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Bank Regulatory & Transactions Practice
February 5, 2015

Collaborators Beware - OCC Encourages Community Banks to Collaborate

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On January 13, 2015, the Office of the Comptroller of the Currency (OCC) released a paper strongly encouraging community banks to consider ways in which they can collaborate to reduce costs, promote expertize, and enhance efficiencies. According to the paper, community banks have expressed concerns about increasing regulatory compliance requirements, competition from larger banks, and challenges in providing competitive products. Recognizing these concerns, the OCC recommends that community banks seek opportunities to share resources and expertise for their mutual benefit. As examples, the OCC identifies collaborative efforts such as sharing back office operations, establishing a compliance consortium, or collaboration on offering a new product. The OCC warns, almost in passing, that the suggested collaboration between community banks may run afoul of federal and state antitrust laws. This warning deserves considerable attention.

Section 1 of the federal Sherman Act declares as illegal any contract, combination or conspiracy in restraint of trade or commerce. 15 U.S.C. § 1. Thus, collaborative agreements among competitors must be careful not to draw antitrust scrutiny from the Federal Trade Commission (FTC) or the U.S. Department of Justice (DOJ), (collectively, the Agencies). For fiscal year 2014, the DOJ obtained jail terms for 21 individual defendants with average sentences of 26 months and substantial monetary fines for violating Section 1.

In 2000, the Agencies published guidelines (cited in the OCC paper) setting forth a detailed framework for analyzing collaborations among competitors (the Guidelines). Competitor collaboration agreements that have the effect of fixing prices or limiting output, or that allocate customers, territories, or lines of commerce, or that rig bids are prohibited because they always have adverse effects on competition. These types of agreements are considered per se illegal and cannot be defended against with economic justifications.

Other competitor agreements are analyzed under the rule of reason to determine their overall competitive effect. While other collaborative agreements may not be per se illegal, they may still harm competition and draw antitrust scrutiny by reducing quality or innovation, limiting independent decision making, or by combining financial interests in production or key assets. On the other hand, the Agencies recognize that some collaborations enhance competition by providing more value, cheaper goods or services, or faster market entry. Under the rule of reason, the Agencies examine the business purpose, the nature of the agreement, and the existence or likelihood of anticompetitive harm.

The Agencies have also established "Safety Zones" for competitor collaborations. For example, for general collaborations, absent extraordinary circumstances or per se violations, when the market share of the collaboration and its participants together accounts for 20 percent or less of the relevant market, the Agencies will not challenge the collaboration. With these Guidelines in mind, some of the OCC's examples of community bank collaboration can be further examined.

- Jointly purchasing materials or services: The Agencies recognize that buying collaborations may be procompetitive because they allow participants to centralize ordering, warehousing, or distribution functions. However, they may also allow participants to drive the price of the good or allow participants to monitor each others' output level. To limit these risks, community banks should consider using an independent third party to negotiate purchases to avoid sharing competitively sensitive information.
- Jointly providing or developing products and services: The Agencies recognize that product collaborations may be procompetitive because they allow participants to produce goods more efficiently. Community banks must, however, avoid agreements on output, price, or use of key assets that could limit independent decision making or limit the ability of a participant to compete. Community banks should also be careful that their collaboration remain limited in scope and time and does not rise to the level of a merger, which would implicate additional antitrust concerns. Community banks should also consider whether they can obtain additional protection afforded by the National Cooperative Research and Production Act of 1993, 15 U.S.C. §§ 4301-06, whereby Congress has protected research and production joint ventures from certain antitrust liability through the filing of a notification with the DOJ and the FTC.
- Sharing back office, other services, or a specialized staff member or team: As with buying collaborations, community banks should protect against sharing of competitively sensitive information such as price, output, costs, or strategic planning. Community banks should also be careful to maintain control over their key assets so that they remain independently competitive.

The Agencies look carefully at complaints from consumers and competitors. Community banks considering the OCC's invitation to collaborate should carefully examine and document the procompetitive benefits of their collaborations and guard against opportunities that would lead to increased prices for consumers and decreased output. Community banks in rural or concentrated areas should also be mindful of their geographic market share and their ability to control the market by collaborating with other community banks.

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