

### ***XIII. Executive Order 14036 and the Effects on Banking and Consumer Finance***

#### **A. Introduction**

Despite the Covid-19 pandemic, the United States' economy has been gaining momentum following the market crash in February 2020.<sup>1</sup> To maintain the momentum and move toward long-term growth, on July 9, 2021, President Biden signed one of the most impactful antitrust development bills of the past decade, or Executive Order 14036 (“EO 14036”) to bring “fair competition back to the economy.”<sup>2</sup> EO 14036, or Promoting Competition in the American Economy, has the stated goal of “affirm[ing] that it is the policy of [the Biden] Administration 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.”<sup>3</sup> The Biden Administration hopes implementing EO 14036 will “lower prices for families, increase wages for workers, and promote innovation and even faster economic growth.”<sup>4</sup>

This article explores the possible new banking merger guidelines that would be put into place due to EO 14036. Section 1 explains what EO 14036 does and who would be affected. Since the guidelines were updated recently, section 2 explores why the Biden administration is wanting stricter guidelines now. Section 3 reviews a brief history of bank mergers in the United States, past regulations, and current regulations. Sections 3 will provide context for sections 4 and 5, which will explore the likelihood of stricter guidelines and what those guidelines would likely look like.

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<sup>1</sup> The White House, *FACT SHEET: Executive Order on Promoting Competition in the American Economy* (July 9, 2021), [https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/\[perma.cc/63YE-ZJCE\]](https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/[perma.cc/63YE-ZJCE]).

<sup>2</sup> President Biden, United States, Remarks by President Biden at Signing of An Executive Order Promoting Competition in the American Economy, State Dining Room (Jul. 9, 2021).

<sup>3</sup> Exec. Order No. 14036, § 1, 86 Fed. Reg. 36987 (July 9, 2021).

<sup>4</sup> The White House, *supra* note 1.

## B. What is EO 14036?

EO 14036 has three main parts. First, EO 14036 issues a general policy statement that the Biden Administration is committed to combating excessive market concentration as well as challenges posed by new industries and technologies, “including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.”<sup>5</sup> Second, EO 14036 urges a “whole-of-government” approach and calls for federal agencies to cooperate with each other to oversee transactions for anti-competitive behavior when there is overlapping oversight authority.<sup>6</sup> EO 14036 only calls for agencies to participate “to the extent consistent with their respective statutory authorities and obligations.”<sup>7</sup> To assist such cooperation, Section 4 of EO 14036 establishes the White House Competition Council (“Council”) within the Executive Office of the President.<sup>8</sup> Third, EO 14036 sets forth 72 specific initiatives to encourage multiple federal agencies to review current anti-trust policy and regulations and issue more stringent rules against unfair competition in mergers, prices, privacy, and other areas.<sup>9</sup>

Regarding banking and consumer finance, the Biden administration is concerned about excessive bank consolidation.<sup>10</sup> To combat this, it has called for the Department of Justice (“DOJ”), in consultation with the with heads of banking regulators—the Chairmen of the Board of Governors of the Federal Reserve, Federal Deposit Insurance Corporation (“FDIC”), and the Comptroller of the Currency—“to review current practices and adopt a plan, not later than 180 days after the date of this order, for the revitalization of merger

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<sup>5</sup> *Id.*

<sup>6</sup> Shelia Adams, et al., *President Biden’s Executive Order on Promoting Competition*, HARVARD LAW SCHOOL FORUM ON CORP. GOV., (Sept. 23, 2021), <https://corpgov.law.harvard.edu/2021/07/20/president-bidens-executive-order-on-promoting-competition> [perma.cc/83YJ-XRZ3] (explaining how the order calls for the Department of Justice, the Chairman of the Federal Reserve, the Federal Deposit Insurance Corporation, and the Comptroller of Currency to work together to oversee transactions for anti-competitive behavior.).

<sup>7</sup> Exec. Order No. 14,036, *supra* note 3, § 4, at 36990.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

oversight under the Bank Merger Act and the Bank Holding Company Act of 1956.”<sup>11</sup> In sum, this mandate encourages banking regulators to consider revisions to the horizontal and vertical merging guidelines, which were formerly revised in 2010 and issued in 2020 respectively.<sup>12</sup>

Additionally, EO 14036 specifically encourages the CFPB to consider “commencing or continuing a rulemaking under section 1033 of the Dodd-Frank Act to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products.”<sup>13</sup> “Section 1033 of the Dodd-Frank Act requires the CFPB to issue rules governing how consumer financial services providers must make a consumer’s data collected or held by the service provider available to the consumer.”<sup>14</sup> This provision is significant, because portability of financial information is seen as the first step towards open banking regulations, as demonstrated in the UK and EU.<sup>15</sup>

### C. Why Now?

As stated above, the horizontal and vertical merger guidelines were revised fairly recently. Why is the Biden Administration concerned about bank mergers now? Simply, it is because the current merger guidelines are not effective, as evidenced by the rapid rate of bank closures across the country.<sup>16</sup> “Over the past four decades, the United States has lost 70% of its banks” with approximately 10,000 bank closures.<sup>17</sup> A majority of these closures are a result of mergers and acquisitions, as the “federal ... [banking regulators] have not formally denied a bank merger application in more than 15 years.”<sup>18</sup> “The Federal Reserve has now approved more than 3,500 consecutive merger

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<sup>11</sup> *Id.*

<sup>12</sup> Douglas Tween, et al, *Biden’s Executive Order and the Shifting US Antitrust Landscape*, Linklaters, (July 16, 2021), [https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/july/bidens-executive-order-and-the-shifting-us-antitrust-landscape\[perma.cc/H9ES-524B\]](https://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/july/bidens-executive-order-and-the-shifting-us-antitrust-landscape[perma.cc/H9ES-524B]).

<sup>13</sup> Exec. Order No. 14,036, § 1, 86 Fed. Reg. at 36,988 (July 9, 2021).

<sup>14</sup> Adams, *supra* note 6.

<sup>15</sup> *Id.*

<sup>16</sup> The White House, *supra* note 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

applications since 2006 without issuing a single denial.”<sup>19</sup> As a result, the top four banks—JP Morgan, Bank of America, Wells Fargo, and Citibank—hold approximately \$9 trillion in assets, which is the same amount as the next 300 banks combined.<sup>20</sup>

One example that highlights the inadequacy of the regulations is the 2020 acquisition of E-Trade by Morgan Stanley.<sup>21</sup> The federal agencies noted in its approval of the acquisition that “Morgan Stanley would control nearly 13% of deposits in Virginia despite not operating any retail branches in the state.”<sup>22</sup>

Bank closures are a serious problem in the United States and lead to increased costs to consumers, denied credit opportunities for small businesses, and caused particular harm to low-income communities.<sup>23</sup> Poor rural communities, mostly communities of color, are disproportionately affected, with “25% of all rural closures in majority-minority census tracts.”<sup>24</sup> These communities are transformed into so-called “bank deserts,” or communities in which there were no banks within 10 miles of populated areas.<sup>25</sup> In addition, the White House Fact sheet stated, “[b]ranch closures can reduce the amount of small business lending by about 10% and leads to higher interest rates.”<sup>26</sup>

Bank consolidation is a serious issue in America today. Before explaining what the new merger guidelines would likely look like, an account of the brief history of bank mergers and corresponding regulation might give some context and guidance.

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<sup>19</sup> Jeremy Kress, *Biden Wants to Crack Down on Bank Mergers — Here’s Why that Could Help Consumers and the Economy*, Michigan Ross (Aug. 4, 2021), <https://michiganross.umich.edu/news/biden-wants-crack-down-bank-mergers-here-s-why-could-help-consumers-and-economy> [http://perma.cc/P9MNB-FS9A].

<sup>20</sup> *Id.*

<sup>21</sup> John M. Pachkowski, *Regulators are rethinking bank M&A rules. It’s about time.*, American Banker (Sept. 1, 2021), <https://www.americanbanker.com/opinion/regulators-are-rethinking-bank-m-a-rules-its-about-time>.

<sup>22</sup> *Id.*

<sup>23</sup> The White House, *supra* note 1.

<sup>24</sup> *Id.*

<sup>25</sup> Richardson, et al, *Bank Branch Closures from 2008-2016: Unequal Impact in America’s Heartland*, NCRC, [https://ncrc.org/wp-content/uploads/2017/05/NCRC\\_Branch\\_Deserts\\_Research\\_Memo\\_050517\\_2.pdf](https://ncrc.org/wp-content/uploads/2017/05/NCRC_Branch_Deserts_Research_Memo_050517_2.pdf).

<sup>26</sup> The White House, *supra* note 1.

## D. Brief History of Bank Mergers and Regulation

### 1. *Bank Merger Waves*

Periods of rapid bank suspensions are not new. Historically, since the independent unit bank—as opposed to bank holding companies today—was dependent its local community, it could not cope with even small economic downturns.<sup>27</sup> Therefore, leading up to the great depression, bank closures were exceedingly common.<sup>28</sup> Bankers then decided it was necessary to form group banking for “the greater opportunity of diversification of lending risks, as well as reservoir of assistance in times of economic crisis.”<sup>29</sup> Due to this notion, bank mergers arose, culminating in a “massive merger movement” in the 1950s where 2,600 banks combined within the decade.<sup>30</sup> Since the 1950s, there have been three more waves of bank mergers, with a possible fourth on the way.<sup>31</sup> First, in 1994, policymakers repealed restrictions that required banks to only operate within a single state.<sup>32</sup> With no geographic limitations, banks merged with others in neighboring states, creating larger, regional banks.<sup>33</sup> The second wave began after the Great Depression-era restrictions on activities such as investment banking and insurance were lifted with the Gramm-Leach-Bliley Act in 1999.<sup>34</sup> Banks then merged with other companies, such as insurance companies or investment companies, to expand into these new markets.<sup>35</sup> “The third wave of bank mergers began during the 2008 financial crises, when several financial giants acquired failing firms, often with governmental assistance,” creating “too big to fail” conglomerates.<sup>36</sup> Today, a new fourth wave is brewing triggered by Trump-era financial deregulation that made it easier for banks to grow and established historically low federal interest rates that is making it

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<sup>27</sup> *The Bank Holding Company Act of 1956*, 7 DUKE L. J. 1, 1 (1957).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2.

<sup>30</sup> Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE JOURNAL ON REGULATION 435, 444 (2020).

<sup>31</sup> Kress, *supra* note 19.

<sup>32</sup> Donald I. Baker, *From Philadelphia National Bank to Too Big to Fail: How Modern Financial Markets Have Outrun Antitrust Law as a Source of Useful Structural Remedies*, 80 ANTITRUST L.J. 353, 359-62 (2015).

<sup>33</sup> Kress, *supra* note 19.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Baker, *supra* note 32.

difficult for banks to earn profits from lending.<sup>37</sup> The main source of profit for banks is from lending at higher interest rates than the interest paid for funding.<sup>38</sup> When the federal interest rates are low, the spread between the lending rate and borrowing rate diminishes, and banks' profits will ultimately decline.<sup>39</sup>

## 2. *Historic Federal Regulation Up to Now*

Where has federal regulation been? To start, bank merger regulation has “expanded significantly” compared to its conception.<sup>40</sup> The first attempts to regulate bank mergers were through the National Bank Consolidation Act of 1918 and the Federal Deposit Insurance Act of 1950, which each required a bank to obtain a federal agency's approval before merging.<sup>41</sup> These statutes were alas inadequate, because the statutes did not specify any standards for the agencies to follow when assessing a merger proposal, and the statutes had considerable gaps, which allowed banks to structure deals around them.<sup>42</sup> Moreover, “the DOJ's Antitrust Division ... generally ignored consolidation in the banking sector, ... [because] [e]arly twentieth century policymakers regarded banks as exempt from the Clayton and Sherman Antitrust Acts” due to banks not falling into the definition of “commerce.”<sup>43</sup>

Therefore, it wasn't until after the first wave of bank mergers in the 1950s, that the federal government started to act. Particularly, Congress enacted the Bank Merger Act of 1960 (“BMA”), which established a federal regulatory guidelines for mergers.<sup>44</sup> The BMA enumerated three factors the agencies must consider when evaluating a merger: (1) “the effect of the transaction on competition,” (2) “the

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<sup>37</sup> Kress, *supra* note 19.

<sup>38</sup> Mark Hack & Sam Nicholls, *Low Interest Rates and Bank Profitability—The International Experience So Far*, Reserve Bank of Australia (Jun. 17, 2021), <https://www.rba.gov.au/publications/bulletin/2021/jun/low-interest-rates-and-bank-profitability-the-international-experience-so-far.html>[<http://perma.cc/UCR2-3SJ8>].

<sup>39</sup> *Id.*

<sup>40</sup> Kress, *supra* note 30, at 443.

<sup>41</sup> National Bank Consolidation Act of 1918, Pub. L. No. 65-240, 40 Stat. 1043, 1043-44; Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, § 2, 64 Stat. 873, 892

<sup>42</sup> Kress, *supra* note 30.

<sup>43</sup> *Id.*

<sup>44</sup> Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified as amended at 12 U.S.C. § 1828(c) (2018)).

convenience and needs of the community to be served,” and (3) “the financial ... condition of each of the banks involved” and “the general character of [their] management.”<sup>45</sup> Then, in 1963, the Supreme Court held, in a single footnote, that banking was “commerce” and therefore was subject to the Sherman and Clayton Acts.<sup>46</sup> Combined, this dual enforcement brought a series of cases by the federal government denying bank mergers.<sup>47</sup> DOJ was able to file suits blocking mergers using its established anticompetition framework.<sup>48</sup> This resulted in the agencies formally rejecting thirty-one applications between 1960 and 1965, and “sixty-three applications between 1972 and 1982 on competitive grounds alone.”<sup>49</sup> However, this enforcement largely cooled off in by the 1980s, due to less confined or localized bank markets, and conservative courts that did not want to stifle commerce.<sup>50</sup>

### 3. *Current Regulation*

Mergers are “assessed by the appropriate bank regulatory agency: for national banks—the [Office of the Comptroller of the Currency] (“OCC”); for state member banks and holding company transactions—the Federal Reserve Board; and for nonmember insured banks—the FDIC.”<sup>51</sup> These banking agencies review the proposed merger application on a quantitative and qualitative basis.<sup>52</sup> However, before reaching a conclusion, these regulators will ask DOJ to provide them an independent antitrust evaluation of the transaction.<sup>53</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 337 n.12 (1963).

<sup>47</sup> See Baker, *supra* note 32.

<sup>48</sup> *Id.*

<sup>49</sup> Kress, *supra* note 30, at 455.

<sup>50</sup> See Baker, *supra* note 32.

<sup>51</sup> *Antitrust Analysis of Bank Mergers: A Survey of Recent Developments*, FindLaw, (Mar 26, 2008), <https://corporate.findlaw.com/finance/antitrust-analysis-of-bank-mergers-a-survey-of-recent.html> [https://perma.cc/X32Y-N8SP].

<sup>52</sup> B.T. Atkinson & William R. Lathan, *A Summary of Bank-Related Provisions of President Biden's July 9th Executive Order Promoting Competition*, NAT. L. REV. (July 13, 2021), <https://www.natlawreview.com/article/summary-bank-related-provisions-president-biden-s-july-9th-executive-order-promoting> [https://perma.cc/AN4J-55WH].

<sup>53</sup> Kress, *supra* note 30.

The current legal standard set by the 1966 amendments has two identifiable steps.<sup>54</sup> “First, the DOJ must establish whether a merger substantially lessens competition in any line of commerce.”<sup>55</sup> This step involves “(1) identifying the relevant product market; (2) identifying the relevant geographic market; and (3) assessing the anticompetitive effect of the merger.”<sup>56</sup> Second, if a proposed merger substantially lessens competition, the proposed merger shall not be approved unless the “anticompetitive effects are clearly outweighed by the public interest in meeting the convenience and needs of the community to be served.”<sup>57</sup> “The community to be served must be the geographic market established earlier in the bank merger analysis.”<sup>58</sup>

In addition to the competition analysis, the Clayton and Sherman Acts provide a statutory and regulatory framework M&A transactions must abide by.<sup>59</sup> “The five criteria include:

- The convenience and needs of the communities to be served, or the Compliance with the Community Reinvestment Act
- The effectiveness of the applicant in combating money laundering
- The financial resources and prospects of the applicant
- The managerial resources and prospects of the applicant
- Risks to the U.S. banking and financial system”<sup>60</sup>

To quantitatively evaluate measure the competition effects, the DOJ and other banking agencies use the Herfindahl–Hirschman Index, or “HHI,” “a commonly accepted measure of market concentration.”<sup>61</sup> To calculate the HHI, the agency squares the “market share of each firm competing in a defined market and then sum[s] the resulting

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<sup>54</sup> Christopher E. Rhodes, Jr., *Back to Basics: The Principles of Bank Merger Review*, 25 N.C. BANK. INST. 273, 288 (2020).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Paul Calem & Gregg Rozanksy, *Bank Merger Applications in Law and Practice*, Bank Policy Institute, <https://bpi.com/bank-merger-applications-in-law-and-practice/> [<https://perma.cc/DP9G-DSTV>].

<sup>60</sup> *Id.*

<sup>61</sup> Atkinson & Lathan, *supra* note 52.



numbers.”<sup>62</sup> Under current guidelines, if the calculation, with the predefined market set by the Federal Reserve, “does not result in a post-merger HHI over 1800 and an increase or more than 200, [then] the banking agencies are unlikely to conduct a further review.”<sup>63</sup>

### E. Is Stricter Regulation Likely?

The current administration’s commitment to bolstering anti-trust regulation, combined with the current department heads point to a likely update in the bank merger regulations. Specifically, Federal Reserve Governor Bowman indicated that the Federal Reserve was currently reviewing its bank merger guidelines to “specifically consider[] the unique market dynamics faced by small community banks in rural and underserved areas.”<sup>64</sup> In addition, “[a]cting Assistant Attorney General of the DOJ’s Antitrust Division, Richard Powers, and FTC Chair, Lina Khan, issued a joint statement in support of EO 14036, stating that the DOJ and FTC ‘plan soon to jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.’”<sup>65</sup> Furthermore, two democratic FTC commissioners dissented to the implementation of the vertical merger guidelines, yet are now in the majority.<sup>66</sup> “Commissioner Chopra argued that a ‘status-quo ideological belief that vertical mergers are presumptively benign,’ and the overreliance on traditional defenses, such as the elimination of double marginalization, fails to capture the potential for a vertical merger to reduce actual and potential competition.”<sup>67</sup>

All of these updates show promise that new stringent regulations will be promulgated. However, not all commentators are happy about the EO 14036 picking up steam. BPI President and CEO Greg Baer released a statement shortly following the executive order’s announcement, stating banking is “among the most competitive, least

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Bowman, Governor, My Perspective on Bank Regulation and Supervision at the Conference for Community Bankers sponsored by the American Bankers Association (Feb. 16, 2021).

<sup>65</sup> Adams, *supra* note 6.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

concentrated industries in America... and banks continue to lose business to unregulated FinTechs or government-sponsored enterprises.”<sup>68</sup>

Furthermore, a recent study by the Bank Policy Institute, “rebutts the notion that regulatory approvals for bank mergers have become a ‘rubber stamp,’ because banks go through a rigorous pre-approval process with the relevant banking agency that flags any issues before a denial can occur.”<sup>69</sup> Also, the study looked at 45 mergers since 2005 that are associated with bank holding companies and found that banks are likely to “avoid transactions that would [] raise competitive issues.”<sup>70</sup> Therefore, according to the study, the bank merging guidelines are not the issue as the process just filters out the anti-competitive applications before they reach the approval stage.<sup>71</sup>

However, even though the process is filtering out some applications that do not meet the statutory requirements, this country still has an issue of rapid bank consolidations. Therefore, many commenters and senators believe the best way to alleviate this issue is through making the bank regulations more strict.<sup>72</sup>

#### F. What New Regulation Could Look Like

The new bank merger regulations have not been released yet, but scholars have concocted theories of what the new regulations would entail. Most scholars agree the DOJ should at least work with the banking agencies to modernize its 1995 merger guidelines to reflect current technological advancements in the banking industry, including FinTech firms and online banking.<sup>73</sup> The DOJ has already requested public comment on potential updates already.<sup>74</sup> The reason for this, according to

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<sup>68</sup> Tara Payne, *BPI Statement on Competition Executive Order*, BPI (Jul. 9, 2021), <https://bpi.com/bpi-statement-on-competition-executive-order/> [<https://perma.cc/J9FY-VJ5P>].

<sup>69</sup> Calem & Rozanksy, *supra* note 59.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Elizabeth Warren, *Senator Warren and Rep. Chuy García Introduce the Bank Merger Review Modernization Act to End Rubber Stamping of Bank Merger Applications*, [senate.gov](https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-rep-chuy-garca-introduce-the-bank-merger-review-modernization-act-to-end-rubber-stamping-of-bank-merger-applications) (Sept. 30, 2021), <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-rep-chuy-garca-introduce-the-bank-merger-review-modernization-act-to-end-rubber-stamping-of-bank-merger-applications> [<https://perma.cc/5J9S-85FU>].

<sup>73</sup> Adams, *supra* note 6.

<sup>74</sup> Anna Chong, John Snyder & Clifford Stanford, *DOJ Antitrust Division Considers Changing Its Bank Merger Review Guidelines*, JDSUPRA (Sept. 11,

the Assistant Attorney General for the Antitrust Division Makan Delrahim, “innovative emerging technologies are disrupting traditional banking models and introducing new competitive elements to the financial sector. 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.”<sup>75</sup>

As for an update to the current banking-merger regulations, Professor Kress, Assistant Professor of Business Law at the University of Michigan School of Business, has a few theories on what the regulations should include.<sup>76</sup> He criticized the fact that policymakers and scholars tend to focus on competition as a sole factor, since other statutory factors promulgated in the BMA and the Bank Holding Company Act—impacts on financial stability, benefits to the public, and the long-term viability of the companies and banks involved in the proposal—should have more attention.<sup>77</sup> He believes competition has become “increasingly irrelevant” when considering bank mergers, because competition has increased substantially due to liberalized geographic movement of banks between state lines, and the recent emergence of nonbank financial companies.<sup>78</sup> One of the main issues today is the size of “too big to fail” banks, and he concludes the current competitive analysis in bank merger applications is not well suited to address this issue, because the antitrust factor focuses on preserving competition in local banking markets, not nationwide market share.<sup>79</sup> Lastly, he contends even if agencies were to use a nationwide HHI, “the simple size metric ignores other important contributors to a firm’s systematic risk, such as its complexity and interconnectedness.”<sup>80</sup> This proposal, or refocusing the analysis on the statutory factors, will force banks to prove how the merger would benefit the public and the community long-term, which will likely slow down the number of bank mergers.

Besides refocusing the analysis on all the statutory factors, Professor Kress also suggests empowering the CFPB to block a bank merger on public interest grounds using consumer compliance records

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2020), <https://www.jdsupra.com/legalnews/doj-antitrust-division-considers-20985/> [<https://perma.cc/L6V5-RTVB>].

<sup>75</sup> *Id.*

<sup>76</sup> Kress, *supra* note 30, at 451.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 465.

<sup>80</sup> *Id.* at 465.

to promote the public welfare.<sup>81</sup> Consumer compliance evaluations look to a bank's compliance with the Equal Credit Opportunity Act, and other consumer protection laws.<sup>82</sup> Banking agencies used to take consumer compliance evaluations into consideration when evaluating a potential merger, and did deny some mergers on compliance grounds until the 1990s.<sup>83</sup> Since the CFPB has the exclusive supervisory authority over consumer compliance by large banks, it "should have an independent voice in the merger review process."<sup>84</sup>

Another way the bank merger regulations could ensure bank mergers really benefit the consumers is to create a "presumption [that] mergers will harm consumers and thus requiring the merging parties to demonstrate the contrary."<sup>85</sup> Another factor the merging party should demonstrate is that the merger would not create banking deserts, and it should explain how it will address branch redundancies.<sup>86</sup> By putting the burden on the merging party, these regulations will have the effect of slowing down bank mergers and acquisitions due to the time and effort of submitting the proposals. Conversely, requiring banks to prove the merger will benefit consumers might add costs onto the consumer due to this same effort.

Lastly, on September 30, Senator Warren reintroduced the Bank Merger Review Modernization Act, which can shed light on what the merger guidelines will include.<sup>87</sup> The Act incorporates many of the proposals made by Professor Kress, including requiring CFPB approval when at least one applicant offers consumer financial products, and focus on the other statutory factors.<sup>88</sup> For example, the Act will call for a quantifiable metric to be developed by the Basel Committee on Banking Supervision to evaluate systematic risk, based on, "size, interconnectedness, substitutability, complexity, and cross-jurisdictional activity" of the applicant.<sup>89</sup> The Act also requires regulators to look at merger's impacts on individual banking products, such as home mortgage lending.<sup>90</sup> All of these measures combined will

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<sup>81</sup> *Id.* at 483.

<sup>82</sup> *Id.* at 484.

<sup>83</sup> *Id.* at 484.

<sup>84</sup> *Id.* at 485.

<sup>85</sup> Pachkowski, *supra* note 21.

<sup>86</sup> *Id.*

<sup>87</sup> Warren, *supra* note 72.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

make bank mergers more difficult and, as Warren hopes, slow down the creation of more “too big to fail banks.”<sup>91</sup>

### G. Conclusion

EO 14036 shows the Biden Administration is committed to bolstering antitrust regulation, to help keep prices down for consumers, increase competition for small companies, and help minority populations. Even though the executive order only requires the banking agencies to review existing regulations and does not mandate any changes, changes seem likely to occur due to the current department heads and commitment of the agencies. Scholars are uncertain what the new regulations will be, but at minimum the DOJ is fairly committed to updating its 1995 merger guidelines. The regulations are unlikely to take effect until at least 2022, but just the fact we are discussing the prospect will move Biden toward his goal of bringing “fair competition back to the economy.”<sup>92</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> Biden, *supra* note 2.

<sup>93</sup> Student, Boston University School of Law (J.D. 2023).