

The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION

OCTOBER 2021

EDITOR'S NOTE: CRYPTOCURRENCY

Steven A. Meyerowitz

CRYPTOCURRENCY AND OTHER NEW FORMS OF FINANCIAL TECHNOLOGY: POTENTIAL TERRORIST FINANCING CONCERNS AND LIABILITY

Chase D. Kaniecki, Samuel H. Chang, Michael G. Sanders, and Rathna J. Ramamurthi

WHAT TO EXPECT FROM NEW SEC CHAIR GARY GENSLER ON CRYPTOCURRENCY

Carol W. Sherman

FINCEN ANNOUNCES NATIONAL AML/CFT POLICY PRIORITIES AND ALSO PROPOSES RULEMAKING TO ESTABLISH "NO-ACTION LETTER" PROCESS

Eddie A. Jauregui, Andres Fernandez, Brian N. Hayes, and Jennifer Correa Riera

PAYMENT CARD ISSUERS FACE MIXED RESULTS SEEKING LOSS RECOVERY ON MERCHANT DATA BREACHES

Jennifer Hall

CONSUMER FINANCIAL PROTECTION BUREAU UPDATES GUIDANCE REGARDING "UNAUTHORIZED TRANSFERS" UNDER THE ELECTRONIC FUND TRANSFER ACT

Arthur E. Anthony and Cameasha Turner

FEDNOW SERVICE PILOT PROGRAM GAINING TRACTION AND SUPPORT

J.C. Boggs, Matthew B. Hanson, George M. Williams jr, Justin M. King, and Andrea Demick

BIDEN COMPETITION ORDER MAY INFLUENCE BANK MERGER APPROVALS

Clifford S. Stanford, Sanford M. Brown, Adam J. Biegel, Jordan A. Jensen, and Elizabeth A. Dunn

FORD V. MONTANA: THE U.S. SUPREME COURT'S LATEST FORAY INTO PERSONAL JURISDICTION AND WHAT IT MIGHT MEAN FOR BANKS

Mark G. Hanchet, Christopher J. Houpt, Robert W. Hamburg, and Anjanique M. Watt

THE FEDERAL RESERVE'S PROPOSED GUIDELINES ON REQUESTS FOR ACCOUNTS AND PAYMENT SERVICES AT FEDERAL RESERVE BANKS: EIGHT THINGS TO KNOW

Jeremy Newell, Michael Nonaka, Karen Solomon, Jenny Scott Konko, and Andrew Ruben

ESG LEGISLATION TARGETS CLIMATE RISK DISCLOSURE

Wayne J. D'Angelo, John M. Foote, Jennifer E. McCadney, Courtney L. Kleshinski, and Maggie C. Crosswy



LexisNexis

THE BANKING LAW JOURNAL

VOLUME 138

NUMBER 9

October 2021

Editor's Note: Cryptocurrency Steven A. Meyerowitz	491
Cryptocurrency and Other New Forms of Financial Technology: Potential Terrorist Financing Concerns and Liability Chase D. Kaniecki, Samuel H. Chang, Michael G. Sanders, and Rathna J. Ramamurthi	494
What to Expect From New SEC Chair Gary Gensler on Cryptocurrency Carol W. Sherman	502
FinCEN Announces National AML/CFT Policy Priorities and Also Proposes Rulemaking to Establish "No-Action Letter" Process Eddie A. Jauregui, Andres Fernandez, Brian N. Hayes, and Jennifer Correa Riera	505
Payment Card Issuers Face Mixed Results Seeking Loss Recovery on Merchant Data Breaches Jennifer Hall	514
Consumer Financial Protection Bureau Updates Guidance Regarding "Unauthorized Transfers" Under the Electronic Fund Transfer Act Arthur E. Anthony and Cameasha Turner	522
FedNow Service Pilot Program Gaining Traction and Support J.C. Boggs, Matthew B. Hanson, George M. Williams jr, Justin M. King, and Andrea Demick	526
Biden Competition Order May Influence Bank Merger Approvals Clifford S. Stanford, Sanford M. Brown, Adam J. Biegel, Jordan A. Jensen, and Elizabeth A. Dunn	534
Ford v. Montana: The U.S. Supreme Court's Latest Foray into Personal Jurisdiction and What It Might Mean for Banks Mark G. Hanchet, Christopher J. Houpt, Robert W. Hamburg, and Anjanique M. Watt	539
The Federal Reserve's Proposed Guidelines on Requests for Accounts and Payment Services at Federal Reserve Banks: Eight Things to Know Jeremy Newell, Michael Nonaka, Karen Solomon, Jenny Scott Konko, and Andrew Ruben	543
ESG Legislation Targets Climate Risk Disclosure Wayne J. D'Angelo, John M. Foote, Jennifer E. McCadney, Courtney L. Kleshinski, and Maggie C. Crosswy	547

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at (800) 252-9257
Email: matthew.t.burke@lexisnexus.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexus.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

ISBN: 978-0-7698-7878-2 (print)

ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexus.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

BARKLEY CLARK

Partner, Stinson Leonard Street LLP

CARLETON GOSS

Counsel, Hunton Andrews Kurth LLP

MICHAEL J. HELLER

Partner, Rivkin Radler LLP

SATISH M. KINI

Partner, Debevoise & Plimpton LLP

DOUGLAS LANDY

White & Case LLP

PAUL L. LEE

Of Counsel, Debevoise & Plimpton LLP

TIMOTHY D. NAEGELE

Partner, Timothy D. Naegele & Associates

STEPHEN J. NEWMAN

Partner, Stroock & Stroock & Lavan LLP

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2021 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

Biden Competition Order May Influence Bank Merger Approvals

Clifford S. Stanford, Sanford M. Brown, Adam J. Biegel, Jordan A. Jensen, and Elizabeth A. Dunn*

In this article, the authors examine the Biden Administration's call to revitalize oversight of bank consolidations and what it means for smaller banks' ability to compete against their larger competitors and FinTech companies.

On July 9, 2021, President Biden issued an executive order (the "Order") encouraging robust antitrust enforcement in what the White House described as a "whole-of-government effort to promote competition in the American economy."¹

The Order focuses its scrutiny on major U.S. industries such as health care, transportation, technology, and banking and directs executive agencies, while encouraging independent agencies, to take sweeping action to counteract perceived anticompetitive trends in these markets.

The Order also establishes a White House Competition Council to coordinate implementation of the Order's initiatives and to advance the administration's efforts to combat purported overconcentration and unfair competition in the economy.

Notably, the Order and related press release² from the White House calls on the U.S. Department of Justice's Antitrust Division ("DOJ") and Federal Trade Commission ("FTC") to vigorously enforce antitrust laws and calls out the practices of previous Administrations that did not use existing law to challenge "bad mergers" across all sectors noted in the Order.

Within the 72 sector-specific policy initiatives, the Order encourages federal agencies to revitalize merger oversight in the banking industry. Federal

* Clifford S. Stanford, a partner in the Atlanta office of Alston & Bird LLP, leads the firm's Bank Regulatory Team. Sanford M. Brown, a partner in the firm's Dallas office, is co-chair of the firm's Financial Services & Products Group. Adam J. Biegel, a partner in the firm's office in Washington, D.C., is co-chair of the firm's Antitrust Team. Jordan A. Jensen and Elizabeth A. Dunn are associates at the firm. The authors may be contacted at cliff.stanford@alston.com, sanford.brown@alston.com, adam.biegel@alston.com, jordan.jensen@alston.com, and lizzie.dunn@alston.com, respectively.

¹ Executive Order on Promoting Competition in the American Economy, *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

² FACT SHEET: Executive Order on Promoting Competition in the American Economy, *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

prudential banking agencies, including the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (“FDIC”), and the Office of the Comptroller of the Currency (“OCC”), each have independent guidelines and processes for reviewing mergers. The DOJ also performs an independent review of bank mergers from the prudential banking agencies.

Importantly, the Order is not the only recent instance of renewed attention to competition review of bank mergers. In September 2020, the DOJ requested public comments on whether and how its 1995 Bank Merger Competitive Review Guidelines should be revised in light of new market dynamics and other advances since the guidelines were first released.³ The review of bank merger applications by the DOJ and the prudential agencies has focused on geographic measures of deposit share as market concentration thresholds, while accounting for thrift and credit union deposit shares only on a limited basis, and not considering modern competition from FinTech companies and geographic dispersion of deposits from online banks.

Additionally, in February 2021, Federal Reserve Governor Michelle Bowman indicated in a speech that the Federal Reserve would reexamine its merger review process to address market-specific challenges faced by rural community banks.

CONTENT OF THE ORDER

While the Order covers a broad range of topics, it offers relatively few specific action items. For banking, the Order encourages the DOJ to consult with the Federal Reserve, FDIC, and OCC to adopt a plan for revitalizing merger oversight within 180 days of the date of the Order. A stated purpose of the Order is “to ensure Americans have choices among financial institutions and to guard against excessive market power.”

In a press release issued contemporaneously with the Order, the White House expressed concern that bank merger activity over the past 40 years has resulted in increased bank closures that disproportionately affect rural and low-income communities’ ability to access credit and other financial services.

The press release suggested that agencies have become complacent in their review of bank mergers, citing a statistic that no bank merger application has been formally denied in over 15 years and indicating that a lack of rigorous oversight has resulted in market overconcentration. Those of us who have toiled

³ Antitrust Division Seeks Public Comments On Updating Bank Merger Review Analysis, *available at* <https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis>.

in these fields for a long time know that this is at best a red herring—applications are so rarely denied because they are withdrawn, often at the encouragement of the agencies, before any denial can be issued.

The Order encourages the DOJ, along with the Federal Reserve, FDIC, and OCC, to revise the bank merger guidelines. This focus is consistent with the DOJ's momentum in late 2020 under the Trump Administration and may spur completion of this effort. However, while the DOJ's efforts focused on revising the bank merger guidelines to reflect the modern, evolving economy and emerging technologies that continue to disrupt traditional banking models, the Order reflects a broad suggestion to raise the bar on competition review.

The Order is not specific about how any new bank merger guidelines should endeavor to increase scrutiny of bank deals. But with the acting head of the Antitrust Division and the new chair of the FTC issuing a statement⁴ on the same day as the Order stating that general antitrust merger guidelines “deserve a hard look to determine whether they are overly permissive,” and an array of proposed legislation in Congress aimed at toughening federal merger reviews, there appears to be an appetite for not only a modernization but also a ratcheting up of competition reviews generally.

Interestingly, in another section of the Order, President Biden directs the Secretary of the Treasury to submit a report within 270 days of the Order that examines the competitive effects of entry by large technology firms and other nontraditional participants into financial services markets.

This mandate introduces the countervailing notion that competition may actually be increasing in the financial services industry. Bowman struck a similar tone in her February 2021 speech, listing increased competition in the banking industry as an additional reason for the Federal Reserve to reexamine its regulatory framework.⁵ In our experience, mergers among smaller banks, often serving smaller markets, can help such banks compete against larger banks and emerging nonbank firms, largely by increasing economies of scale and scope and eliminating expensive legacy infrastructure.

Notably, another provision of the Order relating to Section 1033 of the Dodd-Frank Act (known as the “open banking rules”) encourages the Con-

⁴ Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines, *available at* <https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant>.

⁵ Governor Michelle W. Bowman, My Perspective on Bank Regulation and Supervision, *available at* <https://www.federalreserve.gov/newsevents/speech/bowman20210216a.htm>.

sumer Financial Protection Bureau (“CFPB”) to consider promulgating rules to “facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products.”

The CFPB already published a proposal in October 2020 to implement just such a rule, which raises a range of issues, but is likely to have pro-competitive effects for consumer choice.

Further, it is potentially the case that the CFPB itself may seek an increasing “say” in financial services competition policy broadly, in line with its statutory mandates and language in the Order.

CONCLUSION

While the tone of the Order signals a tougher stance on bank consolidation efforts, it is still too early to predict the impact of the Order for future bank mergers. For example, it is unlikely that any new rules or guidance for bank mergers will be issued in 2021. This is in part because the Order has established the objectives that the independent prudential agencies are encouraged to meet, but these agencies are under no obligation to move immediately.

The DOJ has publicly announced its intent to cooperate with the prudential agencies in implementing the Order; however, the other agencies have yet to comment.

In addition, even once agreement on new guidelines is obtained, the comment process for any proposed regulations must be completed, which typically takes significant time.

And, at this time, leaders of some of the relevant agencies have not been confirmed by the Senate (such as the CFPB and the DOJ Antitrust Division), which could delay or alter some of these initiatives.

There is certainly a split in policy circles about whether there is “overconcentration” in banking. A more nuanced view may be that concentration issues may vary among industry segments, such as certain product markets, and that competition should be carefully considered alongside prudential and systemic risk concerns.

Further, while diminished consumer access to bank branches has been expressed as a concern, the reality of modern banking is that reduced transaction costs provide for easier market entry, including from nontraditional players and banks themselves. Some offer “unbundled” products, increasing consumer choice, while customer acquisition costs may drive others to offer “rebundled” products in competition. The policy debate that is likely to ensue as a result of the Order is likely to get more heated.

The industry may see a push for smaller bank deals to be completed as quickly as possible. But according to some analysts, the Order is focused on transactions involving larger banks and is not aimed at disrupting community and regional bank deals. Community and regional bank mergers allow such banks to be more competitive in the market through improved tech offerings, which falls in line with the objectives of the Order.

Thus, while keeping a close eye on developments resulting from the Order, smaller banks might continue to push forward with consolidation efforts, consistent with trends over the last two decades.