

# Clients&FriendsAlert

## FDIC Seeks Comment on Proposal To Rescind Its 2024 Statement of Policy on Bank Merger Transactions

March 6, 2025

The Federal Deposit Insurance Corporation ("FDIC") is requesting<sup>1</sup> public comment on its [proposal to rescind](#) its [2024 Statement of Policy on Bank Merger Transactions](#)<sup>2</sup> ("2024 Policy Statement") and reinstate its prior Statement of Policy on Bank Merger Transactions ("Prior Policy Statement").<sup>3</sup>

Comments are due no later than 30 days after the request for comment is published in the Federal Register. (As of the date of this Alert, the request for comment has not been published in the Federal Register.) The FDIC stated in its accompanying [Financial Institution Letter](#) that at a later date it intends to ask for comment "on all aspects of the regulatory framework governing the FDIC's review of bank merger transactions." The Department of Justice, which, both by statute and custom, consults with the FDIC (and the Federal Reserve and Office of the Comptroller of the Currency, depending on the type of bank charter) on bank merger transactions, has not yet indicated an intention to reconsider its competitive effects analysis of bank mergers. Whether this suggests an inconsistency in the Trump Administration's approach to bank mergers or just a timing issue will become clearer in time.

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<sup>1</sup> Federal Deposit Insurance Corporation, RIN 3064-ZA45, Statement of Policy on Bank Merger Transactions (March 3, 2025) ("Request for Comment"). The Federal Deposit Insurance Act prohibits an insured depository institution ("IDI") from engaging in a bank merger transaction except with the prior approval of the responsible Federal banking agency. The FDIC has jurisdiction to act on merger transactions that solely involve IDIs in which the acquiring, assuming, or resulting institution is an FDIC-supervised institution and also has jurisdiction to act on merger transactions that involve an IDI and any non-insured entity. 12 U.S.C. §1828(c)(1), (2).

<sup>2</sup> Federal Deposit Insurance Corporation, Final Statement of Policy on Bank Merger Transactions, 89 FR 79125 (Sept. 17, 2024) ("2024 Policy Statement").

<sup>3</sup> The Prior Policy Statement was first published in 1998, and modified in 2002 and 2008. See 63 FR 44761 (Aug. 20, 1998), 67 FR 48178 (Jul. 23, 2002), 67 FR 79278 (Dec. 27, 2002), and 73 FR 8870 (Feb. 15, 2008). The Prior Policy Statement is republished in the request for comment.

*Rationale for the Request for Comment*

The Biden Administration adopted an extensive competitive effects analysis for the approval of bank mergers in two ways: (i) the adoption of the 2024 Policy Statement,<sup>4</sup> which significantly expanded the criteria against which a bank merger would be evaluated, as compared to the Prior Policy Statement; and, (ii) withdrawal from the [1995 Bank Merger Guidelines](#) of the Department of Justice, as replaced by a [2024 Banking Addendum](#) to the [2023 Department of Justice and Federal Trade Commission Merger Guidelines](#) (2023 Merger Guidelines).

The 2024 Policy Statement indicated that the FDIC, in conjunction with the participation of the Department of Justice, would evaluate the potential competitive effects of bank mergers subject to its jurisdiction in accordance with the competitive effects theories incorporated in the 2023 Merger Guidelines.<sup>5</sup> This has had significant market effects. Implementation of the 2024 Policy Statement “has added considerable uncertainty to the merger application process” in part by “deemphasiz[ing] the use of the Herfindahl-Hirschman Index (HHI) [concentration] thresholds in the competitive effects analysis”, “replac[ing] it with more subjective criteria” and “plac[ing] an affirmative burden [on parties] to demonstrate that a merger transaction” will better enable the surviving entity to “meet the convenience and needs of the community” absent the merger.<sup>6</sup> The 2024 Policy Statement has made the bank merger review process “less transparent and less predictable.”<sup>7</sup>

In anticipation of a more comprehensive review of the analytic framework for evaluating bank mergers, the FDIC has proposed re-adoption of the Prior Policy Statement “which is well understood by the public and market participants.”<sup>8</sup> Unlike the 2024 Policy Statement and the 2023 Merger Guidelines, the Prior Policy Statement places significant weight on the post-merger HHI and the change in HHI, in identifying banking mergers unlikely to raise competitive concerns. Under the Prior Policy Statement, the FDIC would not normally deny a proposed merger for competitive reasons where (i) the post-merger HHI concentration level in a relevant geographic market was 1800 or less, or (ii) where the increase in the HHI concentration level due to the merger was less than 200 points.<sup>9</sup> Where a transaction failed these screens, the FDIC would take into account the strength of other

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<sup>4</sup> The OCC under the Biden administration also adopted revised merger guidelines consistent with President Biden's Executive Order on competition. See [Business Combinations Under the Bank Merger Act](#), OCC-2023-0017 (Sept. 25, 2024) (to be codified at 12 C.F.R. pt. 5) (“OCC Final Rule”).

<sup>5</sup> 2024 Policy Statement, 89 FR at 79136 (“The FDIC’s analysis ... is informed by the Department of Justice’s approach to evaluating competitive effects.”)

<sup>6</sup> Request for Comment at 3-4.

<sup>7</sup> Id. at 4.

<sup>8</sup> Id.

<sup>9</sup> The 2023 Merger Guidelines adopt a different threshold for changes in market concentration that creates a presumption of illegality. See 2023 Merger Guidelines, at 7 (Post-Merger HHI of greater than 1800, combined with a change in the HHI of greater than 100.).

participants in the market, and the likelihood of new entry into the market or expansion by current market participants.<sup>10</sup>

*Commentary*

The FDIC's interim adoption of the Prior Policy Statement, and its more focused and predictable competitive effects analysis, conflicts with the Trump Administration's continued adherence to the 2023 Merger Guidelines<sup>11</sup> and the 2024 Banking Addendum. Continued reliance on the 2023 Merger Guidelines, either directly by the FDIC in its competitive effects analysis or indirectly through consultation with the Attorney General (as required by statute), consistent with the 2024 Bank Addendum to the 2023 Merger Guidelines, risks maintaining the negative effects of the 2024 Policy Statement. Comments may wish to address not only the adoption of the Prior Policy Statement but seek clarity on the continuing relevance of the DOJ's 2024 Banking Addendum to the 2023 Merger Guidelines.

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If you have any questions, please contact any of the following Cadwalader attorneys.

Daniel Meade	+1 202 862 2294	<a href="mailto:daniel.meade@cwt.com">daniel.meade@cwt.com</a>
Bilal Sayyed	+1 202 862 2417	<a href="mailto:bilal.sayyed@cwt.com">bilal.sayyed@cwt.com</a>

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<sup>10</sup> See Request for Comment, at 12.

<sup>11</sup> Memorandum from Acting Assistant Attorney General Omeed Assefi to DOJ Antitrust Division Staff Regarding Use of the 2023 Merger Guidelines (Feb. 18, 2025), Mr. Assefi's position reflects the position of Gail Slater, President Trump's nominee for Assistant Attorney General, Antitrust (DOJ). See Questions for the Record, Nomination of Abigail Slater for Department of Justice, 119<sup>th</sup> Congress (2025-2026) (Response to Senator Peter Welch, Question 1.) See also Memorandum from Chairman Andrew N. Ferguson to FTC Staff Regarding Merger Guidelines (Feb. 18, 2025).