



Missouri Bankers Association

October 14, 2020

United States Department of Justice
Antitrust Division
Washington DC

RE: Antitrust Division Banking Guidelines Review

VIA: ATR.BankMergers@usdoj.gov

Dear Ladies and Gentlemen:

The Missouri Bankers Association appreciates the opportunity to comment on the Antitrust Division Banking Guidelines.

The MBA believes that it is imperative for the Justice Department and the bank regulatory agencies (Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of Currency) to incorporate an express discretionary exception and standard that allows the agencies to preserve community banks and public access to financial services through a community bank financial services channel. This is a critical concern in rural or sparsely populated markets. The DOJ and the agencies should set out criteria for a community banking preservation exception to the application of formulative competitive concentration measures. The exception would allow community banks in rural and sparsely populated markets to merge with a local competitor or to acquire branches even though a formulative review shows an anti-competitive impact.

A community banking exception could actually promote competition by reducing the number of branch closures and by retaining a community bank presence in a community that would otherwise see reduced access to the service, relationship value, and convenience offered by traditional community banks.

More directly to the comments request, the MBA concurs that the application of the Herfindahl-Hirschman Index (HHI) as applied should be revised to so that the Justice Department (with the assistance of the bank regulatory agencies) include measures to account for the competitive market impact of non-bank providers of financial services and digital on-line financial services provided by banks and non-bank providers of financial services in competition with community banks.

There should be a community banking preservation exception:

In 1990 there were 15,158 banks. On September 30, 2020 there were 5,052 banks – a 67% decrease. Rural and sparsely populated areas are particularly harmed when a community bank

closes. Adverse demographic changes, high regulatory costs and barriers to entry, have contributed to the decline in bank numbers. Unfortunately, arbitrary application of the HHI index has also contributed to a loss of community-based banks and perversely concentrated and reduced competition.

For example, in a small or rural market served by five banks with one of those having over 50% of the market, if the 5th smallest bank proposes selling a facility (or seeking a merger) to the 4th smallest bank, the 4th would still be 4th – and this bank facility sale (or merged bank) would not cause them to move up the list, just eliminate the 5th bank. The Federal Reserve did not approve a transaction in this scenario due to the HHI competitive analysis. This despite showing that many people in that town/county drove to larger nearby metropolitan areas for work, shopping, etc.

So, the bank with the smallest branch – since the bank could not sell (or merge) to the interested bank - just closed the branch. As those customers disbursed about half ended up at the biggest bank in town (tracking to its 50% market share) making the largest bank even bigger and the market more concentrated. A sale to the 4th largest bank would have limited the concentration in this market as compared to the outcome of denying the branch sale or bank merger.

Under 12 USC 1828(c) the banking agencies are required to consider the competitive impact of bank mergers or facility acquisitions, including the report on “competitive factors” provided by the Department of Justice. However, section 1828(c)(5)(B) provides the applicable bank supervisory agency express power to approve a transaction even with anticompetitive effects - if:

(5) ...

(B) ...

it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system.

Another factor to consider involves the safety and soundness of the banks and the risks to the bank insurance fund. Many times, in an area with adverse demographic trends, a merger of local banks can improve the condition of the surviving bank. Similarly, the economic viability of banks in a market is an express consideration in the charter of new state banks. the Missouri Commissioner of Finance is required to consider the convenience and needs of the community as well as the *adverse competitive impact on existing banks* in granting a new bank charter:

362.040. Notice of refusal of certificate — appeal. — In case the director shall not be satisfied, as the result of the examination, that the character, responsibility and general fitness of the persons named in the articles of agreement are up to the standard above provided, or *that the convenience and needs of the community to be served justify and warrant the opening of the new bank* or trust company therein, *or that the probable volume of business in such locality is sufficient to insure and*

maintain the solvency of the new bank and the solvency of the then existing banks or trust companies in the locality, without endangering the safety of any bank or trust company in the locality as a place of deposit of public and private moneys; and on these accounts or any one of them shall refuse to grant the certificate of incorporation, the director shall forthwith give notice thereof to the proposed incorporators from whom the articles of agreement were received, who, if they so desire, may within ten days thereafter appeal from the refusal to the state banking and savings and loan board.

Section 362.040, Revised Statutes of Missouri.

Bank supervision and the decision to charter or insure a new bank necessarily considers bank viability, including the need to limit, or avoid potentially destructive competition, even though this necessary safety and soundness based action is inherently anti-competitive.

The banking agencies should coordinate with the DOJ to establish bright lines for a community bank preservation exception even where the HHI analysis shows a horizontal merger to present anti-competitive impact. The exception would be to preserve a robust community bank financial services presence in a community as well as to promote the solvency and safety of a community bank and to allow that bank to gain the critical size or strength to compete with alternative and digital financial service providers.

Guideline Comments:

Guidance Generally

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

The MBA endorses the DOJ and bank supervisory actions to establish a banking-specific merger review guidance. The public is benefitted, not harmed, by guidelines, criteria and even exceptions, that allow a community to retain a community bank channel to obtain financial services. Banking presents similarities to public utility regulation that seeks to assure that a supervised business can viably meet community needs.

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

Greater clarity is needed. A merger or branch application presents considerable costs and risks in performing due diligence. An investment in a community is less likely where the costs are high, including the costs to refute an adverse finding, and where the outcome is highly uncertain. Greater clarity and a community bank preservation exception will encourage investments by banks to meet the needs of a community.

- 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 is imperative. Joint guidance fixes responsibility and accountability of the DOJ and the supervisory bank agencies. Joint guidance promotes fair and consistent outcomes across the United States and between similarly situated communities. Joint guidance will allow the DOJ to develop guidelines in conjunction with the knowledge and expertise of the supervisory bank agencies, places all authorities on the same page, and offers the best means to integrate the exception power of the bank supervisory agencies with the DOJ review and guidelines.

Herfindahl-Hirschman Index (HHI) Threshold

- 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.

The DOJ and the supervisory bank agencies should develop appropriate screening thresholds that account for regulatory and supervisory powers and constraints. Thresholds can be comparatively relaxed in banking because banks are closely supervised and regularly examined.

Relevant Product and Geographic Markets

- 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?

Financial services provided and offered for agriculture producers and related businesses can be differentiated from other “business banking” products and services.

- 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?

In whatever terms the geographic market/county-level may be determined the impact of non-bank and digital financial service providers needs to be accounted.

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

Consumers have convenient access to regional and national providers of financial services. Small businesses likewise have access to regional and national providers of financial services. However, such providers seldom, if ever, provide “relationship” based banking services. What this means, is that if the business owner “fits the box” or can rely on a product underwritten on the owner’s personal credit – that business does have regional and national access. Community banks do offer customized solutions that regional and national banks and other competitors can seldom match and this is particularly the case in hard economic times. This diversity in banking

that is inherent in community banking is another reason the guidelines should provide a community bank preservation exception.

Rural versus Urban Markets

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

Some rural communities present a vibrant, diversified economic base. Typically, such communities may have achieved status as a regional commerce center or they have an economic anchor, such as a publicly supported community college, college or university satellite campus. In these instances, the dynamics can be similar between rural and urban markets. But most rural communities present flat or declining demographics and a local economy that may be concentrated in one industry or even vested in one or two major employers. Preservation of a community banking channel for financial services needs to be protected and promoted in these at-risk communities.

- 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?

Yes. A higher threshold for concentration should be determined. And, as noted the DOJ and bank supervisory agencies should have criteria to "except" a merger or asset acquisition from the standards based on community bank preservation – when the proposed transaction qualifies, i.e. the transaction strengthens a local community bank in a manner that promotes and meets the needs and convenience of the local community/market.

- 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 federal farm credit agencies can be predatory competitors to community banks due to their implicit federal support, favorable tax status, and lower regulatory burden. This is another reason to support a community bank preservation exception to assure competition continues in a market served by the farm credit agencies.

Non-Traditional Banks

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

Yes.

- Does the Division give appropriate weight to online deposits?

No.

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

No. Credit unions have regulatory and tax advantages compared to banks and thus their competitive influence can be larger than measured.

- 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.

These banks customer due diligence programs should yield the information required to identify the geographic source of deposits such as zip codes. The bank supervisory agencies could obtain deposit data from the most significant online banks.

De Minimis Exception

- 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?

Yes. There should be a de minimis standard for asset purchases and mergers. The MBA does not have the data or market knowledge to suggest the standard. Such a standard would reduce costs and risks and shorten the timeline to closing in transactions that ultimately benefit a community by promoting the right sizing of a bank and financial services provider.

Once again, the Missouri Bankers Association expresses our appreciation for this comment opportunity.

Sincerely,



Keith Thornburg
General Counsel
Missouri Bankers Association