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Bringing the DOJ's Bank Merger Guidelines into the 21st Century: How Certain Revisions Could Help Community Banks

Legal Update

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In fall 2020, the Department of Justice's Antitrust Division issued a press release providing background and seeking public comment on a potential update to the Division's 1995 Bank Merger Competitive Review Guidelines (Bank Guidelines). The Division's Bank Guidelines have remained virtually unchanged since first published 25 years ago. Small and community banks could benefit from updates to the Bank Guidelines.

DOJ's Current Bank Guidelines – Background and Effects on Community Banks

The Division uses the Bank Guidelines to ensure proposed mergers do not have significant adverse effects on competition. It conducts an initial review of a proposed transaction by reviewing a two-step screening process. Screen A is most used by the banking agencies when conducting a competitive analysis. Screen A identifies the market area and uses the Herfindahl-Hirschman Index (HHI) threshold to assess the competitiveness of a market by adding together the market shares of deposits of each bank in that particular market. Generally speaking, if a bank merger does not exceed the standard HHI threshold, the banking agencies are unlikely to review further the competitive effects of the merger unless there are additional concerns.

If a bank merger exceeds the standard HHI threshold, the merging banks must submit additional information in Screen B, which analyzes the HHI in the market areas where the merging banks make commercial loans. Because the Division is independent from banking agencies, it retains the discretion to investigate any merger transaction if it finds there are competitive concerns.

Under the Bank Guidelines, it has been difficult for small banks and community banks in rural areas to merge due to the market definitions. The market definitions are narrow, and rural communities often have only a few small banks representing the physical banking presence in the market. This leads to a higher market concentration, and when considering a merger or acquisition, may cause these banks to exceed the HHI threshold. Therefore, mergers among smaller institutions in these rural geographies are much less likely to be approved because they appear to be anticompetitive. It is also worth mentioning that the Bank Guidelines and competitive analysis may not give appropriate weight to the increased competition from mobile/online lenders, credit unions, thrifts, or farm credit agencies.

DOJ’s Request for Comment

The Division received several comment letters from regulators, industry trade groups, and consumer protection/advocacy groups. While each of these groups had a different approach and reasoning for their arguments regarding the Bank Guidelines, most if not all agreed that the Bank Guidelines are in need of an update.

Notably, regulatory agency and industry trade group commentary argued for a higher HHI threshold for small and community banks in rural markets due to the high market concentration in these areas. Increasing the HHI threshold for these banks in rural markets would lessen the likelihood that a merger between two smaller institutions would exceed the HHI threshold, ultimately resulting in more opportunity for smaller mergers to succeed. Regulatory agencies and trade groups also encouraged the Division to consider non-traditional banks, credit unions, and savings associations in its competitive analysis and revise its market definitions. Not including these institutions in the competitive analysis underestimates the level of competition from them, especially in rural markets. Including them in a revision to the Bank Guidelines would more accurately account for the level of competition between these institutions and small and community banks in rural markets.

These agencies and trade groups were also in support of a de minimis exception for small transactions. This could potentially allow such banks to merge based on an automatic report of competitive factors issued by the Division and given directly to the relevant banking agencies, thereby eliminating the need for the Division’s own review and allowing banks to merge without having to undergo what is often a lengthy and expensive review process.

If the Division chooses to adopt these revisions, small and community banks may be the institutions that benefit most. These changes could allow for an increase in merger opportunities for rural small and community banks which in turn would allow small banks to maintain a physical banking presence and connections in the communities they serve.