MUTUAL ALERT

DOJ Outlines Plans to Expand and Update Bank Merger Review Process

Jonathan Kanter, assistant attorney general for antitrust at the Department of Justice gave remarks Tuesday outlining updates to the agency's Bank Merger Guidelines. Speaking at the Brookings Institution in Washington DC, Kanter said the banking environment of 1995 – when the guidelines were last updated – is not the banking environment that exists today, and therefore merger reviews must expand beyond traditional factors such as local branch deposits. The DOJ's new approach would take customer financial service needs and the presence of non-bank institutions and credit unions into consideration when analyzing competition factors. While larger banks will doubtlessly be apprehensive of a reinterpretation of anticompetitive behavior, Mr. Kanter's speech suggests that traditional definitions of market share may change to a more segmented rather than industry approach. The weighting of various non–bank financial institutions particularly digital enterprises for calculating market shares could potentially eliminate combinations between banks under $10 billion in assets from any scrutiny by DOJ for their anticompetitive impact. On the other hand, if non-bank financial institution market shares are aggregated with large bank market shares it could benefit large bank mergers.

Given the small wave of large bank failures that began in March, Kanter's remarks are the opposite of industry expectations. However, his comments do align with the 2021 executive order from President Biden, which directed the agency to prioritize bank merger deals.

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June 21, 2023