Simpson Thacher

Memorandum

Bank Regulators Approve Capital One's Proposed Acquisition of Discover Following Extended Review

April 21, 2025

On April 18, 2025, the Federal Reserve and the OCC approved Capital One's proposed acquisition of Discover, without objection from DOJ.

It had previously been reported that DOJ—which is required to submit its views to the banking agencies on the competitive impact of a transaction—was closely scrutinizing potential competitive harms resulting from Capital One's proposed acquisition. This is the first large bank merger approved since DOJ's formal withdrawal from the joint 1995 Bank Merger Guidelines (see our prior client memorandum), a development that set the stage for a potentially significant disconnect between DOJ's and the Federal Reserve's approaches to analyzing bank mergers. The Federal Reserve's Capital One approval order provides further insight into the current state of the diverging frameworks used by the Federal Reserve and DOJ in assessing the competitive effects of a merger—in particular, by clearly reaffirming the Federal Reserve's continued use of the 1995 Bank Merger Guidelines and focus on the traditional "cluster of banking products and services" measured by local geographic markets for antitrust analysis.

Background

Under the Bank Merger Act and the Bank Holding Company Act, the bank regulatory agency reviewing a merger must solicit and consider DOJ's views regarding the proposed merger's competitive effects, and DOJ must submit its views to the banking agencies in the form of a non-public competitive factors report. Once the banking agency approves the proposed transaction, the banking statutes provide for a 30-day period (which is typically shortened to 15 days with DOJ's consent)[1] during which DOJ may decide either to challenge the transaction in federal court to stop the merger or permit the transaction to close. In practice, however, DOJ has not initiated a lawsuit to block a bank merger in decades, as DOJ has instead adopted a practice of resolving competitive concerns by entering into settlements with parties to a merger in advance of providing its competitive factors report to the banking agencies, reflecting a more collaborative approach between DOJ and the banking agencies.

Prior to DOJ's withdrawal from the 1995 Bank Merger Guidelines in September 2024, DOJ and the banking agencies applied a relatively similar analytical framework for analyzing competitive effects, which utilized predictable screens and safe harbors using market share calculations based on local deposits and branch overlaps.

[1] The Federal Reserve did not shorten the 30-day waiting period in its Capital One approval order. The order did not provide any explanation for this change from customary practice.

In formally withdrawing from the 1995 Bank Merger Guidelines, DOJ made clear that going forward it would be applying its general 2023 Merger Guidelines, thereby expanding its bank merger analysis beyond the traditional assessment of HHI screens based on deposits and instead applying a much broader and more flexible framework that would consider additional factors including the impact on discrete lines of business, particular customer segments and service quality. While DOJ stated, when announcing its withdrawal from the 1995 Bank Merger Guidelines, that the withdrawal was the result of collaborative consultations with the Federal Reserve, FDIC and OCC, none of the banking agencies went so far as to state that they would also be completely abandoning the 1995 Bank Merger Guidelines.

Key Takeaways

- **Federal Reserve Remains Committed to Applying the Traditional Analytical Framework in the 1995 Bank Merger Guidelines**. In its Capital One order, the Federal Reserve makes clear that it is continuing to rely heavily on its traditional methodology from the 1995 Bank Merger Guidelines of calculating market shares based on branch deposit data, and using the safe harbors set out in those Guidelines. While the Federal Reserve order notes that DOJ has withdrawn from the 1995 Bank Merger Guidelines, it goes on to state that "none of the federal banking agencies have withdrawn" and that the Federal Reserve "continues to apply the 1995 Bank Merger Guidelines in evaluating bank merger proposals." Accordingly, the Federal Reserve's principal antitrust analysis focused on the relative share of insured deposits that Capital One would control in local banking markets,[2] even though the merging banks are primarily credit card issuers (which the Federal Reserve noted was a component of banking products and services).

- **Level of Alignment Between the Federal Reserve and DOJ Unclear**. The Federal Reserve order does analyze on a standalone basis the potential impact to both "subprime customers" and "new-to-credit customers," although it states that the Board considers such subsets of services as "contained in the cluster" of banking products and services. Notwithstanding that the market shares in the "new-to-credit" segment would create a presumption of harm to competition under the DOJ's 2023 Merger Guidelines, the Federal Reserve ultimately concluded that there would be no harm to competition, pointing to mitigating factors such as recent growth from other competitors and the large total of issuers active in this segment. Also noteworthy is that historically Federal Reserve orders typically include a statement that DOJ has advised the Board that DOJ has concluded that adverse competitive effects are unlikely (or various phrasings to that effect). Here, the order stops noticeably short of that, simply stating that DOJ has advised the Board that the transaction "does not warrant an adverse comment."

[2] The Federal Reserve noted that Capital One and Discover had no overlapping physical branches in any geographic market but did compete nationally including through their internet platforms. To assess this competitive dynamic, the Federal Reserve used confidential depositor location information for both banks to calculate local market HHIs for every relevant market, and concluded that all were within the safe harbor guidelines.

- **Differing Methodology, but Similar Outcomes.** In the end, DOJ decided not to send the Federal Reserve a negative competitive report, showing that, at least on the specific facts of the Capital One/Discover merger, the differing analytical frameworks did not result in divergent outcomes. However, even when applying DOJ's more flexible 2023 Merger Guidelines framework, the Capital One/Discover merger was likely not an overwhelmingly strong case when considering how many other competitors could issue cards to subprime and new-to-credit customers. It remains to be seen, particularly for more traditional brick-and-mortar retail bank transactions, if DOJ's differing analytical approach will result in any materially divergent outcomes, or if Trump's DOJ will adhere more closely to a more traditional approach when assessing bank mergers, notwithstanding the broader analytical tools available within its 2023 Merger Guidelines.

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