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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session III: Addressing Competition Challenges in Financial Markets

-- Contribution from the United States --

4-5 April 2017, Managua, Nicaragua

The attached document from the United States is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

15th Latin American and Caribbean Competition Forum
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Session III: Addressing Competition Challenges in Financial Markets

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-- CONTRIBUTION FROM UNITED STATES --

1. This paper responds to a request for contributions on the topic of "Addressing Competition Challenges in Financial Markets." It describes the close working relationship between the Antitrust Division of the U.S. Department of Justice (Department) and other bank regulatory agencies during merger review. It also discusses efforts at interagency coordination between the Department and other federal and state agencies in investigations of financial crimes.

1. Review of Bank Mergers in the United States

1.1 Introduction

2. In the United States, the federal antitrust laws generally apply to financial institutions in the same way as to other economic sectors. Special procedures, however, apply to the antitrust review of bank mergers. Instead of the Hart-Scott-Rodino (HSR) Act of 1976,[1] which governs the antitrust review process for most industries, bank mergers are subject to the review process set forth in various federal banking statutes. As explained below, this process involves the filing of applications for approval with the relevant bank regulatory agency that oversees the bank and a concurrent competitive review by the Department.[2]

[1] 15 U.S.C. § 18. Note that the procedures described in this article apply only to transactions involving bank depository institutions. The passage of the Gramm-Leach-Bliley Act in 1999 allowed bank holding companies to own nonbank financial subsidiaries. Mergers of holding companies with both bank subsidiaries and nonbank financial subsidiaries are considered "mixed transactions" under the HSR Act. The nonbank component may be subject to the reporting requirements of the HSR Act and its waiting periods. These HSR Act procedures also apply to acquisitions of financial companies (such as investment banks) that do not include a depository institution.

[2] As between the Department and the United States Federal Trade Commission, the Department has exclusive jurisdiction to review bank mergers and acquisitions. See 12 U.S.C. §§ 1828(c), 1849.

3. After the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) in 2010,[3] three federal bank regulatory agencies are in charge of reviewing bank merger applications in the United States. Mergers of bank holding companies are subject to approval by the Board of Governors of the Federal Reserve System (Federal Reserve). In addition, the Federal Reserve reviews acquisitions made by state banks that are members of the Federal Reserve System. The Office of the Comptroller of the Currency (OCC), the primary regulator of nationally-chartered banks, also reviews mergers involving these banking entities. The Federal Deposit Insurance Corporation (FDIC) reviews merger applications filed by state banks that are not subject to the supervision by the Federal Reserve.

4. As of December 31, 2015, about 4,100 bank holding companies operate in the United States. Most of the large banks in the United States operate under a bank holding company structure. These bank holding companies have bank subsidiaries, which may have a national or state charter, as well as non-bank subsidiaries. Banks independent of a holding company also operate in the United States. Approximately 1,000 such banks have national bank charters and are subject to the supervision of the OCC. At the state chartering level, the great majority of state banks, nearly 3,500, are regulated jointly by the state bank regulatory agencies and the FDIC. Another 800 state banks are members of the Federal Reserve System. In addition to banks, approximately 6,000 credit unions[4] and 780 thrifts[5] offer banking products and services in the United States.

1.2 U.S. Banking Statutes and Antitrust Review of Banking Applications

5. Antitrust review of bank holding company and bank mergers are governed, in part, by the banking statutes, including the Bank Holding Company Act (BHCA)[6] and the Bank Merger Act (BMA).[7] The BHCA governs the application process for banking holding company mergers, and the BMA governs the review process for mergers of national or state banks. Pursuant to these statutes, bank holding companies and banks file applications for approval with the appropriate bank regulatory agency, and the agency forwards the application to the Department to enable a concurrent competition review. Both the BMA and the BHCA require the applicable bank regulatory agency to consider the probable competitive effects of proposed mergers and to deny approval to those that threaten competition, unless the probable anticompetitive effects of the transaction are clearly outweighed by the probable effects on the convenience and needs of the community to be served.[8]

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3 Pub. L. 111-203, 124 Stat. 1376 (2010).

4 In 1934, the United States Congress created the federal credit union system, made up of not-for-profit, member-owned depository institutions. Similar to banks, credit unions may have either a federal or state charter. Mergers of credit unions do not follow the procedures set forth in the federal bank statutes; rather, credit unions are subject to the reporting requirements of the HSR Act that apply to other industries.

5 The federal thrift charter was created originally to focus on residential mortgage lending. Until the passage of the Dodd-Frank Act, thrift holding companies and their subsidiary thrifts were regulated by the OTS. The Dodd-Frank Act merged OTS with the other bank regulatory agencies. Differences between the federal thrift charter and the bank charter have narrowed.

6 12 U.S.C. §§ 1842, 1849.

7 12 U.S.C. § 1828(c).

8 See 12 U.S.C. §§ 1828(c), 1842(c).

6. Under the BMA, a bank regulatory agency responsible for the bank merger application is required to seek comments from the Department prior to approving the application.[9] The Department has thirty days from receipt of an agency's request to review the competitive effects of a proposed merger and must comment formally on the application by issuing a report on the merger's competitive factors.[10] After agency approval, the merging banks must wait thirty days after the date of approval before consummating the merger.[11] Immunity from antitrust challenge under Section 7 of the Clayton Act attaches if the Department does not file a lawsuit to challenge the transaction within the 30-day post-approval waiting period.[12] If the Department files suit, consummation of the transaction is automatically stayed until a federal district court conducts a *de novo* review of the transaction.

7. The BHCA governs mergers or acquisitions involving bank holding companies. Bank holding companies seeking approval under the BHCA file applications with the Federal Reserve. The competition review procedures under the BHCA are similar to those under the BMA, although the BHCA does not expressly require the Federal Reserve to give the Department prior notification of a pending application, but rather requires only that the Federal Reserve provide to the Department a copy of its approval of the merger transaction. Nevertheless, because antitrust immunity attaches to these transactions after the specified post-approval waiting period, according to a long-standing practice between the Department and the bank regulatory agencies, the Federal Reserve follows the same procedures for applications filed under the BHCA as those set forth in the BMA.

8. Because of the concurrent review of bank mergers by the Department and the bank regulatory agencies, a significant level of inter-agency staff cooperation occurs on an ongoing basis. Initial review of the large number of bank merger applications received annually by the Department[13] is done through a screening process.[14] The purpose of the screening is to identify proposed mergers that clearly do not have significantly adverse effects on competition and to allow them to proceed quickly. To provide guidance and transparency as to how the bank regulatory agencies and the Department review bank mergers, in 2014 the Federal Reserve and the Department published a *Frequently Asked Questions* (FAQs).[15] The FAQs set forth the common factors that the Federal Reserve and the Department consider in reviewing competitive effects but also identify the differences between the agencies, when applicable.

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9 The bank merger review process described in this article applies to regular merger transactions and does not address emergency transactions or transactions that may require immediate agency action to prevent the probable failure of a financial institution.

10 12 U.S.C. § 1828(c)(4). See also J. Robert Kramer II, Antitrust Review in Banking and Defense, 11 Geo. Mason L. Rev. 111, 115, n.23 (2002). The Department reviews each proposed transaction and sends one of four competitive factors reports in response: (1) a "not significantly adverse" competitive factors report; (2) a "significantly adverse" letter; (3) a "conditional letter"; or (4) an "advisory report." The most recent "significantly adverse" letter was sent in 1999.

11 If the proposed transaction does not raise competitive concerns, the post-approval waiting period may be reduced to 15 days with the concurrence of the Department.

12 12 U.S.C. §§ 1828(c), 1842, 1849(b).

13 In 2015, the Department conducted competitive screenings of 595 bank applications. The Department's Ten Year Workload Statistics, which provide information on the number of competitive screenings conducted each year, can be found at https://www.justice.gov/atr/division-operations.

14 To facilitate the review process, the Department, the Federal Reserve, and the OCC first issued the Bank Merger Competitive Review Screening Guidelines in 1995. https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995.

15 See https://www.justice.gov/sites/default/files/atr/legacy/2014/10/09/308893.pdf.

9. If a bank merger application fails screening, the Department may open an investigation. In investigating the competitive effects of bank transactions, the Department applies the same federal antitrust laws and antitrust analysis that applies to other industries, including the analytical framework set forth in the Department's *Horizontal Merger Guidelines*.[16] The Department's competition analysis is assisted by the availability of public information gathered by the bank regulatory agencies such as the FDIC Summary of Deposit data, bank call reports,[17] small business loan origination data collected pursuant to the Community Reinvestment Act,[18] and Federal Reserve pre-defined geographic banking markets.[19] These data sources allow the Department to evaluate the competitive effects of a merger transaction expeditiously. Because of the availability of this information, the bank merger review process is highly transparent and predictable.

10. Although the Department conducts a separate and independent competition review, Department staff routinely provides to the bank regulatory agencies updates on the Department's analysis and investigations, as well as its proposed resolution of any anticompetitive effects. The Department also may consult with the bank regulatory agencies on timing and invite the agencies to have a joint meeting with the merging parties to discuss a proposed merger.

11. All parties involved in the banking industry benefit from the transparency of the competition review process, the availability of reliable public information, and the close working relationship between the Department and the bank regulatory agencies.

1.3 Cooperation with Other U.S. Regulators in Criminal Investigations

12. The Department's criminal investigations involving financial sectors benefit from wide-ranging cooperative effort among various enforcement agencies in the United States. In 2009, in the wake of the financial crisis, the Department took leadership of the interagency Financial Fraud Enforcement Task Force. The Task Force was established to help coordinate investigations and prosecutions of financial frauds and maximize the ability to recover the proceeds of these frauds and obtain just and effective punishment of those who commit them. The Task Force's work extends to bank fraud, mortgage fraud, and other loan fraud and discrimination; securities and commodities fraud; retirement plan fraud; mail and wire fraud; tax crimes; money laundering; False Claims Act violations; and unfair competition.

13. The Task Force includes representatives from a broad range of federal agencies, regulatory authorities, inspectors general and state and local law enforcement, and it continues to work to improve efforts to coordinate in the investigation and prosecution of significant financial crimes. [20] The Task Force assisted in the successful coordination of criminal and civil enforcement resources in a number of recent antitrust prosecutions.[21]

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16 https://www.justice.gov/atr/file/810276/download.

17 The FDIC Summary of Deposits data and other bank financial reports can be found at https://www.fdic.gov/bank/statistical/.

18 https://www.ffiec.gov/craadweb/aggregate.aspx.

19 https://cassidi.stlouisfed.org/.

20 For more information about the task force, visit: www.stopfraud.gov.

21 See https://www.justice.gov/opa/pr/second-foreign-currency-exchange-dealer-pleads-guilty-antitrust-conspiracy; https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation; https://www.justice.gov/opa/pr/bank-america-agrees-pay-1373-million-restitution-federal-and-state-agencies-condition-justice.