

**COMMENTS OF THE  
AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION  
ON BANK MERGER COMPETITIVE ANALYSIS**

February 15, 2022

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*The views stated in this submission are presented on behalf of the Antitrust Law Section;  
they have not been approved by the House of Delegates or the Board of Governors  
of the American Bar Association and therefore should not be construed as  
representing the policy of the American Bar Association.*

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The Antitrust Law Section of the American Bar Association (the Section) respectfully submits these comments concerning the Antitrust Division's (the Division) review of the 1995 Bank Merger Competitive Review guidelines<sup>1</sup> (Banking Guidelines) and its competitive analysis of bank mergers.

Although bank mergers can be challenged under Section 7 of the Clayton Act, they are first subject to regulatory review. As part of this review, if the Division has competitive concerns that cannot be resolved, it issues a report to the banking agency opposing approval of the application.<sup>2</sup> This has obviated Section 7 litigation for the past three decades. Though the Banking Guidelines do not articulate a single analysis for the Division and the banking agencies, they were intended to make clear to the industry how the Division, the Federal Reserve Board (FRB), and the Office of the Comptroller of the Currency (OCC) approach bank mergers, including differences in their approaches.<sup>3</sup>

On September 1, 2020, the Division asked whether it should revise the Banking Guidelines to reflect emerging trends in the banking and financial services sector and solicited comment on a number of topics, including the role of guidance documents in bank merger review, Herfindahl-Hirshman Index (HHI) thresholds, and relevant markets. On December 17, 2021, the Division updated its call for comment and additionally solicited feedback regarding "whether bank merger

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<sup>1</sup> See U.S. DEP'T OF JUSTICE, BANK MERGER COMPETITIVE REVIEW – INTRODUCTION AND OVERVIEW (1995) [hereinafter BANKING GUIDELINES], <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf>.

<sup>2</sup> See, e.g., Bd. of Governors of the Fed. Reserve Bd., How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act and the Home Owners' Loan Act? FAQs, at 11 (2014) [hereinafter FAQs], <https://www.justice.gov/atr/page/file/1232171/download>.

<sup>3</sup> See Anne Bingaman, Assistant Att'y Gen. Antitrust Div., Antitrust and Banking, Remarks Before the Comptroller of the Currency's Conference on Antitrust and Banking (Nov. 16, 1995), <https://www.justice.gov/atr/speech/antitrust-and-banking>.

review is currently sufficient to prevent harmful mergers and whether it accounts for the full range of competitive factors appropriate under the laws.”<sup>4</sup>

The Section believes that bank mergers should be evaluated using the same standards as other mergers. Although the Section believes that there should be separate Banking Guidelines, it does not believe that competitive factors beyond those typically considered in merger review should be considered as part of bank merger review. The discussion below provides additional detail regarding the Section’s views.

The Section is available to provide additional comments or assistance in any other way that the Division might deem helpful and appropriate. The Section is the world’s largest professional organization for antitrust and competition law, trade regulation, consumer protection, and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the fields listed above. For nearly thirty years, the Section has provided input to enforcement agencies conducting consultations on topics within the Section’s scope of expertise.<sup>5</sup>

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## **I. The Banking Guidelines Should Be Issued Jointly if Maintained**

In its September 2020 call for comment, the Division asked whether it is useful to have banking-specific merger review guidance and whether it is helpful to have joint guidance from the Division and the FRB, OCC, and Federal Deposit Insurance Corporation (FDIC).

As described below, the Section believes that the Division should apply the same standards to all mergers. Nonetheless, the Section also appreciates the potential benefits of having guidance separate from the 2010 Horizontal Merger Guidelines (HMGs) for bank mergers. Banking-specific guidance is necessary to allow the Division to issue joint guidance with the banking agencies.

The Section believes that the Division should evaluate bank mergers’ impact on competition.<sup>6</sup> Issuing joint guidance provides the opportunity for the Division and the banking

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<sup>4</sup> Press Release, U.S. Dep’t of Justice, Antitrust Division Seeks Additional Public Comments on Bank Merger Competitive Analysis (Dec. 17, 2021), <https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis>.

<sup>5</sup> Prior comments submitted by the Section can be accessed on its website at: [https://www.americanbar.org/groups/antitrust\\_law/resources/comments\\_reports\\_amicus\\_briefs/](https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/).

<sup>6</sup> This is consistent with Recommendation 70 of the Antitrust Modernization Commission. *See* ANTITRUST MODERNIZATION COMM’N REPORT AND RECOMMENDATIONS (2007), [https://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) (“For mergers in regulated industries, the relevant antitrust agency should perform the competition analysis. The relevant regulatory authority should not re-do the competition analysis of the antitrust agency.”).

regulators to agree that the Division's review and any required regulatory review will not apply inconsistent standards to the assessment of the competitive impact of a proposed transaction. That said, joint guidance does not prevent the banking agencies from applying the standards they deem appropriate to their evaluation of the non-competition aspects of mergers. The banking agencies also are responsible for determining the relative weight to accord non-competition aspects in determining the ultimate disposition of a bank merger application. Finally, developing and maintaining joint guidance provides an opportunity for the Division and the banking agencies to consult regarding the effects of regulation on competition.<sup>7</sup>

If the Banking Guidelines are not issued jointly, these potential benefits are not available, and it is the view of the Section that they should be withdrawn.

## **II. The Division's Review of Bank Mergers Should Not Consider Factors or Remedies Beyond Those Applicable to Other Industries**

The Division's December 2021 request for comment solicited opinions regarding the appropriate scope of the Division's review. In particular, the Division requested comment regarding whether it should broaden the factors it considers when evaluating bank mergers.<sup>8</sup> The Division also sought input regarding what remedies it should consider when reviewing bank mergers.

The Section believes that, as with all mergers, the Division should approach bank mergers as if Section 7 were the governing standard, as it is in the event that the Division seeks to enjoin a merger that has received regulatory approval.<sup>9</sup> The Division is staffed with lawyers and economists who are well-equipped to investigate mergers and competition issues. However, the banking agencies are the experts regarding banking policy issues.

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<sup>7</sup> See *id.*, Recommendation 71 ("The federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition.")

<sup>8</sup> The Press Release that accompanied the request for comment asked whether bank merger review "accounts for the full range of competitive factors appropriate under the laws." Press Release, U.S. Dep't of Justice, Antitrust Division Seeks Additional Public Comments on Bank Merger Competitive Analysis (Dec. 17, 2021), <https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis>. In contrast, the Division's Public Comments Topics & Issues Guide asked for comment regarding to what extent the Division's competitive scrutiny of bank mergers should "apply standards, and incorporate factors, beyond those applicable to other industries . . ." U.S. Dep't of Justice, Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide (Dec. 17, 2021), <https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide>.

<sup>9</sup> The most recent bank merger case litigated to judgment was under Section 1, but Section 7 standards were applied. See *United States v. Central State Bank*, 621 F. Supp. 1276 (W.D. Mich. 1985); see also *United States v. First Nat'l Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964) (applying Section 7 analysis to bank merger challenge under Section 1).

The Section believes that any considerations beyond competition are better handled by experts in those fields at the banking regulatory agencies.<sup>10</sup> Banking regulators possess expertise and experience in applying non-competition factors, including addressing any concerns relating to the safety and soundness of the nation's financial system. In addition, making clear that responsibility for any consideration of factors beyond competition lies with the banking regulators enables greater accountability because oversight of the banking regulators is provided by Congressional committees with relevant expertise.

Similarly, the Section recommends that the Division seek the same types of remedies in bank merger matters that it seeks in mergers in other industries and limit its remedies to those that will directly address violations of the Clayton Act. Indeed, as the Division has recognized, “[a]ny remedy must be based on sound legal and economic principles and be related to the identified competitive harm.”<sup>11</sup> To resolve violations of the Clayton Act, remedies should focus on preserving competition in the specific relevant market(s) otherwise harmed by a transaction. By targeting these relevant markets, the remedies will be designed to ensure the transaction does not adversely impact competition.

The Section further recommends that the Division not expand the types of remedies that it seeks in bank merger matters to address policy concerns or violations of laws unrelated to competition. As the Division has said in the past, “[t]he Division should not seek remedies that are unnecessary to prevent anticompetitive effects because that could exceed its law enforcement function, unjustifiably restrict companies’ ability to compete, and raise costs to consumers.”<sup>12</sup> For example, the Division should not attempt to use merger remedies to address policy concerns regarding access to credit that are unrelated to the transaction under review.

### **III. HHI Thresholds Under the Banking Guidelines Should Be No More Stringent than Those in the HMGs**

On September 1, 2020, the Division sought guidance on whether the screening thresholds in the Banking Guidelines should be updated to reflect the HHI concentration thresholds in the HMGs.

The Section recommends that the Division update the HHI thresholds in the Banking Guidelines to be no more stringent than those in the HMGs.<sup>13</sup> The Banking Guidelines’ 1800/200 HHI thresholds are intended to serve as a “screen” that allows the regulators to most efficiently

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<sup>10</sup> See, e.g., Edith Ramirez, Chairwoman, Fed. Trade Comm’n, Core Competition Agency Principles: Lessons Learned at the FTC, Keynote Address Before the ABA Antitrust in Asia Conference 6-8 (May 22, 2014), [https://www.ftc.gov/system/files/documents/public\\_statements/314151/140522abachinakeynote.pdf](https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf) (describing why sound competition enforcement focuses on competition factors alone, rather than on consideration of other economic and social policies).

<sup>11</sup> U.S. DEP’T OF JUSTICE, MERGER REMEDIES MANUAL 2 (Sept. 2020), <https://www.justice.gov/atr/page/file/1312416/download>.

<sup>12</sup> *Id.* at 1

<sup>13</sup> On January 18, 2022, the Federal Trade Commission (FTC) and the Division launched an inquiry into the HMGs seeking public input on, among other things, whether the HHI thresholds in the HMGs should be revised. The Section believes that, should the HMGs be revised, the Banking Guidelines should be adjusted accordingly.

focus only on transactions (or narrower geographic regions within a transaction) that are likely to present competitive concerns.<sup>14</sup> The Section understands, however, that in practice the HHI thresholds have served as more than mere screens for many transactions, and have been used to determine the need for structural remedies. The Division should consider the practical implications of the Banking Guidelines' HHI thresholds, as those implications may merit some upward adjustment of the thresholds.

Updating the Banking Guidelines' HHI thresholds is also consistent with the Guidelines' original framework. When first adopted, the Banking Guidelines established HHI thresholds that were more relaxed than those in the 1992 HMGs.<sup>15</sup> This was because the Division recognized "that banks face competition in virtually all of their services from non-banks, as well as from out-of-state banks, that often cannot be captured by computing HHI's based solely on deposits."<sup>16</sup> While the Division and the FTC are reviewing the HMGs' HHI thresholds, the fact remains that banks continue to face robust competition from non-banks that are not reflected in the deposit-based HHI share calculations.

The development of new competition as a result of changes in both bank regulation and technology, which may not be captured by traditional measures of concentration, further counsels against lowering the HHI threshold. The Banking Guidelines compute HHIs using FDIC-reported deposit data. These data tend to be under-inclusive because they limit market participants to those reporting deposits to the FDIC in a relevant geographic market, and thus the resulting HHIs can significantly overstate a bank's competitive position in the relevant geographic market. Specifically, FDIC data are not geocoded by customer location and exclude financial institutions not insured by the FDIC, including online institutions, which are a growing competitive threat to traditional banks.<sup>17</sup> New entrants are expanding the scope of banking-related services available outside the traditional branch model, including neobanks — branchless fintechs partnering with chartered banks to offer deposits, credit cards, loans, and even brokerage services<sup>18</sup> — and

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<sup>14</sup> See BANKING GUIDELINES, *supra* note 1, § 1.

<sup>15</sup> Compare U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 1992 MERGER GUIDELINES § 1.5 (1992), <https://www.justice.gov/archives/atr/1992-merger-guidelines>, with BANKING GUIDELINES, *supra* note 1, § 1.

<sup>16</sup> Robert E. Litan, Deputy Assistant Att'y Gen. Antitrust Div., Antitrust Assessment of Bank Mergers, Remarks Before the Antitrust Section of the ABA (Apr. 6, 1994), <https://www.justice.gov/atr/speech/antitrust-assessment-bank-mergers>.

<sup>17</sup> Andrew Meola, *How fintechs and digital-only banks are innovating the banking sector*, BUSINESS INSIDER (Jan. 28, 2020), <https://www.businessinsider.com/innovative-banking> ("Banking is a rapidly changing industry, and the biggest paradigm shift that has occurred is the move to digital-only banks. Millennials, in particular, are moving more frequently toward digital banking innovation."). See also Sara Berger, *Survey: 3 in 4 Americans Believe Physical Banks Are Becoming Obsolete*, LENDING TREE: MAGNIFY MONEY (Jan. 15, 2020), <https://www.magnifymoney.com/blog/news/bank-branch-survey/> (finding that 84% of Millennials think physical bank branches are becoming obsolete).

<sup>18</sup> See Jeff Kauflin, *Dawn of the Neobank: The Fintechs Trying To Kill The Corner Bank*, FORBES (Nov. 4, 2019), <https://www.forbes.com/sites/jeffkauflin/2019/11/04/dawn-of-the-neobank-the-fintechstrying-to-kill-the-corner-bank/#2b5e8b7fb0f6> ("McKinsey estimates there are 5,000 startups worldwide offering new and traditional financial services, up from 2,000 just three years ago."). In the first nine months of 2019, venture capitalists invested \$2.9 billion into neobanks of the \$24.6 billion invested in global fintech business. See *id.* (reporting \$2.9 billion in neobank investment based on a recent CB Insight report); Global Fintech Report Q3 2019 at 8, CBInsights,

“Banking as a Service” offerings — a technological and marketing advancement that allows “licensed banks [to] integrate their digital banking services directly into the products of other non-bank businesses.”<sup>19</sup> The COVID-19 pandemic has only accelerated the use of digital banking, and these practices are likely to continue well beyond the exigencies of the pandemic.<sup>20</sup>

The Division should consider these changing competitive conditions and the practical implications of the Banking Guidelines’ HHI thresholds when evaluating the appropriate HHI thresholds. At minimum, the Section believes that the HHI thresholds should be no more stringent than the HMG’s HHI thresholds and that the Division may be justified in applying higher HHI thresholds for the Banking Guidelines.

#### **IV. Determination of Additional Product Markets for the Banking Guidelines Should Involve Consultation with the Bank Regulatory Agencies**

On September 1, 2020, the Division sought input on the relevant product and geographic markets it employs in assessing the likely competitive effects of bank mergers. In particular, the Division listed the three product markets it generally examines<sup>21</sup> and first asked whether “there [are] additional product markets that the Division should include in its analysis.” The Division also solicited comment regarding the appropriate geographic markets for consumer and small business products and services.

The Section is not in a position to opine on such questions, but the Section urges the Division to determine the answers in consultation with the bank regulatory agencies and publicize both the answers and the rationales for them. The Division should begin by explaining why it generally focuses on certain product markets. Is a lessening of competition in other products and services not of concern, and if so, why not?

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[https://www.cbinsights.com/reports/CB-Insights\\_Fintech-Report-Q3-2019.pdf](https://www.cbinsights.com/reports/CB-Insights_Fintech-Report-Q3-2019.pdf). Fintechs are now receiving banking charters, including Varo Bank, a neobank that provides financial services through its mobile app; Square; a mobile payment processor, and LendingClub, a peer-to-peer lending company. *See, e.g.*, Emerging Tech Research, Fintech Q2 2020 at p.5, [https://files.pitchbook.com/website/files/pdf/PitchBook\\_Q2\\_2020\\_Emerging\\_Tech\\_Research\\_Fintech.pdf](https://files.pitchbook.com/website/files/pdf/PitchBook_Q2_2020_Emerging_Tech_Research_Fintech.pdf) (“Fintech companies have long recognized the advantages of obtaining a federal bank charter, including the ability to directly access payment systems, use stable FDIC-insured funds, operate across state lines and borrow via the Federal Reserve Bank’s (FRB) discount window.”); Bryan Moore, et al., *From Fintech to Full Service: How Fintechs Can Enter Everyday Banking*, NOVANTAS.COM (Aug. 15, 2020), <https://www.novantas.com/industry-insight/novantas-review/2020-summer-fintechs-enter-banking> (“Varo Money just became the first fintech to receive a national bank charter.”).

<sup>19</sup> James Bessenbach, *What the hell is Banking as a Service? And what is it not?*, FINEXTRA (Mar. 30, 2021), <https://www.finextra.com/blogposting/20099/what-the-hell-is-banking-as-a-service-and-what-is-it-not/>.

<sup>20</sup> *See* Brett Holzhauer, *Digital Banking As The New Normal In 2021: What To Expect From Banks*, FORBES ADVISOR (Jan. 11, 2021), <https://www.forbes.com/advisor/banking/digital-banking-as-new-normal-2021-what-to-expect/>.

<sup>21</sup> The three products listed were: “(1) retail banking products and services, (2) small business banking products and services, and (3) middle market banking products and services.”



The Supreme Court determined that the relevant product market was the “cluster” of products and services that make up “commercial banking.”<sup>22</sup> The last time the Division litigated a bank merger case to judgment, the court rejected the Division’s effort to delineate single products or services as relevant product markets.<sup>23</sup> And the 2014 FAQ states that the bank regulatory agencies continue to employ the cluster of commercial banking products and services.<sup>24</sup> But Division policy outside of banking has been to eschew cluster markets. Instead, the Division aggregates markets as a matter of convenience when supply substitution is “nearly universal” so each of the markets aggregated has the same competitors and the same shares.<sup>25</sup> The Division should explain whether it justifies a product market like “retail banking products and services” as a cluster market or as an aggregation as a matter of convenience.

Since 1982, the merger guidelines have distinguished the definition of the relevant market from the identification of who competes in it. The Section urges the Division to explain, separately for each product market, who competes in the market and how it assesses the impact of non-bank financial institutions, such as credit unions, thrift institutions, fintech lenders, and farm credit bureaus. This explanation is particularly important if the Division and the bank regulatory agencies take different approaches.

The Division rightly asks whether counties and FRB-defined markets are appropriate geographic markets in which to assess the competitive effects of bank mergers. Much certainly has changed in financial services since 1995. Technology has made it possible for customers to obtain many financial services over the internet, and internet providers of such services have become significant. Developments since 1995 do not necessarily imply that the relevant markets have become regional or national, but they raise questions that the Division should answer publicly.

The best approach might be to analyze bank mergers in local markets and treat internet competitors as present in every locality in which they offer services. If so, the Division should explain why and precisely how it assigns market shares to competitors in the relevant markets.

## **V. As with Mergers in Other Industries, the Division Should Conduct an Analysis Tailored to the Current Competitive Environment**

In September 2020, the Division requested comment regarding how it should consider different “dynamics of rural and urban markets” as well as non-traditional banks in its competitive effects analysis.

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<sup>22</sup> *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 356 (1963). The practical effect of defining this cluster market was to exclude from the market all of the financial institutions that offered less than the full cluster of products and services. The Supreme Court observed that commercial banks faced competition from non-banks, which were excluded from the relevant market. *Id.* at 326 n.5, 356–57.

<sup>23</sup> *United States v. Central State Bank*, 621 F. Supp. 1276 (W.D. Mich. 1985), *aff’d*, 817 F.2d 22 (1987) (per curiam).

<sup>24</sup> See FAQs, *supra* note 2, at 4 (“As a result of judicial precedent, the regulatory agencies have adopted a product market limited to the ‘cluster’ of commercial banking products and services.”).

<sup>25</sup> HMGs § 5.1 n.8.

The Section believes that, as with its analysis of mergers in other industries, the Division should conduct an analysis tailored to the current competitive environment. The availability of products from online sources as well as credit unions, thrifts, and non-depository financial institutions should factor into the competitive analysis as appropriate. The nature and variety of products that compete for consumer and small business banking needs is always changing and will continue to change, and the Division should not limit its analysis to products offered by banks when consumers can reasonably turn to products offered by credit unions, thrifts, and non-depository sources.

Relatedly, to the extent that competition differs between rural and urban markets, the Division should consider these differences in its analysis of competitive effects. In particular, if rural and urban markets are impacted differently by the omission of certain competitors in applying baseline screens, those differences should be accounted for—potentially by adjusting the market shares to account for competitors omitted from the data.

Finally, banking is highly regulated, and as with other regulated industries, the Section believes that the Division should take into account the effects of regulation in its competitive analysis. For example, the regulatory environment should be considered in assessing whether entry is timely, likely, and sufficient to deter or counteract potential competitive concerns. To ensure that the impact of the regulatory environment is fully-appreciated in the competitive analysis, the Section recommends that the Division consult with relevant federal and state regulators when necessary to better understand the regulatory environment for the products and services at issue.