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Coordinated DoJ, FDIC and OCC Final Actions on Bank Merger Policy

FDIC and OCC Largely Adopted Proposals Following Brief Review Period; DoJ Withdraws 1995 Bank Merger Guidelines and Adopts a Banking Addendum to its 2023 Merger Guidelines

SUMMARY

Yesterday, in coordinated successive releases, both the Federal Deposit Insurance Corporation and Office of the Comptroller of the Currency adopted final policy statements (the "Final FDIC SOP", available here, the "Final OCC SOP", available here) on bank merger transactions under the Bank Merger Act of 1960.[1] Additionally, the U.S. Department of Justice announced its "withdrawal from" the 1995 Bank Merger Guidelines (available here), explaining that the DoJ will use its 2023 Merger Guidelines (available here) as the "sole and authoritative statement across all industries," including banking. The DoJ also issued an addendum (the "Banking Addendum", available here), addressing application of the 2023 Merger Guidelines to the banking industry.[2] The Final FDIC SOP will apply primarily to mergers where the surviving bank is a small bank, because relatively few large banks today are state nonmember banks (which have the FDIC as the principal federal regulator).[3] The Final OCC SOP will apply to mergers where the surviving bank is a national bank. The new DOJ guidelines apply to all bank mergers.

These actions follow (i) the FDIC's request for comment (the "2024 FDIC RFC")[4] issued on March 21, 2024, regarding proposed revisions to its Statement of Policy on Bank Merger Transactions (the "Proposed FDIC SOP"), which received 23 substantive written comments,[5] (ii) the OCC's notice of proposed rulemaking issued on January 29, 2024 (the "2024 OCC NPR"),[6] regarding proposed amendments to its regulations governing business combination applications and the adoption of a draft policy statement on business combinations as an annex to such regulations (the "Proposed OCC SOP", and together with the Proposed FDIC SOP, the "Proposed SOPs"), which received 34 substantive written comments,[7] and (iii) the DoJ's initial request soliciting public comment on its bank merger competitive review guidelines issued on

September 1, 2020 (the "2020 DoJ RFC")[8] and subsequent request for additional public comment on December 17, 2021 (the "2021 DoJ RFC", and together with the 2020 DoJ RFC, the "DoJ RFCs").[9]

The Final SOPs are substantially similar to the proposals, with certain limited adjustments in response to public comments. As described below, (i) the Final FDIC SOP implements notable changes to the FDIC's decades-long policy[10] on key aspects of its bank merger-related regulatory review framework, including with respect to the scope of its jurisdiction under the Bank Merger Act, its analysis of the statutory factors,[11] and certain process-related expectations,[12] and (ii) the OCC's final rule (the "OCC Final Rule", available here) removes the expedited review and streamlined application procedures governing business combination applications from Part 5 of its regulations and adds the Final OCC SOP as Appendix A to Part 5, which most notably reflects an indicator-based framework for evaluating the statutory factors.

Finally, the DoJ's withdrawal from the 1995 Bank Merger Guidelines is in keeping with recent remarks by DoJ officials criticizing the 1995 Bank Merger Guidelines. Given the generality of the 2023 Merger Guidelines and the sparse nature of the Banking Addendum, however, the withdrawal leaves unanswered important questions about how the DoJ will fulfill its congressional mandate to advise the banking regulators in their review of proposed banking transactions and DoJ's own enforcement intentions. DoJ's application of the 2023 Merger Guidelines to actual mergers (both banking and non-banking) will thus be an important development to watch. For instance, in the 2023 Merger Guidelines the DoJ stated that "[m]arkets with [a Herfindahl-Hirschman Index] greater than 1,800 are highly concentrated, and a change of more than 100 points is a significant increase"—as opposed to a 200-point increase[13] under the 1995 Bank Merger Guidelines—and that "[a] merger that creates or further consolidates a highly concentrated market that involves an increase in the HHI of more than 100 points is presumed to substantially lessen competition or tend to create a monopoly," even though the DoJ cited no precedent either by a court or a DoJ consent decree concluding that there had been competitive harm from a merger resulting in a change in the HHI anywhere near that threshold.[14] Notably, the DoJ's withdrawal from the 1995 Bank Merger Guidelines—which utilized screens developed together by the DoJ and "the banking agencies"—is that it was not accompanied by a similar statement from the Board of Governors of the Federal Reserve System, which is the banking agency with the most well-developed precedent addressing the competitive review of bank mergers. The potential for divergent approaches to be adopted, and divergent conclusions reached, as between the DoJ and the Federal Reserve will thus be an important development to watch in upcoming mergers.

BACKGROUND

Since 2020, the FDIC, OCC and DoJ have signaled that they were revisiting their approach to reviewing bank merger transactions, and that they would work with each other as well as the Federal Reserve on updates to their respective analytical frameworks related to these transactions.

FDIC Bank Merger Policy

The Prior FDIC SOP was last published for comment in 1997, and was revised in 2002 and 2008 without being issued for public comment to reflect, among other things, the anti-money-laundering statutory factor and amendments to the Bank Merger Act resulting from the Financial Services Regulatory Relief Act of 2006. In March 2022, the FDIC issued a request for information on a wide range of issues relating to bank merger transactions (the "2022 FDIC RFI").[15] In November 2023, FDIC Chairman Martin J. Gruenberg, in his testimony to the Senate Committee on Banking, Housing, and Urban Affairs (available here), noted that "[a]lthough there has been a significant amount of consolidation in the banking sector over the last thirty years, facilitated in part by mergers and acquisitions, there has not been a significant review of the implementation of the [Bank Merger Act] by the banking agencies in that time" and that "[t]he FDIC [was] evaluating and considering the comments received [as part of the 2022 FDIC RFI] as it consider[ed] changes to the merger review framework, as appropriate."

In March 2024, the FDIC took a step toward changing its bank merger review framework by issuing the 2024 FDIC RFC soliciting public comment on all aspects of the Proposed FDIC SOP[16] and requesting comments on 39 enumerated sets of questions on a broad set of topics. Public reaction to the Proposed FDIC SOP, including by members of the FDIC Board, was mixed. On the one hand, Chairman Gruenberg stated that he "strongly support[ed]" the Proposed FDIC SOP and its publication for public comment.[17] Similarly, Consumer Financial Protection Bureau Director and FDIC Director Rohit Chopra remarked that the Proposed FDIC SOP would "bring analytical rigor to merger review and better align the agency's framework with the statute" and address the "harms from the permissive, pro-merger policy posture of recent decades."[18] On the other hand, FDIC Vice Chairman Travis Hill remarked that he believed the Proposed FDIC SOP "move[d] in the wrong direction, [and would] potentially mak[e] the [FDIC's regulatory review] process [for merger transactions] longer, more difficult, and less predictable."[19] Similarly, FDIC Director Jonathan McKernan stated that he was "unable to support [the Proposed FDIC SOP] because it reflect[ed] and would implement a bias against bank mergers that is bad policy and contrary to law."[20] Comments from the leaders of the other federal banking agencies also varied. For example, Acting Comptroller Michael Hsu (also a member of the FDIC Board) generally supported the Proposed FDIC SOP, asserting that it was "broadly consistent" with the Proposed OCC SOP issued in January 2024, while noting a divergence in the agencies' respective approach to the use of non-standard conditions.[21]

OCC Business Combinations Policy

During a speech at the Brookings Institute in May 2022 (available here), Acting Comptroller Hsu noted that "the frameworks for analyzing bank mergers need updating" because "[w]ithout enhancements, there is an increased risk of approving mergers that diminish competition, hurt communities, or present systemic risks." In addition, in February 2023 then-Senior Deputy Comptroller and Chief Counsel Benjamin W. McDonough delivered opening remarks for the OCC Bank Merger Symposium on behalf of Acting Comptroller Hsu

(available here) during which he reiterated the Acting Comptroller's views that "[the OCC] needs to build a better mousetrap so that healthy mergers get approved while unhealthy mergers get rejected," and to do so the OCC needs to revise its analytical framework to deepen its evaluation of a bank merger's effect on market concentration, financial stability and the convenience and needs of the communities served.

In furtherance of this goal, in January the OCC issued the 2024 OCC NPR, which included the Proposed OCC SOP. The Acting Comptroller's remarks accompanying the announcement of the 2024 OCC NPR underscored his desire to develop a "macro view" of the banking system—one that holistically evaluates the impact of bank mergers on the banking system and the U.S. economy—as a way to improve "transparency and trust" in the OCC's "micro," case-by-case approach to reviewing bank merger applications.[22]

DoJ Bank Merger Policy

The 1995 Bank Merger Guidelines describe detailed a detailed framework collaboratively developed by "the banking agencies and the [DoJ]" to "speed" their review of banking mergers and "reduce regulatory burden on the banking industry."[23] Toward the end of the Trump Administration, the DoJ issued the 2020 DoJ RFC seeking public comments on the need to revise the 1995 Bank Merger Guidelines to reflect "emerging trends in the banking and financial services sector and modernize its approach to bank merger review under the antitrust laws."[24] The 2020 DoJ RFC solicited public comment on "six specific questions, including whether any new guidance should be bank-specific, whether any new bank merger guidance should be jointly issued [with the banking agencies], whether the 1800/200 [HHI]screen should be updated, and whether there should be a *de minimis* exception."[25]

Subsequently, in furtherance of President Biden's Executive Order on Promoting Competition in the American Economy (the "2021 Executive Order", available here), the DoJ updated its call for public comment with its issuance of the 2021 DoJ RFC, which built on the comments received on the 2020 DoJ RFC and "focuse[d the updated call for comment] on whether bank merger review is currently sufficient to prevent harmful mergers and whether it accounts for the full range of competitive factors appropriate under the laws."[26]

In his June 2023 remarks at the Brookings Institution (available here), Assistant Attorney General Jonathan Kanter observed that "the time is indeed ripe for us to re-examine how we assess bank mergers under the statutory framework that Congress has enacted" and that the DoJ had been "engaged in productive discussions" with the federal banking agencies to reassess the prevailing approach to bank merger review and enforcement "given current market realities." Later, in July 2023, the DoJ (together with the Federal Trade Commission) issued for public comment generally applicable draft merger guidelines (available here) that articulated a policy that was generally more restrictive toward mergers than their prior longstanding policy. In December 2023, the DoJ and the FTC adopted the 2023 Merger Guidelines (available here).

Neither the 2023 Merger Guidelines nor the press releases accompanying them expressly mentioned the 1995 Bank Merger Guidelines or the DoJ RFCs. In comments following release of the 2023 Merger Guidelines, however, DoJ officials have made clear their preference for the 2023 Merger Guidelines over the 1995 Bank Merger Guidelines. For instance, Assistant Attorney General Kanter described "widespread recognition" that the "mode of analysis" set forth in the 1995 Bank Merger Guidelines "is outdated" in a March 2024 conference on banking mergers.[27]

FINAL FDIC SOP

The Final FDIC SOP largely reflects the same content and structure as the Proposed FDIC SOP, and was approved by the FDIC Board by a 3 to 2 vote (with Vice Chairman Hill and Director McKernan dissenting).[28] Separate sections discuss the statutory factors, each of which includes a declarative statement regarding the FDIC Board's expectations with respect to a specific statutory factor as well as an accompanying narrative that describes the FDIC's analytical considerations for the factor.

As with the Proposed FDIC SOP, certain of the stated expectations and requirements in the Final FDIC SOP appear to represent a departure from the Prior FDIC SOP guidance and past practice at the FDIC, including most notably with respect to the following areas:

- ***Convenience and Needs of the Community.*** Section IV (*Statutory Factors—Convenience and Needs of the Community To Be Served*) of the Final FDIC SOP retains, among other things: (i) a novel requirement for applicants to demonstrate that a resulting insured depository institution will "*better meet* the convenience and needs of the community to be served" through, among other means, higher lending limits, greater access to existing products and services, new or expanded products or services, reduced costs, or increased convenience;[29] (ii) a requirement for applicants to provide a greater amount of specific and forward-looking information, including three-year projections for all future branch plans, to enable the FDIC to consider how a transaction will "better meet" the convenience and needs of the community, which information the FDIC will consider to be "claims and commitments" the adherence to which the agency will evaluate on an ongoing basis;[30] and (iii) a general expectation that the FDIC will hold public hearings for transactions where the resulting IDI will have greater than $50 billion in total assets or for which a "significant number of [Community Reinvestment Act] protests" are received.[31]

  Despite "multiple commenters" opposing these changes and asserting that the "better meet" standard is inconsistent with the clear statutory language and decades of precedent, the FDIC states that it retained this requirement because it is "consistent with Congressional intent" (citing only an excerpt of a 1966 statement from the then-Chairman of the Senate Committee on Banking and Currency regarding an agency's evaluation of "beneficial" aspects of a merger) and with the "FDIC's longstanding policy" (quoting a portion of the Prior FDIC SOP indicating that the FDIC will consider "the extent to which [a] proposed merger transaction is likely to benefit the general public").[32] In his dissent, Vice Chairman Hill noted that he is "unpersuaded" by this cited support in the preamble and "continue[s] to oppose imposing an affirmative burden on applicants to demonstrate the merger would *better* meet the convenience and needs of the community."[33]

- ***Competition.*** To "mitigate competitive concerns," Section IV (*Statutory Factors—Monopolistic or Anticompetitive Effects*) of the Final FDIC SOP indicates that the FDIC may require divestitures of "business lines, branches, or portions thereof" to be completed *before* allowing bank merger transactions to be consummated,[34] which is different than longstanding practice for bank mergers where the DoJ, FTC and federal banking agencies typically permit required divestitures to be completed after a bank merger's closing.[35]

- ***Financial Stability.*** Although emphasizing that "size alone is not dispositive,"[36] Section IV (*Statutory Factors—Risk to the Stability of the United States Banking or Financial System*) of the Final FDIC SOP retains the general observation that transactions resulting in institutions with $100 billion or more in total assets are expected to be subject to "added scrutiny" by way of "additional information requests, more frequent discussions and correspondence with application parties, and supplementary meetings and discussions with regulators and community groups,"[37] as these are "more likely" to present potential financial stability concerns.[38] Regarding the retention of this framework from the Proposed FDIC SOP, Vice Chairman Hill noted that he "generally think[s] the inclusion of the $100 billion threshold is unhelpful, even if the preamble acknowledges that it is 'not a threshold for a presumptive denial.'"[39]
- ***Process-Related Matters.*** Section II (*Jurisdiction and Scope—Merger Application Adjudication*) preserves the ability of the FDIC to issue a public statement detailing the agency's concerns with a withdrawn application if "such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants."[40] Although the FDIC recognized commenters' request to eliminate this aspect of the Proposed FDIC SOP and concerns regarding publicizing confidential information,[41] the agency reasserted its "prerogative" to issue such public statements, which are "not expected for most transactions" and would be "fully consistent with the confidentiality requirements of applicable laws and regulations and would not disclose confidential business information of applicants."[42]

Additionally, consistent with the Proposed FDIC SOP, Section II (*Jurisdiction and Scope*) of the Final FDIC SOP reiterates the FDIC's expansive interpretation of the types of transactions requiring FDIC approval, except that the Final FDIC SOP now expressly asserts that acquisitions of "lines of business [where] the target is no longer a viable competitor [in that line of business]" also qualify as "mergers in substance" subject to prior FDIC approval, "regardless of whether the target plans to liquidate immediately after consummating the transaction" as would occur in connection with a "true merger."[43] The FDIC rejected commenters' position that such an expansive jurisdictional assertion was inconsistent with the statutory language and structure.[44] Relatedly, the FDIC rejects state common law as precedential on the basis that "the scope of transactions subject to the [Bank Merger Act] for the purposes embodied by its statutory factors is not perfectly coextensive with the scope of transactions that qualify as *de facto* mergers under divergent state law doctrines for the purpose of establishing successor liability."[45] Further, Section V (*Other Matters and Considerations*) of the Final FDIC SOP discusses how, in connection with its review of applications from non-banks (*i.e.*, from an insured depository institution that is not a "bank" for purposes of the Bank Holding Company Act), banks that are not traditional community banks (*e.g.*, monolines) and operating non-insured entities, which applications are subject to the same statutory factors as transactions between traditional banks generally, the FDIC may require a broader range of information, such as three years of audited financial statements and potentially independent appraisals or valuations of assets to be transferred to an IDI.[46]

In response to public comments, the FDIC did include in the Final FDIC SOP certain limited amendments to the Proposed FDIC SOP, most importantly with respect to the use of non-standard conditions as part of the FDIC's consideration of a Bank Merger Act application. Specifically, Section III (*Application Process and Adjudication—Merger Application Adjudication*) of the Final FDIC SOP clarifies the agency's position that "the imposition of [non-standard] conditions will be taken into account as part of the FDIC's

consideration of [a] merger application, but will not necessarily lead to the favorable resolution of any statutory factor where the facts and circumstances are otherwise unfavorable."[47] As noted above, this is more consistent with the OCC's guidance and past practice as well as that of the Federal Reserve, and also with the FDIC's statements in Financial Resources sections of both the Proposed and Final FDIC SOPs where the agency asserts that it may impose higher-than-applicable capital requirements as non-standard conditions in connection with approving a particular transaction.[48]

FINAL OCC RULE AND SOP

The Final OCC Rule is substantially similar to the 2024 OCC NPR, including adopting as proposed the amendments eliminating the automatic expedited review and approval procedures that permitted certain transactions that qualified as business reorganizations,[49] or for a streamlined application,[50] to be deemed approved as of the 15th day after the comment period on the application closes.[51] The OCC contended that these regulatory amendments better reflect the agency's view that any filing under the business combination regulations warrants "active OCC consideration" and should not be approved through the mere passage of time.[52] Furthermore, the OCC observed, given its practice of removing applications from expedited review, extending its processing timeline, and requesting additional information, it did not expect that these changes would result in a meaningful change to its processing time of merger applications.[53]

Although the Final OCC SOP was in many respects identical to the Proposed OCC SOP in the standards the agency will apply in reviewing business combinations, importantly, the Final OCC SOP reflects certain revisions to resolve confusion regarding whether the OCC intends to disapprove certain types of proposed transactions.[54] This and other key revisions incorporated in the OCC Final SOP are explained below:

- ***Indicator Framework Generally.*** Section I (*General Principles of OCC Review*) of the Final OCC SOP retains the indicator-based framework elaborating on how the OCC considers the statutory factors and certain applicant and transaction features that, in the OCC's experience, are consistent with an application approval or, alternatively, would raise supervisory or regulatory concern.[55] Numerous commenters expressed confusion about how the indicators would apply, and the OCC acknowledged that many interpreted the Proposed OCC SOP to mean that the OCC would not approve an application if one of the positive indicators was absent. As a result, the OCC made revisions to eliminate this confusion, specifying that applications that "tend to withstand scrutiny more easily and are more likely to be approved expeditiously" generally feature all of the enumerated positive indicators, but that "these indicators are not *required* for a transaction to be approved."[56]
- ***Size-Based Indicators.*** The Proposed OCC SOP included as a positive attribute that the resulting entity would have less than $50 billion in total assets, which had prompted commenters' concern that this was a "ceiling for transactions consistent with approval."[57] In addition to the OCC's general clarifying change regarding the purpose of the indicators as described in the bullet above, the OCC also explained in its release that this "$50 billion indicator merely reflects the likelihood of an expeditious approval," but that many larger transactions may also be approved.[58]

  Two commenters also criticized one of the positive indicators regarding a target's "combined total assets" being less than or equal to 50% of the acquirer's total assets, suggesting that the OCC meant to systematically disapprove mergers of equals.[59] In response, the OCC clarified that this indicator merely reflected the OCC's experience that transactions involving institutions of similar sizes generally required "more review," but that this "indicator is not intended to discourage mergers of equals."[60]

- ***G-SIBs***. The OCC also responded to commenters' concerns that the Proposed OCC SOP meant that if an acquirer is a G-SIB or subsidiary thereof, any related application would not be approved. The OCC stated that this was not the case and clarified that indicators of regulatory or supervisory concern do not preclude OCC approval.[61] However, because of the OCC's stated experience that "G-SIBs are among the most complex financial institutions" and "often present supervisory issues," inclusion of this indicator was still appropriate.[62]
- ***Competition.*** The OCC rejected commenters' request for more information regarding the OCC's analysis of the competition-related statutory factor, noting that Appendix A is not "the appropriate vehicle" for this detail, given the complexities of the analysis and the OCC's partnership with the DoJ.[63]
- ***General Processing Matters.*** The OCC also remarked that the Appendix A was not intended to "address OCC processing issues," thereby dismissing commenters' requests for more information regarding staff review timelines, the disclosure of confidential supervisory information, the reasoning behind application withdrawals, internal decision-making considerations, or the practice of pre-filing meetings.[64] Specifically in response to commenters' request for more precision about application processing times, the OCC explained that it intended to make determinations "in a timely fashion, consistent with a fulsome review of applications and safety and soundness."[65]

DOJ BANKING ADDENDUM

In its Banking Addendum, the DoJ pointed to the need to address a merger's potential effects on a number of subsegments of customers who purchase financial services, including "depositors," those needing "mortgages," those who visit "branch locations," corporations needing "large or bespoke financing," "[s]mall businesses," "non-profit organizations," "local stores," "economically underserved individuals," and "customers with low credit scores."[66] The DoJ did not purport to describe how competitive effects on those subsegments would be addressed, but instead pointed to the need to conduct a "market-by-market" analysis.[67] The Banking Addendum also summarized the statutory scheme relating to bank mergers and concluded by observing that "[t]he banking agencies may, at their discretion, use their own methods for screening and evaluating bank mergers."[68] Thus, unlike the 1995 Bank Merger Guidelines, the Banking Addendum does not purport to address the approach of the "banking agencies" and speaks only to the approach to be followed by the DoJ.

ANALYSIS

The coordinated manner in which the FDIC, OCC and DoJ announced their final actions yesterday was notable and appears to signify the culmination of the Biden Administration's directive to "revitaliz[e] merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956" pursuant to the 2021 Executive Order.[69] It is unclear, however, to what extent the Final SOPs and the as-revised 2023 Merger Guidelines will impact bank consolidation activity or the respective agencies' application review processes.

A few additional observations:

Final FDIC SOP. The FDIC suggests the aim of the Final FDIC SOP is to "provide transparency"[70] on its bank merger policy. As noted above, however, certain aspects of the Final FDIC SOP—particularly the novel guidance relating to the "convenience and needs" and competition-related statutory factors and application withdrawals—go beyond merely clarifying existing policy. These changes represent a

significant shift vis-à-vis not only the FDIC's, but also from the OCC's and Federal Reserve's, long-established approach to evaluating and processing applications under the Bank Merger Act.[71] A lack of interagency coordination in such a critical policy area creates greater uncertainty for industry participants and may have a chilling effect on bank merger transactions where the resulting IDI is a state nonmember bank.[72] Indeed, Director McKernan's dissent asserts that "the [FDIC's] decision to reject [] concerns raised by the commenters on the [Proposed FDIC SOP] confirms that [the Final FDIC SOP] does indeed implement a bias against bank mergers that is bad policy and contrary to law."[73]

Additionally, despite receiving comments regarding the extensive delays associated with the FDIC's bank merger review process,[74] consistent with the Proposed FDIC SOP, the Final FDIC SOP provides applicants with no guidance on if or how the agency plans to institute predictable staff review procedures or approval deadlines.

- ***Final OCC SOP*.** Importantly, the OCC addressed and dispelled the overarching concern that the OCC would approve only applications that included all the enumerated positive indicators. The OCC's revisions in the Final OCC SOP clarify that the OCC did not intend to change its existing policies and practice and that, specifically, the agency did not intend to prohibit mergers of equals, transactions resulting in an institution with more than $50 billion in assets, or any transaction involving a G-SIB or a subsidiary thereof. This update provides helpful clarity to the market.

  Still, and consistent with the Final FDIC SOP, the OCC's final rulemaking did not provide any further clarity or comfort regarding the lengthy period of time for reviewing bank mergers by all the agencies. Despite multiple comments regarding this concern, the OCC responded only that it is "mindful of the effects of the length of review periods on all relevant parties."[75] Indeed, as noted above, the OCC states that the removal of the automatic expedited review and streamlined application processes will have only a *de minimis* effect on its processing times, given its historical practice of requesting additional information or extending review periods. However, there is little in the Final OCC SOP or accompanying regulation changes to suggest that the processing times for merger applications will actually improve.

  Acting Comptroller Hsu, although commenting on the Final FDIC SOP, observed that "we must also be open to embracing and approving mergers where strong banks that have earned the trust of their communities and regulators seek to acquire weaker ones and have credible plans and capabilities to improve them."[76]

- ***Final DoJ Bank Merger Guidelines*.** The DoJ's rejection of its longstanding approach to bank mergers and the relatively high-level discussion in the Banking Addendum of the application of the 2023 Merger Guidelines to bank mergers may leave unanswered important questions that banks will need to consider carefully in their strategic plans.

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ENDNOTES

1 12 U.S.C. § 1828(c).

2 DoJ, *Press Release: Justice Department Withdraws from 1995 Bank Merger Guidelines* (Sept. 17, 2024) (available here).

3 As discussed below, the Final FDIC SOP also applies to what the FDIC terms "in substance" mergers of non-banks into all insured banks.

4 FDIC, *Request for Comment on Proposed Statement of Policy on Bank Merger Transactions*, 89 Fed. Reg. 29222 (Apr. 19, 2024) (available here); *see also* our prior memorandum regarding the 2024 FDIC RFC here.

5 *See* Memorandum to the FDIC Board of Directors, Final Statement of Policy on Bank Merger Transactions (Sept. 17, 2024, available here) at 3. The public comment period for the 2024 RFC closed on June 18, 2024, approximately 90 days ago.

6 *See* OCC Final SOP at 3*;* OCC, *Notice of Proposed Rulemaking: Business Combinations under the Bank Merger Act*, 89 Fed. Reg. 10010 (Feb. 13, 2024) (available here). *See also* our prior memorandum regarding the 2024 OCC NPR here.

7 OCC Final SOP at 3. The public comment period for the 2024 RFC closed on June 15, 2024, also approximately 90 days ago.

8 DoJ, Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis (Sept. 1, 2020) (available here). Comments to the 2020 DoJ RFC are available here.

9 DoJ, Antitrust Division Seeks Additional Public Comments on Bank Merger Competitive Analysis (Dec. 17, 2021) (available here). Comments to the 2021 DoJ RFC are available here.

10 FDIC, *Statement of Policy on Bank Merger Transactions*, 63 Fed. Reg. 44761 (Aug. 20, 1998) (as amended) (available here) (the "Prior FDIC SOP").

11 The statutory factors the FDIC, OCC and Federal Reserve are required to consider in connection with their review of applications pursuant to the Bank Merger Act include competitive effects, financial and managerial resources, future prospects, convenience and needs of the community to be served, effectiveness in combatting money laundering, and the risk to the stability of the United States banking or financial system. *See* 12 U.S.C. § 1828(c).

12 The FDIC did not adopt final revisions to its supplemental section to the Interagency Bank Merger Act Application form yesterday as part of its approval of the Final FDIC SOP, which revisions were the subject of a separate FDIC information request earlier this year. *See* FDIC, *Agency Information Collection Activities: Proposed Collection Renewal; Comment Request*, 89 Fed. Reg. 29245 (Apr. 19, 2024) (available here).

13 *See* 1995 Bank Merger Guidelines at 1–2.

14 *See* 2023 Merger Guidelines at 5–6.

15 *See* our prior memorandum regarding the FDIC's 2022 RFI on bank merger transactions here.

16 2024 FDIC RFC at 13.

17 Statement by Martin J. Gruenberg, Chairman, FDIC, on Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024) (available here).

18 Prepared Remarks of CFPB Director Rohit Chopra at the Peterson Institute for International Economics Event on Revitalizing Bank Merger Review (Mar. 21, 2024) (available here).

19 Statement by Vice Chairman Travis Hill on the FDIC's Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024) (available here).

ENDNOTES (CONTINUED)

20 Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Statement of Policy on Bank Merger Transactions (Mar. 21, 2024) (available here).

21 OCC Press Release, *Acting Comptroller Issues Statement on the FDIC's Proposed Statement of Policy on Bank Merger Transactions* (Mar. 21, 2024) (available here).

22 Speech, Acting Comptroller Michael Hsu, *What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced* (Jan. 29, 2024) (available here).

23 1995 Bank Merger Guidelines at 1.

24 DoJ 2020 RFC at 1.

25 *See* DoJ press release cited in *supra* note 9.

26 *Id.*

27 Remarks of Assistant Attorney General Kanter at the Peterson Institute for International Economics Event on Revitalizing Bank Merger Review at 41:45 (Mar. 21, 2024) (available here).

28 *See* Statement by FDIC Vice Chairman Travis Hill on the Final Statement of Policy on Bank Merger Transactions (Sept. 17, 2024) (the "Hill Dissent", available here); Statement by FDIC Director Jonathan McKernan on the Final Statement of Policy on Bank Merger Transactions (Sept. 17, 2024) (the "McKernan Dissent", available here).

29 Final FDIC SOP at 46 (emphasis in original).

30 *Id.* at 47.

31 *Id.* at 49.

32 *Id.* at 21, notes 13 and 14.

33 Hill Dissent at 1 (emphasis in original).

34 *Id.* at 41.

35 The FDIC also expanded the content in this section as compared to the Proposed FDIC SOP to (i) clarify that it may request an IDI divesting or otherwise closing a branch in connection with a transaction to "waive any terms or conditions that preclude the ability of other IDIs to lease or purchase the property" and (ii) provide guidance regarding policies and practices relevant to transactions involving rural institutions, namely that: (x) as circumstances warrant, the FDIC will take into account certain non-bank competitors, expressly identifying credit unions, thrifts, and Farm Credit System institutions and (y) the FDIC will carefully balance the competitive effects of such a merger with the public interest served by the capacity of the resulting IDI to serve the convenience and needs of the community. *Id.* at 39, 41.

36 *Id.* at 10.

37 *Id.* at 27.

38 *Id.* at 50.

39 Hill Dissent at 1.

40 *Id.* at 38.

41 *Id.* at 15.

42 *Id.* at 15–16.

43 *Id.* at 13 and 33.

44 *Id.* at 13.

45 *Id.* at 13 (emphasis in original).

46 *Id.* at 55.

ENDNOTES (CONTINUED)

47 *Id.* at 36.

48 *Id.* at 42.

49 § 5.33(d)(3) defines a "business reorganization" as either a business combination between (i) eligible banks and eligible savings associations, or between an eligible bank or an eligible savings association and an eligible depository institution, that are controlled by the same holding company or that will be controlled by the same holding company prior to the combination; or (ii) an eligible bank or an eligible savings association and an interim national bank or interim Federal savings association chartered in a transaction in which a person or group of persons exchanges its shares of the eligible bank or eligible savings association for shares of a newly formed holding company and receives after the transaction substantially the same proportional share interest in the holding company as it held in the eligible bank or eligible savings association (except for changes in interests resulting from the exercise of dissenters' rights), and the reorganization involves no other transactions involving the bank or savings association.

50 § 5.33(j) authorized use of a streamlined application if:

(i) at least one party to the transaction is an eligible bank or eligible savings association, and all other parties to the transaction are eligible banks, eligible savings associations or eligible depository institutions, the resulting national bank or resulting federal savings association will be well capitalized immediately following consummation of the transaction, and the total assets of the target institution are no more than 50% of the total assets of the acquiring bank or federal savings association, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application;

(ii) the acquiring bank or federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting national bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the filers in a pre-filing communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application;

(iii) the acquiring bank or federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the total assets acquired do not exceed 10% of the total assets of the acquiring national bank or acquiring federal savings association, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application; or

(iv) in the case of a transaction under § 5.33(g)(4) of this section, the acquiring bank is an eligible bank, the resulting national bank will be well capitalized immediately following consummation of the transaction, the filers in a pre-filing communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application, and the total assets acquired do not exceed 10% of the total assets of the acquiring national bank, as reported in the bank's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application.

51 *See* Final OCC Rule at 44.

52 *Id.* at 5–6.

53 *Id.* at 5, 7–8.

54 *Id.* at 13.

55 *Id.* at 45.

56 *Id.* at 14 (emphasis in original).

57 *Id.*

ENDNOTES (CONTINUED)

58 *Id.* at 14–15.

59 *Id.* at 15.

60 *Id.*

61 *Id.* at 17.

62 *Id.* at 18.

63 *Id.* at 11.

64 *Id.* at 10.

65 *Id.* at 35.

66 Banking Addendum at 2.

67 *Id.*

68 *Id.* at 3.

69 2021 Executive Order at 8.

70 Final FDIC SOP at 1.

71 This is notwithstanding Acting Comptroller Hsu's remarks that the Final FDIC SOP "is broadly consistent with the [Final OCC SOP]." Statement by FDIC Director, Acting Comptroller Michael Hsu on the Final Statement of Policy on Bank Merger Transactions (Sept. 17, 2024) (the "Hsu Statement", available here).

72 The Final FDIC SOP does not apply to bank merger transactions where the resulting IDI is a national bank or a state member bank.

73 McKernan Statement at 1.

74 Final FDIC SOP at 16.

75 Final OCC SOP at 35.

76 *See* Hsu Statement at 1.

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