

## Publications

### “Promoting Competition in the American Economy”: President Biden’s EO and Financial Institutions

#### Related Industries

Financial Institutions

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On Friday, July 9, President Biden issued an Executive Order and fact sheet (the EO) calling for certain actions that would impact the financial services industry as well as many other industries, ostensibly intended to enhance competition in the marketplace and protect consumers.

The fact sheet cites a number of statistics and concepts relating to industry consolidation and the provision of financial services in communities of color, as well as the impact of industry consolidation on consumers, small businesses and low-income communities. It notes that federal agencies have not formally denied a bank merger application in more than 15 years, without recognizing that in fact most transactions have been reviewed for likely approval before applications are formally filed.

The EO and fact sheet goes on to encourage relevant federal agencies to update their merger-related guidelines to “...provide more robust scrutiny of mergers,” without specifying how that would be accomplished or what areas require further scrutiny. It also suggests rules that would allow customers to “...download their banking data and take it with them” when changing banks.

In reality, with regard to the banking industry the EO and fact sheet really just recite administration concerns and desires to somehow improve consumer well-being by utilizing some undefined and undiscernible enhanced industry standards to do so. One of the unfortunate results will be to inject further regulatory uncertainty into an industry that relies on certainty to provide appropriate products and services to both consumer and commercial customer segments.

And as for the regulators, it once again places them in a position of having to deal with interpreting the administration’s concerns and turning them in to viable agency policies and procedures that may or

may not have the intended effect and may or may not result in unnecessary industry pressures and problems. Other agencies involved in industry M&A oversight, in addition to the banking regulators, such as the Department of Justice (DOJ) and Federal Trade Commission (FTC), may likewise sense pressure to somehow enhance industry oversight without clear guidance as to how or why. They may react by taking the conservative approach of slowing industry transactions or requiring additional information with little if any direction as to why or how. Illustrative of that concern is the DOJ's July 9 statement that "...current guidelines deserve a hard look to determine if they are overly permissive." The EO also strangely recommends that the DOJ and FTC "...recognize that the law allows them to challenge prior bad mergers that past administrations did not previously challenge." While difficult at best to discern, the specter of unwinding already-consummated bank mergers is fraught with issues and potential problems for institutions and consumers alike, not to mention investors.

While the industry has been consolidating for decades, new fintech and other entrants into the financial services marketplace have provided, and continue to provide, new competition for traditional banking institutions, which is not reflected in either the EO or the accompanying fact sheet. Many of these new entrants have not been subject to the same scrutiny as banking institutions when it comes to ascertaining the needs of the communities and providing services that meet the needs of those communities.

In addition, there has been no allegation that existing or historic use of the competitive analysis using the Herfindahl-Hershman Index has been inappropriate or ineffective in gauging the impact of bank combinations on competition.

It is difficult to tell at this point whether the EO, combined with potential tax law changes being advanced by the current administration, may push institutions to consider consolidations just because of the future uncertainty. It could also result in a negative impact on M&A because of the potential for adverse agency treatment based on a desire not to act (or to be ultra conservative in M&A analysis) until the actual impact of the EO is decided.

All other issues aside, what the EO does is help the industry recognize how it is perceived by the current administration. It also helps the industry anticipate the types of attitudinal impacts that that perception may have on actions by the federal banking (and other) agencies in conjunction with M&A or a plethora of other banking industry issues.