



Federal Reserve and Justice Department Release FAQs on Antitrust Review of Bank Mergers

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On October 9, the Federal Reserve Board and the Antitrust Division of the Justice Department jointly released a set of frequently asked questions and answers relating to antitrust reviews of bank mergers. The FAQs (accessible [here](#)) generally reflect longstanding administrative policies and practices of the two agencies and are a useful compilation of their respective views, including areas where the approaches taken by the two agencies diverge. The FAQs indicate that a common analytical approach will be used for all types of banking organization merger applications, including those filed under the Bank Holding Company Act, the Bank Merger Act, and the Home Owners' Loan Act.

INITIAL SCREENING

Federal Reserve – An initial screening is done for each pre-defined banking market in which bank deposits are weighted at 100% and thrift deposits are weighted at 50% (except for thrifts owned by bank holding companies, either before or after the acquisition, which are weighted at 100%). If in any overlapping market the resulting Herfindahl-Hirschman Index (“HHI”) increases by less than 200 points as a result of the merger or the post-merger HHI is less than 1,800, and the post-merger organization does not have a greater than 35% market share, then the transaction will pass the initial screening and be eligible for approval by a local Reserve Bank under delegated authority. Transactions that exceed these thresholds must be reviewed by Federal Reserve staff in Washington, but may still be approved based on a closer review of the markets, the presence of mitigating factors, and other considerations.

DOJ – The DOJ’s initial screening analysis is also done using deposit data, but it does not necessarily use the Federal Reserve’s pre-defined geographic banking markets. While the DOJ’s decision regarding geographic markets is made on a case-by-case basis, the FAQs note that applicants “may wish” to also perform HHI calculations for each county in which the merging parties have overlapping operations. Since the Federal Reserve’s geographic markets typically are based on Metropolitan Statistical Areas (“MSAs”) that usually comprise multiple counties, concentration levels for individual counties can often be higher than for the MSA or Federal Reserve banking market as a whole. In addition, the DOJ (unlike the Federal Reserve) screens for two different product markets – retail banking and small business banking – and thrift deposits are given different weights in those markets, as described below.

PRODUCT MARKETS

Federal Reserve – As a general matter, the Federal Reserve considers banks to compete in a single product market – the “cluster” consisting of commercial banking products and services – and uses branch deposit data to measure market concentration. The FAQs note that for

certain wholesale or nonbanking products that may be obtained separately from the normal cluster of commercial banking services, such as credit cards and mortgage lending, the Federal Reserve may do a separate concentration analysis and utilize different geographic markets, which may be regional or national in scope.

DOJ – As noted above, the DOJ does not use the Federal Reserve’s “cluster of services” product definition but instead focuses on the markets for retail banking services and for small business services. The DOJ believes that small business customers are generally more limited geographically in where they can turn for banking services and generally can obtain those services only from commercial banks and not thrifts or credit unions. For this reason, thrift deposits are weighted at 100% in the retail banking analysis but given no weight in the small business analysis (except for thrifts that are active in commercial lending, including having 2% or more of their total assets invested in commercial and industrial loans). Credit union deposits are generally weighted at 0% as well in the small business market analysis, although the presence of credit unions with active commercial lending businesses may be considered a mitigating factor. In addition, the DOJ will look at information on small business lending in the relevant markets, including business loans booked at the merging parties’ branches, small business loan originations reported under the Community Reinvestment Act, market surveys conducted by the parties, and similar data. Because information on small business lending is not reported for all market participants at a branch level the way deposit data are, compiling market share data on small business lending can be challenging. As a result, a DOJ investigation of a bank merger may include both document requests from the merging parties (such as pricing surveys, lost business reports, and board presentations) and interviews with competitors and customers.

On occasion, the DOJ has also investigated the effect of bank mergers on middle market banking, which presents similar information gathering challenges.

DEPOSIT DATA ADJUSTMENTS

Thrifts and Credit Unions – The Federal Reserve initially weights commercial bank deposits at 100% and thrift deposits (other than thrifts owned by bank holding companies) at 50%. Federal Reserve staff will usually agree to give 100% weight to deposits of thrifts that are actively engaged in commercial lending (often indicated by commercial and industrial loans being more than 5% of total assets). Federal Reserve staff will also include a credit union’s deposits at a 50% weighting if the credit union has broad field of membership requirements that include most or all of a market’s population and has branches that are easily accessible to the public. In very rare circumstances, the Federal Reserve will give a 100% deposit weighting to a credit union with significant commercial lending business.

Centrally Booked/Out-of-Market Deposits – On occasion, one of the merging parties may have a branch in an overlapping market that is used to book deposits from out-of-market sources (e.g., national escrow deposits) that distorts its market share. The Federal Reserve has in the past made adjustments to exclude such deposits where the applicant can demonstrate both the out-of-market nature of such deposits and that similar adjustments need not be made to branch deposits of other market participants. Since detailed information on deposit source is generally

not available publicly, obtaining such information for other market participants can present challenges. Significant government deposits booked in a particular branch can be addressed in the same manner.

Specialized Depository Institutions – Certain types of specialized depository institutions that source their deposits from broader markets, such as credit card and Internet banks and trust companies, are typically excluded from the Federal Reserve’s screening analysis.

REMEDIES

For transactions that present significant antitrust issues even after considering mitigating factors and any approved deposit adjustments, the typical remedy to obtain approval is a commitment to sell branches in the concentrated markets. The Federal Reserve typically allows the applicant to select a package of branches to be sold that will reduce the HHI below the 200/1,800 thresholds and a 35% market share. In practice, due to mitigating factors, the Federal Reserve has often accepted smaller divestiture packages. The FAQs do not address the range of permissible market concentrations but instead note that “there are no general guidelines for determining the level of divestiture that would be necessary to allow the [Federal Reserve] to approve a potentially anticompetitive application.”

The DOJ follows a similar approach to remedies, but has more stringent requirements for several aspects of proposed divestitures:

- the total customer relationship of the divested branch (deposits and loans) must be sold;
- only target bank, and not acquiror, branches may be used to satisfy the divestiture requirements; and
- the DOJ must approve each of the divested branches for sale, as well as the proposed purchaser (which must be “competitively suitable”), and the package of divested branches must allow the buyer to “compete effectively” in the market.

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