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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 release[2] 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

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[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

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[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 statement[4] 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.