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The Federal Reserve and the Antitrust Division Provide Updated Guidance on Bank Merger Analysis

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The Board of Governors of the Federal Reserve System ("Federal Reserve") and the Antitrust Division of the Department of Justice ("Antitrust Division") have statutory authority to review the competitive effects of proposed bank mergers and acquisitions under applicable banking laws, such as the Bank Holding Company Act, the Bank Merger Act, and the Home Owners Loan Act.[2] To provide guidance to merging parties and the industry in general about the standards the agencies apply in reviewing such mergers, the agencies jointly developed their Bank Merger Guidelines in 1995 ("1995 Guidelines").[3] The 1995 Guidelines set forth the types of information parties should provide, and the framework for how parties should present the data and information and compute the competitive effects of their merger, and provide screens that the agencies will use in reviewing mergers to determine whether such mergers may result in anticompetitive effects.

While the agencies have continued to use the 1995 Guidelines in their bank merger or acquisition reviews, there have been certain developments over the past twenty years that were not reflected in any formally issued amendment to the 1995 Guidelines. And while the agencies have issued some guidance over the years amplifying and elaborating on certain aspects of their review, there has not been any formal guidance since 1995 -- until last year. In October 2014, the Federal Reserve in conjunction with the Antitrust Division issued a series of thirty-six questions and answers – FAQs – elaborating on how the Federal Reserve and the Antitrust Division currently review bank mergers and acquisitions ("FAQs").[4] The

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2 The Federal Deposit Insurance Corporation and the Office of the Controller of the Currency also have statutory authority to review the competitive effects of proposed bank mergers and acquisitions under applicable banking laws. See https://www.fdic.gov/formsdocuments/bma-fapp.pdf.

3 See Bank Merger Competitive Review – Introduction and Overview (1995), available at http://www.justice.gov/atr/public/guidelines/6472.htm.

4 See FAQs, "How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act, and the Home Owners Loan Act?," available at http://www.federalreserve.gov/bankinforeg/competitive-effects-mergers-acquisitions-faqs.htm.

FAQs cover multifarious aspects of the agencies' review, some of which relate to process – such as where to file the application and when the Federal Reserve's authority can be delegated – but most of which address the substantive factors that the Federal Reserve will look at to analyze the competitive effects as well as those applied by the Antitrust Division. The FAQs also discuss where the agencies employ different modes of analysis and consider different factors and how those differences may have an impact on the ultimate outcome of the review. This article will focus on five core areas covered by the FAQs: (1) The basic framework for assessing the competitive effects of bank mergers and acquisitions and how the Federal Reserve and Antitrust Division define the relevant product market and how they differ in their treatment of various depository institution competitors; (2) how they define the relevant geographic market and their differences in doing so; (3) how they view mitigation factors; and (4) how the differences in analytical approaches may impact the remedy.

> the Antitrust Division assesses the competitive effects of bank mergers or acquisitions on disaggregated product markets rather than the "cluster of products and services" market definition used by the Federal Reserve.

I. The Analytical Framework and Relevant Product Market Definition

The Federal Reserve and the Antitrust Division begin their analyses of bank mergers or acquisitions by identifying all competitors – in addition to the parties – who supply competing products and services within a properly defined geographic market and then applying basic merger screens to calculate the structural effects of the merger. This is the basic framework set out in the 1995 Guidelines and it is still the basic framework employed today. Once all market participants are identified within the proper geographic market, the agencies compute a Herfindahl-Hirschman Index ("HHI"), a standard measure based on the sum of the squares of the market participants' market shares also used by the Federal Trade Commission and the Antitrust Division to analyze the competitive effects of mergers in all other industries.[5] The Federal Reserve and the Antitrust Division still apply the same safe harbors set out in the original 1995 Guidelines – 1800/200. So long as the merger does not result in a post-merger HHI over 1800 points or an increase in the HHI of more than 200 points, the merger is regarded as not likely to have any significant anticompetitive effects and generally will not require any further review on antitrust grounds. This initial evaluative step has not changed since 1995 – and the 2014 FAQs reaffirm that this continues to be the agencies' approach.

Consistent with early judicial decisions,[6] the Federal Reserve defines the relevant product market to be the cluster of commercial banking products and services. (FAQ 8). This market definition covers a variety of bank products and services provided to retail customers and small business customers. In contrast, the Antitrust Division assesses the competitive effects of bank mergers or acquisitions on disaggregated product markets rather than the "cluster of products and services" market definition used by the Federal Reserve. Depending upon the particular products and services offered by the merging parties and their overlapping activities, the Antitrust Division could assess the merger based on a retail banking product market, small business banking product market, middle market banking product market, and large corporate banking product market. The differences in product market definition between the two agencies can impact not only whether a divestiture will need to be made but also the size of such divestiture. These differences are discussed in more detail below.

Both the Federal Reserve and the Antitrust Division use deposits held by market participants as a proxy for determining their competitive position and strength in the relevant market.[7] While commercial banks, thrifts and credit unions are each authorized by law to take and hold deposits – and all are insured by the FDIC – these institutions are not treated equally by the Federal Reserve or the Antitrust

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5 HHIs are used for initial screens in the Horizontal Merger Guidelines as well. See U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (Aug. 19, 2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010.html. However, as discussed below, the safe harbor levels applied in the bank merger context and set forth in the 1995 Guidelines are different from the safe harbor levels used in the Horizontal Merger Guidelines.

6 See, e.g., United States v. Philadelphia National Bank, 374 U.S. 321, 356 (1963).

7 Banks and thrifts report branch level deposits in Summary of Deposits Survey to the Federal Deposit Insurance Corporation (FDIC). The Survey includes the location of, and deposits held at, each branch of institutions insured by the FDIC. (FAQ 11) The deposits reported are as of June 30 of each year. See https://www2.fdic.gov/sod/.

Division. The differing treatment – which is reaffirmed in the 2014 FAQs – is based on statutory and historical differences among these institutions, particularly with respect to commercial banking products and services.

A. Banks and Thrifts

In the Federal Reserve's analysis, bank (institutions with a commercial bank charter) deposits are weighted at 100% of deposits. Historically, thrifts (savings banks and savings and loan institutions) focused on real estate lending and could not engage in any significant non-real estate lending. While recognizing that these historical limitations have been relaxed and thrifts can now engage in commercial lending, the 2014 FAQs note that continuing today "many thrifts remain less active competitors than commercial banks in commercial lending offices." (FAQ 5) The Federal Reserve weights the deposits of thrifts at 50%. The FAQs acknowledge that thrifts might be weighted at 100% of deposits if the thrift is an active commercial lender with a full time commercial lending staff. In this regard, the Federal Reserve staff will consider various factors such as (1) the amount of commercial and industrial (C&I) loans made by the thrift, relative to its other lending activities or overall assets, and/or (2) the thrift's C&I lending compared to the C&I lending activity of local commercial banks. (FAQs 5 & 17) Consequently, if the parties can show that a thrift in the market has a C&I-loan-to-assets ratio comparable to the commercial banks in the particular local market and it has a full-time commercial lending staff, the Federal Reserve may agree to increase the deposit weighting applied to such thrift to 100%. The FAQs do not provide the precise ratio that will persuade the Federal Reserve to treat a thrift as competitively comparable to a bank and. instead, as the factors above suggest, the Federal Reserve will look at each local market on a case-by-case basis.[8]

The exception to the rule that the Federal Reserve generally weights all thrifts at 50% of deposits in the initial screening is when the thrift is owned by a bank holding company or when the thrift is to be acquired by a bank holding company. When a thrift is a subsidiary of a bank holding company, the FAQs explain that it is assumed to be an integral part of the parent, which includes having access to the bank holding company parent's resources, such that it should be treated the

8 In a recent Federal Reserve decision, the Federal reserve weighted the deposits of a thrift at 100% when the thrift had a C&I to assets ratio of more than 5% "which is comparable to, or greater than, the ratio for some commercial banks in the market . . . ." Chemical Financial Corporation, FRB Order No. 2014-16 (Sept. 30, 2014).

same as a commercial bank. (FAQ 5) When a thrift is to be acquired by a bank holding company, its deposits will be weighted at 50% in the pre-merger HHI calculation, but its deposits will be weighted at 100% in the post-merger HHI calculation. (FAQ 20)

The Antitrust Division takes a different approach in its initial screens and ultimate review of the competitive effects of the merger. The difference in approaches between the two agencies is based on the approach each agency takes in defining the relevant product markets. As mentioned above, the Antitrust Division assesses the competitive effects of bank mergers or acquisitions on disaggregated product markets rather than the "cluster of products and services" market definition used by the Federal Reserve. In most mergers, the two most common relevant product markets analyzed by the Antitrust Division are retail banking and small business banking. For retail banking, the Antitrust Division will treat banks and thrifts equally, weighting both types of institution's deposits at 100%. For small business banking competition, the Antitrust Division applies a "2% test" to determine which competitors to include in the computation. All institutions that devote 2% of their total assets to C&I lending will be given a deposit weighting of 100%. (FAQ 31) Any institution that meets the test will receive a weight of 100% of deposits, while any institution that does not meet the test may not be given any weighting at all. The 2% test is a device used to identify whether the thrift is active in commercial lending.[9]

> The two most common relevant product markets analyzed by the Antitrust Division are retail banking and small business banking.

While the Antitrust Division's 2% test is an analytic device to ascertain how competitive market participants are with respect to small business banking using deposits as a proxy for commercial lending, the FAQs note that the Antitrust Division will also look at small business loan originations reported under the Community Reinvestment Act ("CRA"). (FAQ 30) These data will show the volume and value of reported small business loan originations each year by county broken down into discrete categories, such as less than $100,000; $100,000 to $250,000; $250,000 to $1 million; and $100,000 to $1 million. The Antitrust Division often focuses on the $100,000 to $1 million category of originations. These data are

[9] Consistent with the rationale for the 2% test, the Antitrust Division could reduce the deposit weighting of a commercial bank if that bank is not an active commercial lender. This is rare but not impossible.

helpful in depicting a more accurate portrait of the current state of competition for loans to small businesses. Not all insured depository institutions are required to report their small business lending data, so the data does not provide a complete picture of small business lending in a given market. However, parties to a merger may attempt to estimate the small business loan originations of the depository institutions that are not required to report under the CRA.

B. Credit Unions

Historically, credit unions had limited membership eligibility and were thus not accessible to the broader population within a market. Credit union membership eligibility requirements were relaxed in 1998, allowing credit unions to have more extensive eligibility criteria, which in some cases can cover an entire geographic market. With this expansion in membership and greater accessibility by a market's population, the agencies have regarded credit unions as becoming more competitive with banks and thrifts in providing retail banking products and services. However, credit unions have not been regarded as equal competitors to banks and thrifts when analyzing the competitive effects of small business banking because historically credit unions did not offer small business banking products and services. They also were and continue to be subject to certain legal restrictions on their commercial lending activities. Over time, however, credit unions have become much more competitive and are increasingly being included in the market analysis by the agencies – either by including their deposits or as mitigating factors.[10]

The Federal Reserve may either accord weight to the deposits of credit unions in a market or treat them as mitigating factors in the overall competitive analysis. In recent years, the Federal Reserve has recognized that certain credit unions are similar thrifts in that it has been weighting the deposits of such credit unions at 50% if the credit union satisfies certain criteria: (1) the credit union has broad membership eligibility covering "all, or almost all" of the market's population, (2) it has branches that are at street-level and thus accessible to the public, and (3) it offers a wide range of consumer banking products. (FAQ 18) In 2014, Federal Reserve decisions approving bank mergers reveal that they accorded weight to

10 First Hawaiian, 77 Fed. Res. Bull. 52, 55 (1991); Bancorp Hawaii, 76 Fed. Res. Bull. 759, 760-61 (1990) ("the Board also has considered the strong presence of credit unions in both the Honolulu and Maui markets"); First Hawaiian, 79 Fed. Res. Bull. 966, 968 (1993).

credit unions meeting the above mentioned criteria: First Interstate BancSystem, Order No. 2014-11 (June 30, 2014); ANB Bank, Order No. 2014-14 (September 11, 2014); Chemical Financial Corporation, Order No. 2014-16 (September 30, 2014); Central Bank of Audrain County, Order No. 2014-17 (October 17, 2014). If a credit union has significant commercial lending and has business banking staff dedicated to commercial banking activities, the FAQs indicate that the credit union may be eligible for 100% weighting by the Federal Reserve. (FAQ 19) Even if credit unions do not meet all of the requirements (discussed above) to be given a deposit weighting, the Federal Reserve will continue to view them as mitigating factors.

In view of the Antitrust Division's focus on small business banking competition, it is less common for the Antitrust Division to include the deposits of credit unions in the assessment of the competitive effects of a merger on this relevant product. The FAQs reaffirm that the Antitrust Division may include the deposits of credit unions in its analysis if, in addition to evidence that the credit union satisfies the criteria specified by the Federal Reserve (e.g., broad eligibility requirements, street level branches, a full panoply of bank products and services), there is evidence that the credit union is an active commercial lender. (FAQ 32) For instance, the Antitrust Division will look to see if the credit union is competing for small business banking by making C&I member business loans. The Antitrust Division applies the 2% test consistently with respect to all depository institutions in a geographic market. Therefore, if the parties can come forward with evidence that the credit union is an active commercial lender – offers small business banking products, has a small business banking staff and has a sufficient small business loan portfolio – then all of the credit union's deposits may be included in the HHI analysis. Credit union deposits have been accorded weight by the Antitrust Division in its competitive analysis when the credit union satisfies the Antitrust Division's criteria.

In view of the Antitrust Division's focus on small business banking competition, it is less common for the Antitrust Division to include the deposits of credit unions in the assessment of the competitive effects of a merger on this relevant product.

Note that credit unions do not file branch level data with the FDIC and thus accurate data concerning the appropriate level of deposits to include in a local market may be difficult to provide. (FAQ 32) One can obtain only aggregated deposit data for credit unions (not branch by branch data). If a credit union has only one branch or if all of its branches are present within only one market, then the credit union's total deposits could be included with other institutions in the market under review. If its branch network covers multiple markets, then estimates of credit union deposit volumes may be made for the market under scrutiny. The FAQs confirm that in cases where the deposits of a credit union that otherwise meets all of the criteria for inclusion in the analysis cannot be accurately estimated within the market, the presence of such credit unions will be considered by the Antitrust Division as a mitigating factor in the analysis. (FAQ 32)

II. Geographic Market Definition

The other key element in all antitrust analysis is the definition of the geographic market. In the financial industry, depending on the product or service in issue, competition can be national, regional or local. While there may be broader geographic markets for certain products and services offered by banks, such as mortgages and credit card issuance both of which are regarded as regional or national, retail and small business banking are analyzed in local geographic markets. Consumers generally will consider providers of retail banking and small business banking products and services within a more locally limited area to be substitutes for one another. While the dimensions of what is considered local may differ depending upon the section of the country, the geographic market is considered local for these products and services. Both the Federal Reserve and the Antitrust Division analyze bank mergers within local markets, but each takes a slightly different approach to defining the reaches of the geographic market.

The Federal Reserve has defined numerous relevant banking markets over time in connection with applications it has reviewed. Each of the Federal Reserve Banks is generally responsible for defining the relevant banking markets within its respective district. The Federal Reserve Bank of St. Louis maintains a website – Cassidi[11] – that compiles current federal banking market definitions for more than 1,500 banking markets across the country. (FAQs 7 & 12) Not only can one look up the relevant market definition on the Cassidi website but the website provides tools and tables for calculating the initial HHIs in the pre-defined banking markets from the various Federal Reserve Banks. (FAQ 7) The FAQs note that the Federal Reserve's definitions are based on demand-side substitutability – that is, it looks to consumer responses to changes in product offerings, rates, fees and other factors. (FAQ 10) Depending upon the section of the country, the pre-defined geo-

[11] See https://cassidi.stlouisfed.org/.

graphic market may comprise a Metropolitan Statistical Area (MSA), a rural county, multiple MSAs or countries, or parts of MSAs or counties. (FAQ 13). The dimensions will depend upon many factors but generally are based on how economically integrated an area of the country is such that the institutions within it will be sensitive to the competitive activity of other institutions within the area and customers will be willing to switch banks within the area. The FAQs confirm that sources of information used to define the market include, among others, commuting patterns, shopping patterns, and interviews and surveys of local governmental officials and households or small businesses. (FAQ 14).

Underlying the Antitrust Division's market definition is the notion that small businesses may not travel as far as retail customers and thus their choices of market participants may be found in a smaller geographic area.

The Antitrust Division takes a slightly different approach to defining relevant geographic markets in bank mergers. The FAQs confirm that the Antitrust Division regards the geographic dimensions of a retail market to be different from the geographic dimensions of a small business banking market. While the Antitrust Division may apply the Federal Reserve's pre-defined geographic market definitions for retail banking, it may use smaller geographic market definitions for analyzing small business banking. (FAQ 20). Thus, where the Federal Reserve pre-defined market covers multiple counties, the Antitrust Division may look at a smaller RMA portion of the market, at each county separately or, occasionally, at parts of counties. Underlying the Antitrust Division's market definition is the notion that small businesses may not travel as far as retail customers and thus their choices of market participants may be found in a smaller geographic area.

A. <u>Challenging the Geographic Market</u>

Parties have successfully challenged pre-defined geographic markets and the FAQs acknowledge that this can be done. (FAQ 15) The Federal Reserve itself may redefine a geographic market pertinent to an application under review. The FAQs indicate that in cases where the merger exceeds the safe harbors, the Federal Reserve will automatically review the market definition to determine whether it should be adjusted from the pre-defined market. The adjustment can make the concentration levels better – or worse. As discussed above, the Antitrust Division generally does not confine itself to the Federal Reserve's pre-defined markets in its assessment of the impact of the merger on small business banking competition and instead looks at RMAs, counties and/or parts of counties.

If the parties decide to challenge a geographic market, they must come forward with evidence based on the information sources that the Federal Reserve typically uses (FAQ 14) showing that a market should be smaller or larger than the current market definition. Concrete and substantial evidence of a different market definition will be required to persuade the Federal Reserve to revise its market definition. Parties should be prepared to provide evidence that there is significant commutation between one area in the market and another outside the market, that the core advertising area is broader than the predefined market, the people are traveling for shopping, entertainment, recreation, school, and medical care across a broader area and other data showing economic integration within the broader market. In essence, the parties' task is to convince the Federal Reserve that the market has changed since the last time the Federal Reserve reviewed it – economically and structurally. Recognize however that the challenge to the geographic market definition takes time as the Federal Reserve staff will need to conduct their own research to determine whether the proffered market definition is correct, including conducting interviews of government officials, competitors, and businesses. Note further that it is not uncommon for the Antitrust Division to reject broader markets and thus if the merger creates a problem in the market as defined by the Antitrust Division, then those concerns may not be eliminated by the Federal Reserve's enlargement of the market.

III. Mitigating Factors

If the initial screens reveal concentration levels above the 1800/200 safe harbor levels (or with respect to the Federal Reserve, a post-merger market share of 35% or more), the parties will need to show mitigating factors to demonstrate why these initial values do not represent the market accurately and ultimately try to avoid or reduce the required remedy. The most common remedy in all bank mergers where the analysis reveals likely anticompetitive effects which are not eliminated by virtue of mitigating factors is a divestiture of physical branches, with associated deposits and loans.

Mitigating factors in banking mergers are analytically similar to mitigating factors acknowledged in analyzing mergers in other industries. These are factors that suggest that the market is more competitive than the merger screens suggest. Bank mergers with higher resulting concentration levels and increases will require stronger mitigating factors than mergers with lower concentration levels.

The FAQs reaffirm the traditional mitigating factors applied by both agencies. (FAQ 22) First, the agencies will look at the strength and number of the remaining competitors. Are the remaining competitors larger or comparable to the merging entities, or are they smaller? The robustness of the remaining competition is core to the analysis and if robustness is demonstrated it will constitute a mitigating factor. As discussed above, credit unions may be accorded a weighting of deposits in the competitive assessment, but whether or not their deposits are weighted in the analysis, if their presence is significant, the Federal Reserve will regard them as mitigating factors in the analysis of competitive considerations. Second, the agencies will look at the financial strength of the target. If the target is a weak or failing institution, this too may be regarded as a mitigating factor. Third, the agencies will look at whether the market is attractive for entry and expansion. If there is evidence that there has been new entry into the market during the last several years, or the opening of additional branches by existing competitors, this generally will be regarded as a mitigating factor. The parties may also show economic factors indicating that the market is attractive for entry. For instance, has there been growth in deposits, growth in income, or growth in in population in the market that exceeds the state and national averages? If so, these can be considered mitigating factors. Finally, the agencies may also consider whether other measures of competitive activity are less concentrated than the deposit concentration levels suggest – e.g., the parties' combined branch network or small business banking activities. If so, these may be regarded as mitigating factors as well.

> "Centrally booked deposits" may be adjusted out of the market – that is subtracted from the market deposits of the parties thereby reducing their shares in the local market – under certain circumstances.
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Other Factors Relevant to Calculating Market Strength of the Parties and Competitors

There are certain categories of deposits held by banks that are not local deposits but nonetheless may be booked at a branch in a local market. This issue is most likely to occur in markets where one of the parties has its main or regional headquarters branch. The agencies have long recognized that these deposits overstate the competitive positions of the parties in a local market, and the FAQs reaffirm an approach that the Federal Reserve has developed over time to attempt to address this issue. These so-called "centrally booked deposits" (FAQ 23) may be adjusted out of the market – that is subtracted from the market deposits of the parties thereby reducing their shares in the local market – under certain circumstances. First, the applicant must provide supporting evidence that the deposits are not local deposits (e.g., they may be deposits for which competition is national). Second, there should be some reasonable basis to make similar adjustments for other third party institutions which also have a headquarters branch in the market. If no other institutions have a headquarters branch in the market, then the adjustment may be more readily acceptable. The FAQs also identify government deposits as similar to centrally booked deposits that will be considered for adjustment in appropriate circumstances. (FAQ 24)

The Federal Reserve has made adjustments for centrally booked deposits in a series of mergers. For instance in PNC's merger with National City, the Federal Reserve made adjustments for centrally booked deposits and other similar deposits, noting the limited grounds on which it would do so: (1) where deposits were not legally available for use in that market, (2) where data were available to make comparable adjustments to the market shares for all other market participants, and (3) where there is strong evidence that an institution moved its national business line deposits to a particular branch for business reasons unrelated to its efforts to compete in that market and did not use those deposits to enhance its competitive position in that market or to manipulate Summary of Deposit data.[12] Thus while the Federal Reserve has been willing to adjust out these types of non-local deposits, the parties need to demonstrate that the deposits are not local and have not been used to enhance competition in the market by coming forward with appropriate evidence in line with the FAQs and applicable Federal Reserve decisions.

IV. Differences that Impact the Required Remedy

A divestiture may be required when the Federal Reserve and/or Antitrust Division concludes that the merger will likely result in anticompetitive effects. This occurs when the HHIs exceed the safe harbors of 1800/200 and there are insufficient factors regarding competition in the market to mitigate the anticompetitive effects of the merger. The indicated divestiture will be based on the deposit amount needed to reduce the post-merger HHI to the safe harbor levels.

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12 The PNC Financial Services Group, 95 Fed. Res. Bull. B1 (December 15, 2008); see also JPMorgan Chase/Bank One Corporation, 90 Fed. Res. Bull. 352 (Sept. 2004).

The different approaches applied by the agencies could lead to two very different divestiture requirements in certain mergers. For instance the Federal Reserve and the Antitrust Division treat banks and thrifts differently in certain circumstances, which could have an impact on the ultimate concentration levels resulting from a merger and which, in turn, could lead to a greater indicated divestiture. In a merger of two banks in a local market with many thrifts who are not commercially active lenders, the Federal Reserve will give the thrifts 50% weighting while the Antitrust Division will not give them any weight. Depending upon the size of the merging banks relative to the remaining commercially active participants, the divestiture required by the Antitrust Division could be larger than that requirement by the Federal Reserve. The differences in geographic market definition could also impact the ultimate divestiture obligation. If the Antitrust Division believes that the Federal Reserve's pre-defined market is too broad, and the resulting HHI increase and concentration levels are higher in a smaller market (e.g., market defined on the basis of county lines), then the parties could be subject to a larger indicated divestiture.

Conclusion

While there are differences between the agencies' approaches, there are many similarities, and both agencies are open to hearing all of the evidence about the current state of play within a market. And while the FAQs were a welcome addition to the body of knowledge in this area, reaffirming the structural approach to the agencies' bank merger analysis and elaborating on developments over the past two decades since the issuance of the 1995 Guidelines, some issues remain where it would be helpful in the future to have further research followed by written guidance, such as (1) whether geographic markets should be broadened in view of advances in technology, and (2) whether credit scoring advances have affected larger small business loan credits (e.g., greater than $100,000) allowing for competition across a larger geographic market.