act on a merger application without requesting the views of the Antitrust Division. See 12 U.S.C. § 1828(c)(4)(C).

<sup>10</sup> Unless otherwise ordered specifically by the court. 12 U.S.C. § 1828(c)(7)(A). Should the Antitrust Division choose to challenge a transaction that the banking agencies approve, that challenge proceeds under a standard that includes consideration of the full range of factors considered by the banking agencies. See 12 U.S.C. § 1828(c)(7)(B).