

Via Electronic Mail

United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

October 16, 2020

RE: Request for Public Comment: US Department of Justice Antitrust Division Bank Merger Guidelines Review (Request)¹

Ladies and Gentlemen:

The American Bankers Association (ABA)² appreciates this opportunity to provide the views of our members to the Department of Justice Antitrust Division (Division) during its review of the 1995 bank mergers guidelines (Banking Guidelines). ABA's members comprise the entire range of the US banking industry and compete vigorously in diverse product and geographic markets to serve their customers. Preserving this diversity and enhancing delivery of financial services to the national economy is a central concern of both our industry and our nation's public policy.

ABA thanks the Division for undertaking a review of the Banking Guidelines, whose current form is now 25 years old. In the intervening years, the market for financial products and services has undergone tremendous change, thanks to the rise of online banking, the interstate expansion of bank branch networks since passage of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994,³ and the expanded penetration of markets made possible by communication and advertising innovations generally.

As a result of these significant changes in the financial services market, ABA agrees that a wide-ranging review of the Banking Guidelines is urgently needed. Most important, the current Banking Guidelines fail to account for significant competition in many product lines, especially in many rural markets, due to the current definitions of geographic markets. The Division should reexamine its current geographic market definitions in light of the financial industry changes noted above and their impact on the breadth of services available in markets that are currently too narrowly defined. The remainder of this letter elaborates on this recommendation via answers to key questions the Division raises in its Request.

¹ See <https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide>, September 1, 2020, *updated* September 24, 2020.

² The American Bankers Association is the voice of the nation's \$21.1 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard nearly \$17 trillion in deposits and extend nearly \$11 trillion in loans.

³ Public Law No: 103-328 (108 Stat. 2338; Date: 9/29/94).

Guidance Generally

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

Guidance is very useful, as it provides predictability and banking-industry-specific standards for preliminary judgments about feasibility of transactions. ABA acknowledges that, though the Banking Guidelines do not represent a government commitment concerning enforcement action, they provide an opportunity to resolve any concerns the Division may have before commitments become irrevocable. Bank-specific guidelines are useful because they can reflect a more targeted analysis of relevant geographic and product markets.

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

Most important is reconciliation of conflicting standards in the two sets of guidelines. Specifically, the Banking Guidelines provide for increased review when the proposed transaction results in a post-merger Herfindahl-Hirschman Index (HHI) over 1800 and an increase of over 200.⁴ The 2010 Horizontal Merger Guidelines (2010 Guidelines), on the other hand, define a “moderately concentrated market” as having an HHI of between 1500 and 2500 points.⁵ The Division notes that “[m]ergers resulting in moderately concentrated markets [i.e., an HHI greater than 1500] that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.”⁶ The Division (and other agencies participating in transaction review, as discussed below) should be consistent in the approach to market concentration analysis under all applicable versions of its merger guidance.

In addressing this conflict, the Division should raise to 2500 the threshold below which the Division would generally not challenge proposed mergers or require divestitures, in addition to taking into account the need to update guidelines to reflect current geographic markets for financial services discussed below.

⁴ See <https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995>.

⁵ See <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#4>.

⁶ *Id.* ABA notes that the 2010 Guidelines also provide that, “[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points **will be presumed** to be likely to enhance market power. [emphasis added]” If this threshold and its presumption became the standard below which the Division generally would not challenge transactions or require divestitures under revised bank merger guidelines, that could be an appropriate way to reconcile the discrepancies between the two current sets of guidelines.

- **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 very useful because it is based on a consistency in approach of the agencies having jurisdiction over analysis of competitive impacts of mergers. State analysis of proposed merger transactions also should be consistent. The concerns noted elsewhere in the letter about outdated geographic markets apply also to current market definitions used by the regulatory agencies.

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.**

As noted above, the Banking Guidelines are currently inconsistent with the guidelines applicable to industries generally under the 2010 Guidelines, and this inconsistency should be resolved (and can be resolved as a first step). For the reasons noted below, however, simply conforming the Banking Guidelines to the 2010 Guidelines would be an incomplete solution because it would not resolve the fundamental flaws in the current definitions of geographic markets.

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?**

It is critical that analysis of the potential competitive impact of the transaction take into account the other providers and potential providers of similar products and services to individuals within the same market. The examples described below of lending activities of the Farm Credit System institutions, thrifts, and credit unions are specific areas of concern, and at a minimum any revisions to the Banking Guidelines should take full account of these market activities.

- **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?**

Geographic markets defined by the Federal Reserve or by county mean that application of screening thresholds to a proposed transaction will often indicate a reduction in competition. These market definitions frequently fail to take into account how customers in those markets actually seek and obtain banking services.

Several techniques could often provide a more accurate picture of financial institutions' actual market activity and thus a clearer picture of the actual competitive landscape. For example, analysis of data reported under the Home Mortgage Disclosure Act (HMDA)⁷ and the Community Reinvestment Act (CRA)⁸, traffic patterns, and other information often provides a more sophisticated and accurate picture of services available to customers, including which institutions customers in particular locations actually use. HMDA data, for example, provide locations of customers for certain home mortgage loans, and these data are available for certain nondepository lenders in making loans on properties in the area. The data would, for example, highlight the fact that customers will often travel farther within rural markets to obtain financial products and services than the current geographic market definitions assume, as well as obtaining products and services through online channels or otherwise not through local offices. These data, therefore, provide insight into the actual degree of concentration in a market and thus the competitive landscape that would exist following a proposed merger.

Parties to a proposed transaction sometimes use these data as mitigating factors when initial HHI screens suggest that a proposed transaction would result in an unacceptable increase in concentration. By demonstrating that the current defined geographic market (county or Federal Reserve identified market) is unrealistically limited (because customers in those areas actually receive financial services from providers throughout a wider area), these data can establish a lower but more realistic picture of concentration before and after the proposed transaction.

The fact that the Division and the financial regulatory agencies have in appropriate cases accepted these and similar mitigants, and the fact that there are a number of sources from which these data are available, not only to transaction parties but to the government, are compelling reasons for updating the Banking Guidelines to include them in defining initial screens. Transaction parties should

⁷ Codified at 12 USC §2801 *et seq.*

⁸ Codified at 12 USC §2901 *et seq.*

not bear the burden of submitting them simply to refute market criteria that no longer reflect the actual scope of actual economic activity and market presence.⁹

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

For the reasons discussed above, the Division should review other and more current data to update the definitions of geographic markets. These data are likely to demonstrate that in many cases these product markets will not be “local” as that term is currently interpreted.

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?**

As discussed above, customer behavior in rural markets, in particular, often reflect use of financial services providers significantly beyond the currently defined geographic markets. In addition, Internet technology permits efficient delivery of financial services from physically distant suppliers to rural markets in which few providers maintain a branch or other physical presence. These innovations since the adoption of the Banking Guidelines have significantly altered the competitive landscape and in many cases widened rural geographic markets.

- **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?**

ABA believes that correcting geographic market definitions, particularly in rural areas, would significantly improve measurement of market concentration and initial screening of transactions. Changes to concentration thresholds could achieve a similar result, at least to some extent, but addressing the geographic market definitions obsolescence would provide the most comprehensive solution.

⁹ In addition to data available under current regulatory reporting regimes and from other sources, the Office of the Comptroller of the Currency has issued a final rule under the CRA that will require certain banks to geocode retail deposits by county, starting in 2023 or 2024, depending on the size and type of institution. See <https://www.occ.treas.gov/news-issuances/federal-register/2020/nr-occ-2020-63a.pdf>. The Federal Reserve has also asked for input on possible approaches to defining assessment areas for CRA assessment purposes that could include geocoding deposits. See <https://www.federalreserve.gov/aboutthefed/boardmeetings/files/cra-fr-notice-20200921.pdf>. Though it is not yet possible to determine in detail what relevant information may eventually be available from these sources, the geographic distribution of deposits, including online deposits, may become more transparent as a result. When implemented by the Consumer Financial Protection Bureau, small-business loan reporting under Section 1071 of the Dodd-Frank Act (15 U.S. Code § 1691c–2) may facilitate a similar analysis of competition in that product line.

- **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?**

In rural markets banks and institutions of the Farm Credit System compete vigorously in agricultural lending. In addition, Farm Credit System institutions are beginning to offer servicers that compete with banks' deposit-taking.

Non-Traditional Banks

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

Online banks, loan and deposit production offices, and nondepository competitors all provide additional sources of financial services to many US markets.

- **Does the Division give appropriate weight to online deposits?**

Under application of the Banking Guidelines, online deposits and other products and services delivered through online channels are not taken into account in assessing the degree of competition in a given market. Updating geographic markets discussed above would likely address these shortcomings.

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

Credit union and thrift presence in market should be assessed in terms of products and services actually offered, which in many cases compete directly with banks in the same markets. Their deposits should be counted fully in such cases to provide a true picture of concentration in the markets served by parties to a proposed transaction.

- **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.**

See discussion above concerning possible sources of data for online banking activity, including data about competitor lending and other activity in particular geographic markets that does not directly rely on deposits associated with those markets as a proxy.

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?**

It would be useful to establish a *de minimis* exception threshold for transactions, which could be triggered by factors beyond purely competitive considerations. For example, the Division could apply criteria based on the size of the institutions, the number of institutions in the market, and the presence of another institution or institutions over a certain size (which presumably could compete effectively if it so chooses, even if it has a small market share in that particular market at the time of the assessment). As another example, if an institution that is part of a proposed transaction would be so burdened by compliance or other operating costs, if it continues as a stand-alone bank, or if it is unable to offer a viable succession plan for management, it could be allowed to merge even if application of revised Banking Guidelines suggests an increase in concentration. The alternative under these circumstances could eventually be the cessation of its operations, which would likely lead to a more extreme concentration and decrease the availability of financial services in the market.

Conclusion

Under current application of the Banking Guidelines, small institutions may be prevented from merging if the government assumes they are the only competitors in their geographic markets, as the Division and the bank regulatory agencies define those markets. This outdated conception fails to reflect the competitive impact of online channels and other means of delivering financial services that do not depend on physical branch networks and are not captured by current competitive analyses. A more comprehensive analysis of these competitive factors will provide an accurate picture of products and services available to customers and promote a healthy market and economy.

Thank you for the opportunity to express our views on these important issues. Should you have any questions, please do not hesitate to contact the undersigned at [REDACTED].

Very truly yours,

A handwritten signature in cursive script, appearing to read "Hu A. Benton".

Hu A. Benton
Vice President
Banking Policy