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BLOG

Competition EO: Eyes on Banking

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President Biden's July 2021 Executive Order on Competition in the American Economy (the Order) includes a number of directives meant to address concerns over reduced competition in the commercial banking industry. Specifically, the Order calls upon regulators to evaluate the evolving competitive landscape of the consumer finance sector, ramp up oversight of bank mergers, and adopt rules promoting the portability of consumer financial data among institutions.

These initiatives could trigger a significant shift in the level of antitrust scrutiny placed on financial service providers. However, the Order itself is vague and leaves implementation of the President's directives to the DOJ and other bank regulators. Consequently, it is still uncertain exactly how these policy changes will play out.

1. Bank Merger Review

The Executive Order calls upon the Attorney General, in conjunction with other financial regulators, to "ensure Americans have choices among financial institutions and to guard against excessive market power" by revitalizing "merger oversight under the Bank Merger Act and the Bank Holding Company Act."

In a Fact Sheet accompanying the Order, the Biden Administration explained that over the past four decades, the United States has seen the number of operating banks decline by roughly 70%, a trend which has hit communities of color (particularly those in rural areas) especially hard. This figure includes nearly 10,000 bank closures, the vast majority of which resulted from mergers. Indeed, although bank mergers are subject to federal review, "federal agencies have not formally denied a bank merger application in more than 15 years." In the Biden Administration's view, such "consolidation raises costs for consumers, restricts credit for small business, and harms low-income communities."

The Order gives the Attorney General up to 180 days, or until January 2022, to adopt a plan for "the revitalization of merger oversight" and encourages the DOJ to enhance the enforcement standards set forth in its Bank Merger Competitive Review guidelines (the Guidelines), with input from the other regulatory agencies responsible for reviewing financial services mergers (the Federal Reserve, Federal Deposit Insurance Corporation, and the Office of the Comptroller of Currency).

The current Guidelines, which have not been substantively updated since 1995, establish mechanisms, or "screens," that the DOJ and bank regulators use to evaluate the potential competitive impacts of mergers. These screens depend largely on Herfindahl-Hirschman Index (HHI) calculations, the traditional method for assessing how mergers will affect market concentration.

Critics have argued that the Guidelines are ill-suited to protect modern financial markets and must be revised.[1] For example, FTC Commissioner Rohit Chopra has argued that the DOJ should amend the Guidelines to lower the HHI thresholds used to evaluate bank mergers, making it harder for banks to merge. According to Chopra, the current Guidelines "have failed to protect U.S. consumers and businesses from the negative consequences of bank consolidation" which has "increased the cost and reduced the availability of credit, inflated the fees that banks charge for basic financial services, and depressed the interest rates that banks pay to their accountholders."[2]

Critics have also argued that by focusing solely on market concentration and competitive effects, the Guidelines ignore potential non-price harms and other factors that should be evaluated, including the risk of financial instability, public interests, and the merging banks' financial and managerial resources.[3]

On the other hand, some commentators have suggested that the Guidelines' current HHI framework is misguided because it depends on market definitions that are too narrow. Applying artificially small geographic market boundaries can produce high market concentrations in rural areas that only have a few commercial banks, preventing otherwise beneficial mergers. Likewise, some observers have argued that by relying mainly on the deposit share of commercial banks to determine market concentration, the Guidelines ignore competition from credit unions, online lenders, farm credit unions, and other savings institutions.[4]

Of note, the DOJ had previously begun considering potential changes to the Guidelines under the direction of former Assistant Attorney General Makan Delrahim. In September 2020, the DOJ Antitrust Division announced that it was seeking public comments on whether the Guidelines should be modernized. "Innovative emerging technologies are disrupting traditional banking models and introducing new competitive elements to the financial sector," Delrahim explained. Accordingly, the specific topics for comment included, among other things, whether the DOJ should amend the Guidelines' HHI thresholds and relevant market frameworks to account for modern banking dynamics. The original comment period concluded in October 2020, but the DOJ has not yet announced any resulting changes to the Guidelines. The Order now gives the DOJ a set timeline by which it is to revise its guidelines as well as a mandate to increase the level of antitrust scrutiny given to bank mergers.

2. Treasury Study of Fintech Impact on Consumer Finance Competition

The Order also directs the Secretary of the Treasury to submit a report within 270 days to the Chair of the newly created White House Competition Council "assessing the effects on competition of large technology firms' and other non-bank companies' entry into consumer finance markets."

As discussed in a previous Competition Corner post, the DOJ is already considering the impact that new market entrants, and especially FinTech firms, are having on competition in the consumer finance space. FinTech firms can potentially enhance competition by offering alternatives to traditional consumer banking services and by making those services accessible to consumers who have historically been neglected by consumer banks. Accordingly, there are open questions regarding whether and in what circumstances nontraditional FinTech alternatives should be treated as market participants when examining the competitive effects of proposed bank mergers. The DOJ has also expressed concern that traditional market institutions might try to acquire these nascent competitors as a way to protect their hold on the market.

Given the increasing importance of new technologies in the financial services sector, the Treasury Department's report will likely be used to drive further legislative and regulatory reform initiatives.

3. Transferability of Consumer Financial Data and Trade Practices

The Order also encourages the Consumer Financial Protection Bureau (CFPB) to adopt rules that will increase the portability of consumer-level financial transaction data. In the accompanying Fact Sheet, the administration explained that "[e]ven where a consumer has multiple options, it is hard to switch banks partly because customers cannot easily take their financial transaction history data to a new bank." And when consumers do switch banks, the inability to download and transfer their prior banking data increases the costs associated with seeking new lines of credit.

Notably, the CFPB initiated the process of formulating new rules regarding consumers' access to financial records in November 2020, but has not yet adopted any final rules. Although the Order encourages the CFPB to consider a continuation of the rulemaking process, it neither requires nor sets a timeline for the implementation of any new rules.

Key Takeaways

- The Order directs the DOJ and financial services regulators to revise the standards used to review proposed bank mergers to enhance scrutiny of these transactions. While it is not yet clear what the updated review process will entail, or how any new review standards will be applied, banks seeking to merge should engage early with regulators when negotiating a deal and prepare for heightened antitrust and regulatory scrutiny.
- Companies should pay close attention to the Treasury's forthcoming report on competition in the financial services sector, as the findings could drive further changes to the bank merger review process, new enforcement actions, and future legislative and regulatory reforms.
- As pressure mounts on banks to improve the portability of consumer financial data, companies should be careful about potential privacy issues that could arise, as there has been increasing recent focus on the intersection between data privacy and antitrust compliance.
- Companies can also prepare for any changes in consumer data rules by monitoring—and participating in—any new CFPB rulemaking process. If the CFPB solicits public comments on proposed rules, companies can submit their own comments directly or through a trade association.

This article is part of our "Unpacking the Executive Order on Promoting Competition" series. Click here for other related articles. Please contact a member of the Winston & Strawn Antitrust/Competition Practice Group or your Winston relationship attorney for further information.

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[1] *See* Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 Yale J. on Reg. 435, 436 (2020).

[2] Comment of FTC Commissioner Rohit Chopra and Professor Jeremy Kress on the DOJ Antitrust Division Banking Guidelines Review (Oct. 16, 2020), a*vailable at* https://www.ftc.gov/system/files/documents/public_statements/1581730/chopra_-_comment_doj_banking_merger_guidelines.pdf.

[3] *See* Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 Yale J. on Reg. 435, 436 (2020).

[4] CSBS Comment Letter: Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide, CSBS (Oct. 16, 2020), https://www.csbs.org/policy/statements-comments/csbs-comment-letter-antitrust-division-banking-guidelines-review-public.

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