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What President Biden's Competition Executive Order Means for Banks and the Financial Services Industry

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On July 9, 2021, President Joe Biden issued an Executive Order (EO) "Promoting Competition in the American Economy." The EO affirms that it is the administration's policy "to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony."

While certain portions of the EO apply generally, the EO includes provisions aimed at specific sectors of the economy. Though the financial services sector is one of the specific sectors targeted in the EO, our initial assessment is that the EO and related regulatory actions are unlikely to have a significant near-term impact on the sector. However, there are potentially broader, longer-term implications for the financial services sector to begin to consider.

Below, we identify those portions of the EO that are relevant to the financial services sector and discuss their potential practical impact, including as relate to (1) bank mergers; (2) fee income; (3) consumer data; (4) Unfair, Deceptive, or Abusive Acts or Practices (UDAAP); and (5) financial technology (Fintech).

- **Bank Mergers** – The EO encourages the attorney general, in consultation with US banking regulators, to within 180 days review current practices and adopt a plan for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956. Notably, however, the Department of Justice (DOJ) appears already to have begun this process, having in September 2020 begun to request public comments on updating is bank merger review analysis. In issuing its request for public comments, DOJ noted that "as part of the division's increased attention to modernizing our competitive analysis of financial services markets, we are examining whether the 1995 Banking Guidelines need updating to reflect our evolving economy."

  While the review mandated by the EO is pending, we do not anticipate any significant impact on bank mergers, especially those involving smaller and mid-size banks. Moreover, the review could result in some modernization of the bank merger guidelines. Earlier this year, Federal Reserve Board Governor Michelle Bowman acknowledged that the current guidelines, which were adopted in 1995, have not changed substantially since then and consideration should be given to revisions that reflect competition banks face from other market participants. Formal consideration of competition posed by credit unions and non-banks could reduce competitive concerns in many markets. That said, given the significant focus in Congress on antitrust and competition issues, lawmakers may make a push to enact legislation that updates the standards under which federal regulators analyze bank merger applications. Even if lawmakers are unable to enact such legislation – which would be a tall order in this divided Congress – the focus on bank mergers could impact the timing and substance of potential regulations.

  For example, Sen. Elizabeth Warren (D-MA) and Rep. Chuy Garcia (D-IL) earlier this year introduced the Bank Merger Review Modernization Act, which would:

  1. Seek to ensure that mergers are in the "public interest" by, among other things, requiring Consumer Financial Protection Bureau (CFPB) approval when at least one applicant offers consumer financial products, only allowing institutions with the highest rating in two out of three of their last Community Reinvestment Act exams to merge, and requiring disclosure of discussions between the institutions and regulators before the merger application is filed;
  2. Require regulators to use a quantifiable metric developed by the Basel Committee on Banking Supervision to evaluate systemic risk;
  3. Require regulators to examine how the merger would impact market concentration for individual banking products, such as commercial deposits, home mortgage lending and small business lending; and
  4. Require regulators to review the leadership of the merged institution to ensure that the selected individuals have strong records with respect to risk management, with larger financial institutions required to have their balance sheets examined.

  This is consistent with an approach advocated in the Yale Law Review by Jeremey Kress, a former attorney for the Federal Reserve, who suggests that a contemporary bank merger analysis should include statutory factors that regulators have traditionally not considered: whether a proposed merger would increase systemic risks, enhance the public welfare, and strengthen the relevant institutions.

- **Fee Income** – In outlining the administration's concerns about competition in the American economy, the EO notes that "[i] n the financial-services sector, consumers pay steep and often hidden fees because of industry consolidation." However, the EO does not propose specific actions to directly address these so-called hidden fees. While generation of fee income is driven more by today's low interest rate environment, it is possible that the EO could result in policymakers seeking to address concerns about overdraft fees through legislative action. In fact, later this week, the Brookings Institute will hold an event to discuss the future of overdraft fees and "analyze whether new technology and products can meet people's needs for financial flexibility in a more fair and efficient manner."

- **Consumer Data** – The EO encourages the CFPB to consider a rulemaking to "facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products." Over the last several years, the CFPB has sought to better understand the consumer benefits and risks related to market developments that rely on access to consumer financial account and account-related information. Most recently, in November 2020, the CFPB issued an Advance Notice of Proposed Rulemaking addressing consumer data access. As part of this process, the CFPB sought public comments, which are currently being reviewed as it considers appropriate next steps. In light of the EO and the CFPB's ongoing work in this area, we could soon see the CFPB take action to propose regulations that are more in line with open banking regulations similar to those that have been pursued in the EU.
- **Unfair, Deceptive, or Abusive Acts or Practices** – In linking UDAPP and competition for the first time, the EO also encourages the CFPB to consider strongly enforcing the prohibition on UDAAP "to ensure that actors engaged in unlawful activities do not distort the proper functioning of the competitive process or obtain an unfair advantage over competitors who follow the law." Since the early days of the Biden administration, it has been clear that the CFPB's approach to UDAAP enforcement would be different from the agency's approach during the Trump administration. For example, in March of this year, Acting CFPB Director Dave Uejio rescinded a policy statement related to UDAAP issued by his predecessor, arguing that it "undermined deterrence and was contrary to the CFPB's mission of protecting consumers."

  Moreover, with former FTC Commissioner Rohit Chopra's nomination to serve as the CFPB director currently working its way through the Senate confirmation process, it seems particularly likely that the CFPB will take action to protect consumers against UDAAP. In fact, during his nomination hearing before the Senate Banking Committee, Mr. Chopra suggested that the CFPB may move forward with a rulemaking on UDAAP, but at the same time made clear that the CFPB already has sufficient authority to enforce UDAAP prohibitions – raising the question as to whether the CFPB will reinstate former Director Richard Cordray's policy of "rulemaking through enforcement."
- **Fintech** – Also of interest to the financial services sector is the EO's requirement that the Treasury Secretary submit a report to the chair of the newly established White House Competition Council "assessing the effects on competition of large technology firms' and other non bank companies' entry into consumer finance markets." While the EO is intended to promote competition, thus suggesting that the Biden administration would be supportive of policies like Fintech charters, which facilitate the entry of new firms into the market, the administration also clearly holds a negative view of "big tech" that will likely necessitate a balanced regulatory approach.

  For example, in May of this year, Acting Comptroller of the Currency Michael Hsu testified before the House Financial Services Committee regarding his preliminary perspective on licensing and charters, noting:

> "Notwithstanding the strong oversight and enhanced provisions the OCC requires, some are concerned that providing charters to Fintechs will convey the benefits of banking without its responsibilities. Others are concerned that refusing to charter Fintechs will encourage growth of another shadow banking system outside the reach of regulators. I share both of these concerns. Denying a charter will not make the problem go away, just as granting a charter will not automatically make a Fintech safe, sound, and fair. I will expect any Fintechs that the OCC charters to address the financial needs of consumers and businesses in a fair and equitable manner and support the important goal of promoting the availability of credit. Recognizing the OCC's unique authority to grant charters, we must find a way to consider how Fintechs and payments platforms fit into the banking system, and we must do it in coordination with the FDIC, Federal Reserve, and the states."

  Given that the Treasury Secretary's report is not due until the first quarter of 2022, however, it seems unlikely that there will be significant changes in Fintech regulation in the near term.

Lessons From Overseas

Europe's Payment Services Directive (PSD) has significantly altered the landscape of payments and banking services in the EU and the UK. The PSD's original aims were similar to those included in the EO: increase competition, open up the banking market to non-banks, and bring consistency to standards of consumer protection. This resulted in notable improvements to consumer rights in relation to refunds, charges and faster payments. Additionally, while opening up the banking market to new providers, the regulatory regime was developed with safety and protection in mind. All new payment services providers are subject to regulatory capital requirements and there are rules in place ensuring that customer funds in safeguarding accounts.

As PSD (and PSD2) freedoms were taken up enthusiastically by both new and existing players in the market, perhaps the most notable developments have been in the use of Application Program Interfaces (APIs) to offer easily accessible information on bank accounts and payments. While there were concerns about privacy breaches, the regulatory regime developed Strong Customer Authentication (SCA) measures as a means of protecting account information and personal data. This, in turn, gave comfort to users and there has, thus, been substantial growth in non-bank apps, websites and tools using APIs and promoting the freedom of information offered by PSD. One might not go so far as to say that PSD has created a new market, but it certainly seems to have brought some fresh thinking from new entrants when compared to traditional banking.

After the success of open banking legislation, the UK is now developing thinking around "open finance," which provides for open financial architecture (by extending open banking principles) to give consumers control over a wider range of financial data from savings to insurance, mortgages, investments, pensions and consumer finance. As with open banking, the transformative benefits will likely be felt by both consumers and financial services businesses.

If the proposals in the EO develop in line with its intention, we expect to see similar results in the US. The forthcoming regulatory changes will certainly facilitate change to the market and market participants – including potentially allowing Fintechs and others who now market account relationships and provide the customer's user interface to play a more active role with the banks potentially providing banking services more in the background. However, our experience shows the banks have and continue to be adept at offering innovative products that both comply with regulatory requirements and are in line with consumer demand, so we believe it is highly unlikely that EO will ultimately relegate banks to a declined position.

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