Occupy the SEC
http://www.occupythesec.org

February 8, 2022

Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Comment on 1995 Banking Guidelines

Dear Sir or Madam:

Occupy the SEC[1] ("OSEC") submits this comment letter in response to the Department of Justice ("Agency") Antitrust Division's Request for Comment on its 1995 Banking Guidelines and the competitive analysis of bank mergers. As explained below, OSEC urges the Agency to drastically revamp the Agency's procedures for review of proposed bank mergers.

Scope of Division Review

The 1995 Banking Guidelines are outdated and must be revamped for a host of reasons. Perhaps the most significant reason is that the Guidelines fail to implement Congressional mandates. At present, the Guidelines only account for the kind of anticompetitive concerns that are addressed in other industries under Section 7 of the Clayton Act. However, the Bank Merger Act requires much more when it comes to bank merger review:

> **In every case**, the responsible agency **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.[2]

The statutory terms "in every case" and "shall" very clearly express a Congressional mandate for the bank merger process to address issues of systemic risk and convenience to the community. Yet, the Guidelines are incredibly brief (especially given the sizable market share that is under

---

[1] Occupy the SEC (http://occupythesec.org) is a group of concerned citizens, activists, and financial professionals that works to ensure that financial regulators protect the interests of the public, not Wall Street.

[2] 12 U.S.C. § 1828(c)(5) (2021) (emphases added). The Bank Holding Company Act of 1956 contains similar provisions. *See* 12 U.S.C. § 1842(c) (2021).

consideration in many proposed bank mergers), and fail to incorporate these mandatory factors. This failure is hardly surprising, given that the systemic risk factor was added by the Dodd-Frank Act in 2010,[3] about 15 years before the Guidelines were implemented. What *is* surprising is that the Guidelines have not been revised to comport with statutory requirements in over two decades.

This regulatory lassitude is also evident in reported statistics for bank mergers, which reveal that "the banking agencies have become a rubber stamp for merger proposals."[4] While the Federal Reserve approved 408 proposals in the second half of 2020, it denied none and only caused a mere 7 to be withdrawn by the applicants due to competitive, managerial or other substantive concerns.[5] Given that both market consolidation[6] and risk correlations in the banking industry have continued unabated for decades, one would expect regulators to substantively reject more than 1.6% of merger applications. At a time when government agencies and businesses worldwide were either shut down or operating at limited capacity due to the COVID-19 pandemic, it was business as usual for bank merger regulators; the median processing time for merger and acquisition proposals in the second-half of 2020 was 47 days, only 4 more than in 2019. The alacrity with which bank mergers applications are processed is remarkable. A brand-new bank with the bare minimum in required capital needs to wait 60 to 120 days for FDIC approval,[7] whereas multinational banks with billions in assets and offices in dozens of countries can expect merger approval in a little over a month.

Recommended Changes

The Agency must revise the merger review process to become less mechanical or metrics-driven. At present, merger applicants are essentially assured regulatory approval if their Herfindahl Hirschman Index (HHI) meets the (somewhat arbitrary) 1800/200 threshold. The Banking Guidelines make this quite clear to merger applicants: "[i]f the [1800/200 threshold is met], the banking agencies are unlikely to further review the competitive effects of the merger." While this safe harbor is doubtless comforting to merger applicants, it flouts the plain language of the banking statutes.

The HHI metric fails to consider systemic risk metrics or community impact even though those factors, as mentioned above, must be considered under the relevant statutes.[8] Indeed, community impact is a consideration that cannot be distilled into metric form. Accordingly, the entire bank

---

[3] Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, Pub. L. No. 111-203, § 604(f), 124 Stat. 1376, 1602 (2010).
[4] Jeremy C. Kress, Modernizing Bank Merger Review, 37 Yale J. on Reg. 435, 454 (2020).
[5] Bd. of Governors of the Fed. Reserve Sys., 8 Semiannual Report on Banking Applications Activity: July 1–December 31, 2020, at 1, 2 (2021).
[6] Kyle Fee and Erik Tiersten-Nyman, Federal Reserve Bank of Cleveland, *Has Bank Consolidation Changed People's Access to a Full-Service Bank Branch?* (Oct. 6, 2021), *at* https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20211006-has-bank-consolidation-changed-peoples-access.aspx.
[7] FDIC, *General Application Processing Timeframes for Regional Offices*, *at* https://www.fdic.gov/regulations/applications/application-processing-timeframes.pdf (retrieved January 9, 2022).
[8] 12 U.S.C. §§ 1828(c)(5), 1842(c).

merger process must be revised into a discretionary determination that accounts for the relevant factors.

While the HHI can sometimes serve as a reliable indicator of competitive effects, it suffers from a number of flaws that counsel against its continued usage as the prime consideration in the merger review process. First and foremost, the Agency must recognize that the HHI can be manipulated by merging firms to evade regulatory scrutiny.

> The person crunching the numbers can define the relevant market any way they please, and can thus come up with nearly any HHI score they desire. This makes it analytically useless. In fact, during the fact-finding phase of a merger investigation, opposing counsel routinely fight over the relevant market size to be used in that case's HHI calculations. Whatever decision is reached is arbitrary, and often depends more on the judge's political views than anything else.[9]

Even absent outright manipulation, HHI scores may provide unreliable data. In some cases, the market itself may be amorphous, or may be highly segmented according to product class or geographic access, such that raw market concentration data are not reliable.

We urge the Agency to retain the HHI as but *one factor* in a discretionary determination process for merger review. However, changes should be made to how the HHI is used. For one thing, the 1800/200 threshold should be lowered to better prevent anticompetitive effects.[10] Moreover, exceeding the HHI threshold should be considered a *per se* bar to merger approval, with no exceptions permitted. In addition, the Agency should disregard the HHI in cases where the market share of the firms under review is not properly defined or subject to manipulation.

Thank you for your attention to this matter of great public interest.

Sincerely,
/s/
Occupy the SEC

Akshat Tewary
Eric Taylor
Neal Tailor
Josh Snodgrass
et al.

[9] *See* Ryan Young, Competitive Enterprise Institute, *Antitrust Basics: Misleading Herfindahl-Hirschman Index* (July 1, 2019), *at* https://cei.org/blog/antitrust-basics-misleading-herfindahl-hirschman-index/.
[10] Kress, 37 Yale J. on Reg. at 464.