Office of the Comptroller of the Currency

Washington, DC 20219

October 1, 2020

Rene Augustine, Deputy Assistant Attorney General
Antitrust Division, U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Subject: Response to Department of Justice Antitrust Division's Request for Public Comments on Updating Bank Merger Review Analysis

Dear Deputy Assistant Attorney General Augustine:

This letter is in response to the Department of Justice Antitrust Division's (DoJ's) request for comments on updating its 1995 Bank Merger Competitive Review Guidelines (1995 Banking Guidelines). The OCC recognizes the evolution of banking products and markets and how both have been expanded by advances in technology that have increased the range of options available to consumers and businesses. The OCC is pleased to provide comments to the DoJ to better analyze the competitive effects of bank mergers. To that end, we have provided the answers to the questions that you raised in your September 1, 2020, request for comments.

Guidance Generally

1. *To what extent, if at all, is it useful to have banking-specific merger review guidance, beyond the 2010 Horizontal Merger Guidelines?*

The banking industry is highly regulated. Historically, the banking industry has merited special consideration in the antitrust context, beyond the general antitrust guidance that the DoJ has issued, including the 2010 Horizontal Merger Guidelines. Due to the nature of banking regulation and the evolution of the mission and functions of banks, the OCC believes that it would be useful for the DoJ to retain banking-specific merger review guidance. As detailed in the answers to the questions below, the OCC supports the DoJ in updating its 1995 Banking Guidelines to reflect changes in the banking industry, especially with respect to special purpose financial institutions whose focus does not include traditional deposit-taking activities.

2. *To what extent, if any, does the industry need greater clarity on how the Division applies the 2010 Horizontal Merger Guidelines in its investigations?*

The 2010 Horizontal Merger Guidelines address the analysis of competitive effects across the entire spectrum of American economic activity. Due to the unique and highly regulated nature of banking in America, the OCC would support using banking-specific guidelines, such as what is contained in the 1995 Banking Guidelines. These banking-specific guidelines could be updated to better account for banking-specific transactions, particularly in situations involving non-deposit-related banking services and products. To the extent that the DoJ would like to employ concepts or methods from the 2010 Horizontal Merger Guidelines for changing its analysis of banking markets and the 1995 Banking Guidelines, the OCC recommends that such changes be clarified to specify when and how the changes would work with respect to banks.

3. *To what extent, if any, is it helpful to have joint guidance from the Antitrust Division and the banking agencies, i.e., the Federal Reserve Board of Governors (FRB), the Office of Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC)?*

Joint guidance from the DoJ and all the federal banking agencies would be helpful to the banking industry. It would prevent forum shopping for bank mergers when the different characteristics of a merger would be evaluated differently by the DoJ and individual bank regulatory agencies. However, the OCC believes that the DoJ's current efforts to update DoJ's bank merger guidance are also beneficial and supports the DoJ in doing so. Because the DoJ has a broad perspective over the entire American economy, it may be beneficial to have the DoJ establish policy independent of what other federal regulatory agencies choose to do.

Herfindahl-Hirschman Index (HHI) Threshold

4. *Should the screening thresholds in the 1995 Banking Guidelines be updated to reflect the HHI thresholds in the 2010 Horizontal Merger Guidelines? If so, please explain why with evidence, if available.*

As stated above, the OCC supports retaining guidance specific to the banking industry in the antitrust context. Accordingly, the OCC does not believe that the 1995 Banking Guidelines need to be updated to reflect the HHI thresholds in the more general 2010 Horizontal Merger Guidelines, which apply to other industries. The HHI measure may not be the most useful measure for gauging competition, especially in lending markets. The core question is whether the merged company will be able to raise prices or not. Pricing for loans or payment services aren't necessarily correlated with deposits. The OCC supports the DoJ in evaluating whether the HHI measure and the focus on deposits as a basis to determine the competitive effects of a merger are still appropriate in light of the changes to the banking industry over the last twenty-five years, especially when considering the effects of mergers between large financial institutions and financial institutions whose core business does not involve taking deposits.[1]

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[1] For example, see Calomiris, Charles, and Thanavut Pornrojnangkool. "Monopoly-Creating Bank Consolidation? The Merger of Fleet and BankBoston." Working Paper No. 11351, NBER, May 2005.

Relevant Product and Geographic Markets

5. *Depending on the transaction, the Division generally reviews three separate product markets in banking matters: (1) retail banking products and services, (2) small business banking products and services, and (3) middle market banking products and services. Are there additional product markets that the Division should include in its analysis?*

The OCC supports the DoJ's consideration of separate markets for banking products and services when appropriate. For example, for retail banking, competition in the mortgage lending market may be different than that in the credit card market. The OCC specifically encourages the DoJ to consider further segmentation of the product market for middle market banking products and services, where antitrust concerns may go beyond deposit-related products and services. For example, middle-market firms may be large enough that their lending needs cannot be met by small community banks, but not large enough to be able to rely on global lenders or capital markets at an affordable cost. They rely on competition among regional and nationwide banks in middle market lending to provide them with competitively priced loans. Excessive concentration at the regional level in the market shares of middle market lending by regional and nationwide banks are important to track to ensure competition. It is also conceivable that underwriting of securities for middle market firms would be another area in which regional competition could be weak.

6. *The 1995 Banking Guidelines specify that the Division screens bank merger applications using the FRB-defined geographic markets and/or at a county-level. Should there be other geographic market definitions used in the screening process? If so, what should they be and why?*

The OCC supports the consideration of other geographic market definitions when appropriate for banking products and services. For example, in the case of credit cards, providers may compete regionally or nationally rather than at the county level. Similarly, the market for certain lending products or for bank processing services may be regional, national, or international in scope. For example, for lending to middle market firms, the focus should be on regional competition, as these firms can operate beyond the confines of a county or state. In this scenario, the geographic market can be specified at the regional level and defined to be roughly the size of a Federal Reserve Bank District or a Census Region.

7. *Should the geographic markets for consumer and small business products and services still be considered local?*

The OCC supports defining geographic markets in a way that is appropriate to the specific product or service in question, based on the dynamics of the market and where consumers have access to reasonable alternatives. In some cases, competitors for consumer and small business products and services may be local, whereas in other cases, competitors may be regional or national. The OCC also believes that geographic market analysis should consider the availability of these products and services online.

Rural versus Urban Markets

8. *The dynamics of rural and urban markets can differ significantly. In what ways, if at all, should these distinctions affect the Division's review?*

The OCC supports considering the differing dynamics of rural and urban markets in the DoJ's review of bank mergers. The OCC recognizes the difficulty for rural financial institutions to operate profitably. The OCC would recommend that the DoJ take this into consideration when analyzing the anticompetitive impact of a bank merger in a rural market that may no longer be able to support as many competitors as had previously operated in that market. At the same time, the Farm Credit System offers an important additional source of competition, and this must be taken into account when considering lending competition in rural areas. Also, in some geographic areas, farm sizes are either small (and therefore able to be serviced competitively by a few local banks and the Farm Credit System) or very large (and able to access to national lending or capital markets), implying that the potential problems associated with middle market lending for industry in some case may not apply to agriculture.

9. *Should the Division apply different screening criteria and HHI thresholds for urban vs rural markets? If so, how should the screening criteria and the thresholds differ?*

HHI thresholds are not necessarily the right measures to apply to understanding competition in lending markets. Economic theory suggests that strategic pricing by competitors can sometimes be competitive even when HHI measures might suggest otherwise. Small farmers operating in rural markets may see less competition for banking products and services because of the difficulty small financial institutions have operating profitably and safely within them. For example, rural non-bank mortgage lenders are required by the market to maintain three times the equity capital ratios of rural banks in those areas, which is suggestive of the greater risks associated with undiversified local agricultural lending. The OCC believes that the DoJ should consider the dynamics of these markets when setting screening criteria and recognize the limitations of HHI thresholds for capturing the competitive landscape. Mindful of those considerations, it may make sense to apply less stringent HHI standards for rural markets (*i.e.*, allow higher changes in HHI for bank mergers in rural markets). Perhaps more important than the thresholds of HHI screens, however, is to develop an approach that is less focused on deposits as a proxy for market power. The DoJ should consider analyzing non-deposit-related markets for banking products and services, as well as the access that consumers and small businesses have to these markets.

10. *The Division often considers farm credit lending as a mitigating factor. Is there a more appropriate way to measure the actual lending done by farm credit agencies in rural markets?*

The OCC believes that the provision of credit to farmers is important and encourages the DoJ to tailor its competitive analysis to the specific lending products and geographic markets at issue, including capturing the effect of lending by farm credit agencies when applicable. As you know, the existence of the Farm Credit System provides a competitive check on local banks, and vice versa, and should be accounted for in the analysis of this market. The Farm Credit System's operations differ in important respects across different regions, and therefore, a region-specific analysis of the competitive landscape would be desirable.

Non-Traditional Banks

11. Should the Division include non-traditional banks (e.g., online) in its competitive effects?

The OCC supports the consideration of non-traditional banks in the DoJ's competitive analysis. Since 1995, the number of internet banks and other banks whose business models generate deposits or provide lending products from areas not tied to their physical location have become a significant presence in the banking industry.

12. Does the Division give appropriate weight to online deposits?

As stated above, the number of internet banks and other non-traditional banks offering online deposit and lending products have increased. Accordingly, the OCC encourages the DoJ to consider and give more weight to online deposit and lending products in its competitive analysis.

13. Does the Division give appropriate weight to credit unions and thrifts?

The OCC believes that more weight should be given to thrifts and credit unions. In particular, the National Credit Union Administration has significantly loosened its restrictions in the last decade such that credit unions can now more directly compete with banks. In addition, the powers of federal and state savings associations have become almost identical to that of national banks and state banks across are variety of products and services. Therefore, the effect of competition from savings associations on the market for banking services should be considered to be greater than it was previously.

14. Given that the geographic dispersion of deposits from online banks is not publicly available (by market or branch), suggest how these institutions can be incorporated into screening and competitive effects analysis.

The OCC supports considering deposits from all sources, including online banks, in the DoJ's competitive analysis. The DoJ should consider, however, alternatives to using a deposit based HHI index and reevaluate its reliance on deposits as a surrogate for market power. One alternative to consider is using data from product markets, such as the markets for business and consumer lending when available. For example, data collected under the Home Mortgage Disclosure Act may be useful for some markets in considering home lending products. As opposed to applying it only to deposit markets, an HHI index based on lending data also could be applied to evaluate the competitive effects of a merger and to determine whether competition is occurring or not. But there are limitations of the HHI as a measure of competition. Therefore, the DoJ should consider circumstances where any HHI index, whether based on deposits or some other product, does not directly translate into market power because of other factors in the competitive environment.

De Minimis Exception

15. *Should the Division implement an internal de minimis exception for very small transactions whereby the Division would automatically provide a report on the competitive factors of the transaction to the responsible banking agency but would not conduct an independent competitive effects analysis of these deals? If so, what would be an appropriate de minimis size of transaction?*

The OCC supports the creation of a *de minimis* exception in circumstances where one or more of the banks in a merger are so small as to bring into question their long-term viability. The *de minimis* exception should be applied to situations where the resulting entity has assets of $100 million or less or if the acquisition involves a target financial institution with assets of $25 million or less. This approach, however, should be done carefully, so as not to reduce competition in markets where the only effective competitors for a specific product are much smaller institutions.

Again, the OCC appreciates having the opportunity to provide comments and strongly recommends that the two agencies maintain an open dialog on this important issue. The OCC would be happy to meet with the DoJ to further discuss and clarify our comments.

Sincerely,

Stephen A. Lybarger
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