September 23, 2024

DOJ, FDIC and OCC Update Approaches to Bank Merger Review

Summary

On September 17, 2024, the U.S. Department of Justice ("DOJ"), Federal Deposit Insurance Corporation ("FDIC") and Office of the Comptroller of the Currency ("OCC") each took actions to update their respective bank merger review policies and procedures. The FDIC and OCC issued final policy statements regarding bank merger application procedures and providing guidance on how they consider statutory factors under the Bank Merger Act of 1960 when reviewing bank merger applications. In addition, the OCC finalized changes to its procedural rules governing bank merger applications, eliminating streamlined application and expedited review procedures. The DOJ withdrew from the 1995 Bank Merger Guidelines and stated that it will apply its generally-applicable 2023 Merger Guidelines to the banking industry. The DOJ also issued a brief Banking Addendum to the Merger Guidelines identifying "portions of the 2023 Merger Guidelines that [it]considers to be frequently relevant when evaluating the competitive consequences of a bank merger." Notably, the Board of Governors of the Federal Reserve System ("Federal Reserve") has not issued any new guidance, but worked in partnership with the OCC and FDIC in the DOJ's approach.[1]

The simultaneous actions by the DOJ, FDIC and OCC reflect a coordinated government approach with regard to the respective announcements of changes to bank merger policy, but that makes it notable that they declined to act on an interagency basis. These actions reflect a shift toward more expansive evaluation of bank mergers and related transactions, and portend the possibility of greater divergence in approaches between the federal banking agencies and the DOJ.

Background

In the United States, mergers of insured depository institutions are subject to a unique regulatory process set forth in the Bank Merger Act. In general, the acquiring bank's federal regulator—either the Federal Reserve, FDIC or OCC—must affirmatively approve the merger.[2] Approval requires, among other things, an analysis of the competitive effects of the proposed transaction.[3] In furtherance of this analysis, the federal banking agencies must request from the DOJ a "report on the competitive factors involved" unless immediate action is required "to prevent the probable failure" of one of the banks in the transaction.[4]

Under the law, the banking agency "shall not approve" a merger to monopoly or a merger that is part of a conspiracy or "attempt to monopolize the business of banking in any part of the United States."[5] The banking agency also may not approve a merger "whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade."[6] This is similar to the language in the Clayton Act governing non-bank mergers.[7] However, unlike a non-bank merger, the banking agency may approve an otherwise anticompetitive transaction if "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."[8]

In addition to the potential competitive effects of the merger, the banking agency also "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."[9] The banking agency and

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DOJ competitive reviews are separate; and, if the DOJ has determined a bank merger to be anticompetitive, it has the discretion to sue to enjoin the merger regardless of the conclusion reached by the banking agency.[10]

Analysis of Changes to Bank Merger Regulation and Policy

OCC Final Rule and Policy Statement

On September 17, 2024, the OCC issued a final rule modifying its procedures for reviewing bank merger applications under the Bank Merger Act (the "OCC Final Rule"), and a final policy statement describing the substantive standards it will apply when reviewing Bank Merger Act applications (the "OCC Final Policy Statement").[11] The OCC Final Rule makes two procedural changes to the OCC's bank merger review: it (i) eliminates the OCC's expedited bank merger review procedures and (ii) eliminates the OCC's streamlined application, which applicants are currently permitted to use in limited circumstances.[12] The OCC Final Policy Statement describes the substantive standards that the OCC will use to evaluate bank merger applications, including indicators that point in favor of likely approval or rejection. The OCC Final Rule and OCC Final Policy Statement become effective on January 1, 2025.[13]

The OCC Final Rule and OCC Final Policy Statement carry out, in part, the directives of President Biden's July 2021 Executive Order,[14] which urged the federal banking agencies to update and revise their bank merger guidelines as part of the whole-of-government approach to competition articulated in the Executive Order. They also take into consideration comments in response to the OCC's notice of proposed rulemaking published on January 29, 2024 ("OCC NPR and Policy Statement").[15] (*See* here for our analysis of the OCC NPR and Policy Statement.) Aside from some minor clarifications, the OCC Final Rule and OCC Final Policy Statement largely adopt the OCC's proposals in the form that they were previously issued.

OCC Updated Approach to Bank Merger Policy

The OCC Final Policy Statement outlines the general principles that the OCC will apply when reviewing Bank Merger Act applications, and provides information about how the OCC evaluates certain statutory factors in the Bank Merger Act: (1) financial stability, (2) financial and managerial resources and (3) convenience and needs of the community.[16] The OCC Final Policy Statement also outlines a non-exhaustive list of indicators of likely approval or disapproval. Noting that it understood the "confusion" among commenters about how the indicators apply, the OCC clarified that most transactions would fall in a "middle category" that does not feature all of the positive indicators, but also has none of the negative indicators. It noted that many transactions in this category are "likely consistent with approval."[17] It, thus, reframed the positive indicators as indicators that an application is "more likely to withstand scrutiny and to be approved expeditiously."[18] On the other hand, the OCC did not change the prefatory language for the negative indicators, though it noted that the negative indicators did not preclude approval of a transaction.[19]

The OCC declined to make any changes in response to comments suggesting that it address the uncertainty in timelines for regulatory approval.[20] It also declined to add any discussion in the OCC Final Policy Statement regarding its approach to competition issues and declined to add further guidance on its standards for imposing conditions, instead referring to its existing regulations.[21]

Other key takeaways from the OCC Final Policy Statement are summarized below.

- **Financial Stability.** The OCC describes its standards for reviewing the financial stability factor as consistent with the OCC's longstanding approach.[22] The OCC will consider the following factors when considering the financial stability factor under the BMA: (i) whether the size of the combined institutions would result in material increases in risk to financial stability; (ii) potential reduction in the availability of substitute providers for the services offered by the combining institutions; (iii) whether the resulting institution would engage in business activities or participate in markets that may cause significant risks to financial stability; (iv) the impact on the complexity of the financial system; (v) the extent of cross-border activities; (vi) the difficulty of resolving or winding up the resulting institution's business in the event of a failure or insolvency; and (vii)

any other factors that indicate a risk to the financial system.[23] The OCC will also consider whether to mitigate financial stability concerns by imposing conditions such as asset divestitures or higher minimum capital requirements.[24]

- **Financial and Management Resources and Future Prospects.** The OCC Final Policy Statement describes the OCC's position on financial and management resources and future prospects factors in the Bank Merger Act, explaining that it considers these factors both independently and holistically for the combining and resulting institutions.[25] The OCC will also consider these factors "within the context of the prevailing economic and operating environment," recognizing that economic conditions may affect the advantages of a merger.[26] When applying these factors, the OCC is more likely to approve transactions when it is not true that the acquirer: (i) has a "less than satisfactory" supervisory record, (ii) has experienced rapid growth, (iii) has engaged in multiple acquisitions with overlapping integration periods, (iv) has failed to comply with conditions imposed in prior OCC licensing decisions or (v) is functionally the target in the transaction.[27]

- **Convenience and Needs.** The Policy Statement emphasizes that the OCC's review of the convenience and needs factor is prospective, and based on the "probable effects" of the proposed combination on the community to be served rather than past performance on Community Reinvestment Act evaluations.[28] The OCC will consider a range of factors, including: (i) closure, expansion, or consolidation of branches or branching services, including in low-or-moderate income areas; (ii) reduction of the availability or increase of the cost of banking services or products; and (iii) proposed community outreach and engagement strategies regarding the development of community investment initiatives.[29]

- **Public Comments and Meetings.** The OCC also provides additional details about its approach to public comments and meetings. The OCC may extend the comment period on a bank merger application beyond the standard 30 days when a filer fails to provide all required publicly available information on a timely basis, when a filer makes a request for confidential treatment not granted by the OCC or when a commenter requests an opportunity to respond to a filer that does not fully address a comment.[30] Comment periods may also be extended when other extenuating circumstances exist.[31] The OCC will decide whether to hold public meetings by balancing the public's interest in the transaction with the value or harm of a public meeting to the decision-making process.[32]

FDIC Statement of Policy

The FDIC Board of Directors, by a 3-2 vote (with Vice Chairman Travis Hill and Director Jonathan McKernan dissenting), approved a final Statement of Policy (the "FDIC Final Policy Statement") for its evaluation of bank merger applications under the Bank Merger Act.[33] The FDIC Final Policy Statement replaces the former Statement of Policy on Bank Merger Transactions ("FDIC Former SOP")[34] as the FDIC's guiding framework for the evaluation of bank merger applications that are subject to FDIC approval.

Similar to the OCC Final Rule and OCC Final Policy Statement, the FDIC Final Policy Statement carries out, in part, the directives of President Biden's July 2021 Executive Order on Promoting Competition in the American Economy,[35] which urged federal banking agencies to update and revise their bank merger guidelines as part of the whole-of-government approach to competition articulated in the Executive Order. The FDIC Final Policy Statement also takes into consideration responses to the FDIC's Request for Information published on March 31, 2022, which sought public input on the effectiveness of the FDIC's existing framework for meeting the requirements of the Bank Merger Act[36] and comments received in response to the FDIC's April 19, 2024, request for comment on its Proposed Statement of Policy on Bank Merger Transactions ("FDIC Proposed Statement").[37] The FDIC Final Policy Statement generally retains the approach taken in the FDIC Proposed Statement, but incorporates some changes in response to public comments.

Prior to the FDIC Final Policy Statement, to fulfill its prescribed role under the Bank Merger Act, the FDIC issued regulations[38] and the FDIC Former SOP, which described the FDIC's application procedures and its standards for evaluating merger applications. In addition, in 2019, the FDIC made public the merger chapter of its Applications Procedures Manual ("APM").[39] The APM provides the FDIC's professional staff with detailed procedural instructions and information on the assessment of each of the Bank Merger Act's statutory factors.[40]

The FDIC Former SOP had only been updated twice since public comment was last solicited in 1997: first in 2002, to address the USA PATRIOT Act's addition of the anti-money-laundering factor to the Bank Merger Act, and secondly in 2008, in response to amendments to the Bank Merger Act in the Financial Services Regulatory Relief Act of 2006.[41] The FDIC Final Policy Statement is the outgrowth of the FDIC previously suggesting that a review of the regulatory framework applying to bank merger transactions governed by the Bank Merger Act was appropriate due to the "significant changes . . . in the banking industry and financial system, including continued growth and consolidation," as well as further amendments to the Bank Merger Act (such as the addition of the financial stability factor by the Dodd-Frank Act).[42]

FDIC Amended Statement of Policy on Bank Merger Transactions

The FDIC Final Policy Statement largely adopts the approach taken in the FDIC Proposed Statement, with some modest changes in response to public comments. Throughout the FDIC Final Policy Statement, the agency emphasizes its view that growth and consolidation in the financial system justify revisions to the regulatory framework. The most significant changes from the FDIC Proposed Statement include:

- Clarifying that it would not find favorably if a merger resulted in a "weaker IDI," instead stating that a favorable finding would be appropriate only where the resulting IDI presents less financial risk than the institutions standing alone (i.e., not precluding a transaction where a strong IDI absorbs a weak one);[43]
- Building upon the FDIC Proposed Statement's discussion of competitive effects by highlighting practices that may be particularly relevant to rural institutions, such as taking into account certain non-bank competitors and recognizing that mergers in rural markets involving local community IDIs may result in concentrated markets, which is relevant to balancing the competitive effects with the convenience and needs of the community;[44] and
- Adding that, where an IDI is divesting or otherwise closing a branch in connection with a transaction, the FDIC may request that the selling IDI waive any terms or conditions (e.g., exclusive use clauses) that preclude other IDIs from leasing or purchasing the property.[45]

The FDIC Final Policy Statement introduces a broadened approach to the competitive effects analysis and makes some notable changes to the review and approval process, including potential publication of an FDIC statement—even in the event of an application withdrawal—and the possibility that the FDIC may require that divestitures be completed before the consummation of the merger (but after regulatory approval).[46] The FDIC also expects the selling institution not to enter or enforce non-compete agreements with employees of a divested entity.[47]

From a procedural perspective, under the FDIC Final Policy Statement, the FDIC retains the prerogative to issue a public statement detailing the agency's concerns with an application, even if the applicant withdraws the application, if the FDIC considers such a statement to be in the public interest for creating transparency for the public and future applicants.[48] The FDIC expects applicants to submit a substantially complete application upon submission, and to provide detailed and well-supported materials, including internal studies, surveys, analyses and reports related to the transaction.[49] Notwithstanding the FDIC Final Policy Statement's goal of increasing the clarity and transparency of Bank Merger Act review, the FDIC generally avoids adopting bright-line rules or thresholds for most factors.

Below is a summary of key takeaways from the FDIC Final Policy Statement.

- **FDIC's Expansive Interpretation of Its Jurisdiction.** The FDIC adopts an expansive interpretation of its jurisdiction under the Bank Merger Act, asserting that it has authority over all transactions that result in an insured depository institution substantively and effectively combining with a non-insured entity ("mergers in substance"), regardless of the form or structure of the transaction, the type or nature of the assets acquired, or whether the target plans to liquidate after the transaction. These include acquisitions of lines of business where the target is no longer a viable competitor, even if the target does not plan to liquidate immediately after consolidating the transaction.[50]

- **Heightened Scrutiny on Regional Bank Mergers.** The FDIC imposes heightened scrutiny on merger transactions that would result in an institution with assets over $100 billion, finding that these transactions are more likely to present potential financial stability concerns and pose greater risks to the Deposit Insurance Fund and the FDIC's resolution and receivership functions. However, in the FDIC Final Policy Statement, the FDIC clarified that the $100 billion threshold was not a threshold for presumptive denial.[51] The FDIC may also impose heightened review (e.g., public hearings) on mergers where the resulting bank will be larger than $50 billion in assets.[52]

- **Heightened Standard for "Convenience and Needs."** The FDIC requires applicants to demonstrate with specific and forward-looking information that the merger would "better meet" the convenience and needs of the community to be served, and that the benefits to the community would clearly outweigh any anticompetitive effects, despite numerous comments indicating that the "better meet" standard departed from statute and precedent.[53] To that end, applicants are expected to provide "specific and forward-looking information" to enable the FDIC to evaluate the expected impact of the merger on convenience and needs.[54] The FDIC expects applicants to provide a detailed three-year plan for all projected or anticipated branch expansions, closures or consolidations following the merger, to quantify or provide information regarding anticipated job losses or reduced job opportunities and to make commitments regarding future retail banking services in the community to be served for at least three years following the consummation of the merger.[55]

- **Broadened Analysis of Competitive Effects.** The FDIC conducts its own independent analysis of the competitive effects of the merger, but the FDIC Final Policy Statement declines to introduce any bright line metrics for when a merger is considered anticompetitive.[56] Instead, the FDIC's competitive effects analysis will continue to use deposits as an initial proxy for the cluster commercial banking products and services, but will tailor the product market definition to individual products as needed, using other analytical methods, data sources, or geographic or product market definitions "when practicable and relevant" to evaluate whether "consumers retain meaningful choices."[57] The FDIC will initially focus its competitive effects analysis on the share of total deposits held in relevant geographic markets, using the Herfindahl–Hirschman Index to calculate market concentration, but will also consider products other than deposits.[58] The FDIC will consider all relevant market participants (including at the local, regional and national levels).[59] The relevant markets will be defined as areas where the merging entities have an office, but may also include areas where merging entities do not have a physical presence but still provide products and services.[60]

DOJ Banking Addendum

In 1995, the federal banking agencies and the DOJ issued guidelines that described a screening procedure used by the banking agencies and the DOJ "to identify proposed mergers that clearly do not have significant adverse effects on competition" and allow them to proceed without further review (the "1995 Guidelines").[61] The screen was fairly straightforward as it was based on an accepted method to compare pre- and post-merger market concentration based on the deposits in banks in pre-defined geographic markets. Yet the screen was imperfect. By relying on only one aspect of bank competition—competition for deposits—and on pre-defined geographic markets which may or may not have been consistent with any properly defined antitrust market, the screening procedure in the 1995 Guidelines risked false negatives. Indeed, the screen did not necessarily spare below-threshold mergers from further review. For example, under the 1995 Guidelines, the DOJ could subject a bank merger to in-depth review, in particular, where the screen did not "reflect fully the competitive effects of the transaction in all relevant markets, in particular lending to small and medium-sized businesses."[62]

DOJ Withdrawal from 1995 Bank Merger Guidelines

The DOJ withdrew from the 1995 Guidelines because they "contain modes of analysis that do not accurately reflect how the Antitrust Division currently reviews bank mergers."[63] Instead, as explained in the Banking Addendum, the DOJ will rely on the generally-applicable 2023 Merger Guidelines to evaluate proposed bank mergers.[64] Practically speaking, the Banking Addendum describes how the competitive analysis of bank mergers has moved away from a primary focus on deposits and branches to a much broader inquiry into all aspects of bank competition, including deposits, mortgages, "convenience and quality of service" and the effects of a merger on various types of customers (e.g., large corporations, small businesses, "economically underserved individuals or customers with low credit scores," etc.).[65]

One clear example of the different approaches is in their use of screens based on market concentration figures. The screen in the 1995 Guidelines was used to identify deals that could be cleared without further investigation. The 2023 Merger Guidelines, by contrast, use a screen to identify deals that are *presumptively illegal*.[66] Quite strikingly, the key concentration level for both of these screens is the same, yet whereas a deal with that concentration level might be cleared without further review in 1995 would be presumed illegal in 2024. (The old permissive presumption also would have allowed deals that created a larger increase in concentration than today's illegality presumption would allow.)

The Banking Addendum is consistent with a June 2023 speech given by Assistant Attorney General for the DOJ's Antitrust Division, Jonathan Kanter, where he more comprehensively described the DOJ's "moderniz[ed] approach to investigating and reporting on the full range of competitive factors involved in a bank merger to ensure that we are taking into account today's market realities and the many dimensions of competition in the modern banking sector."[67] In his speech, Kanter emphasized that the DOJ:

- "will assess the relevant competition in retail banking, small business banking, and large- and mid-size business banking," including competition involving "fees, interest rates, branch locations, product variety, network effects, interoperability, and customer service;"
- will evaluate "concentration levels across a wide range of appropriate metrics and not just local deposits and branch overlaps;"
- "will carefully consider how a proposed merger may affect competition for different customer segments;"
- "will closely scrutinize mergers that increase risks associated with coordinated effects and multi-market contacts. The division will also examine the extent to which a transaction threatens to entrench power of the most dominant banks by excluding existing or potential disruptive threats or rivals;" and
- has a "high bar for the divestitures we will accept as remedies" and it believes that such "divestitures are not always adequate to address the broader range of competitive concerns, including interoperability and network effects, among many other potential areas that may be relevant to a particular review." The DOJ has "reorient[ed]" itself away from "remedies agreements with parties (as has become custom over the last many years)."[68]

The broader scope of the 2023 Merger Guidelines, coupled with the DOJ's current aversion to divestiture remedies, could lead to more challenges for bank mergers. And, insofar as the banking agencies continue to adhere to the 1995 Guidelines, there may be instances where the DOJ and the banking agency come to different conclusions as to the competitive effect of a deal, because the DOJ has independent authority to challenge a bank merger.

The Upshot

The actions by the DOJ, FDIC and OCC, reflect a coordinated effort to update and revise their bank merger review policies in response to the changing banking and financial services landscape and the policy priorities of the Biden administration. However, the actions introduce some uncertainty and potential inconsistency in the bank merger review process, as the DOJ, FDIC and OCC have adopted modified approaches and standards, but have not fully addressed how they will coordinate with each other and with the Federal Reserve, which has not issued any new guidance on its bank merger policy. Banking organizations should be well prepared and consult with legal counsel early in their planning process to navigate the revised bank merger review framework.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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[1] *See* Press Release, U.S. Department of Justice, Justice Department Withdraws from 1995 Bank Merger Guidelines (Sept. 17, 2024), https://www.justice.gov/opa/pr/justice-department-withdraws-1995-bank-merger-guidelines.

[2] The OCC is the responsible federal banking agency where (i) the resulting institution is a national bank or federal savings association and (ii) all of the institutions involved in the transaction are insured. The FDIC is the responsible federal banking agency for transactions that involve an insured depository institution combining with an uninsured depository institution.

[3] *See* 12 U.S.C. § 1828(c).

[4] *See id.* § 1828(c)(4)(A), (C).

[5] *Id.* § 1828(c)(5)(A).

[6] *Id.* § 1828(c)(5)(B).

[7] *See* 15 U.S.C. § 13(a).

[8] 12 U.S.C. § 1828(c)(5)(B).

[9] *Id.*

[10] *See id.* § 1828(c)(7) (recognizing that the DOJ may bring an action "under the antitrust laws" prior to the consummation of a merger otherwise approved by the federal banking agencies).

[11] Business Combinations Under the Bank Merger Act, OCC-2023-0017 (Sept. 17, 2024) (to be codified at 12 C.F.R. pt. 5) ("OCC Final Rule").

[12] *Id.* at 4.

[13] *Id.* at 1.

[14] *See* Exec. Order No. 14,036, Executive Order on Promoting Competition in the American Economy, 86 Fed. Reg. 36987 (July 9, 2021) ("Executive Order"), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[15] *See* Business Combinations under the Bank Merger Act, 89 Fed. Reg. 10010 (Feb. 13, 2024) (to be codified at 12 C.F.R. pt. 5), https://www.govinfo.gov/content/pkg/FR-2024-02-13/pdf/2024-02663.pdf.

[16] OCC Final Rule at 3. Note that the OCC Final Policy Statement does not address the BMA's statutory factors related to competition and money laundering. *See* 12 U.S.C. § 1828(c)(5), (11); OCC Final Rule at 9 n.13.

[17] *Id.* at 13–14.

[18] *See id.* at 13–14, 45.

[19] *See id.* at 17–19, 46.

[20] *Id.* at 10.

[21] *Id.* at 11; *see* 12 C.F.R. § 5.13(a)(1).

[22] *Id.* at 22.

[23] *Id.* at 47–48.

[24] *Id.* at 49.

[25] *Id.* at 50.

[26] *Id.*; *see id.* at 29.

[27] *Id.* at 51.

[28] *Id.* at 57.

[29] *Id.* at 57–58.

[30] *Id.* at 58–59.

[31] *Id.* at 59.

[32] *Id.* at 60.

[33] *See* Final Statement of Policy on Bank Merger Transactions (Sept. 17, 2024) ("FDIC Final Policy Statement"), https://www.fdic.gov/system/files/2024-09/final-statement-of-policy-on-bank-merger-transactions.pdf.

[34] *See* Statement of Policy on Bank Merger Transactions, 73 Fed. Reg. 8870 (Feb. 15, 2008) ("FDIC Former SOP").

[35] *See* Exec. Order, 86 Fed. Reg. 36987.

[36] *See* Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions, 87 Fed. Reg. 18740 (March 31, 2022).

[37] *See* Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. 29222 (proposed April 19, 2024) (to be codified at 12 C.F.R. pt. 303) ("FDIC Proposal").

[38] 12 C.F.R. §§ 303.60–65.

[39] *See* Fed. Deposit Ins. Corp., Applications Procedures Manual § 4 (2024), https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-04-mergers.pdf.

[40] *See* FDIC Former SOP, 73 Fed. Reg. at 8870–72.

[41] *See* FDIC Proposal, 89 Fed. Reg. at 29222 n.6; FDIC Current SOP, 73 Fed. Reg. at 8870.

[42] *See* FDIC Final Policy Statement at 2; FDIC Proposal, 89 Fed. Reg. at 29222.

[43] *See* FDIC Final Policy Statement at 8–9.

[44] *See id.* at 6–7.

[45] *Id.* at 41.

[46] *Id.* at 15–16, 39–42.

[47] *Id.* at 41.

[48] *Id.* at 38.

[49] *Id.* at 34.

[50] *Id.* at 33.

[51] *Id.* at 27.

[52] *Id.* at 49.

[53] *Id.* at 21.

[54] *Id.* at 47.

[55] *Id.* at 46–49.

[56] Regardless of whether the FDIC requests a DOJ competitive factors report, the DOJ will review a transaction to determine if it will agree to a shortened 15-day waiting period from the 30-day waiting period otherwise called for in the Bank Merger Act. *See* 12 U.S.C. § 1849(b)(1); 12 U.S.C. § 1828(c)(6). Additionally, the DOJ may bring a court action under the antitrust laws to challenge a transaction regardless of FDIC or other banking agency analysis. *See id.*

[57] *See* FDIC Final Policy Statement at 19, 41.

[58] *Id.* at 18.

[59] *Id.*

[60] *Id.* at 40.

[61] Dep't of Justice, *Bank Merger Competition Review – Introduction and Overview* at 1 (1995) (withdrawn Sept. 17, 2024).

[62] *Id.* at 2.

[63] Dep't of Justice, *2024 Banking Addendum to 2023 Merger Guidelines* at 1 (Sept. 17, 2024) ("Banking Addendum"), https://www.justice.gov/atr/media/1368576/dl; *see* Dep't of Justice, Press Release, *Justice Department Withdraws from 1995 Bank Merger Guidelines* (Sept. 17, 2024), https://www.justice.gov/opa/pr/justice-department-withdraws-1995-bank-merger-guidelines.

[64] Banking Addendum at 1.

[65] *Id.* at 2.

[66] Dep't of Justice & Fed. Trade Comm'n, *2023 Merger Guidelines* (Dec. 18, 2023).

[67] Assistant Attorney General Jonathan Kanter, Keynote Address at the Brookings Institution's Center on Regulation and Markets Event "Promoting Competition in Banking" (June 20, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution.

[68] *Id.*