



FedFin Client Report

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Biden Demands Turn-Around in Bank-Merger, Consumer-Data, Tech-Platform Competition

Client Report: **MERGER6**

Executive Summary

In an [executive order \(EO\)](#) that truly deserves to be called "sweeping," President Biden today announced a "whole-of-government" initiative aimed at reducing market concentration, enhancing consumer choice, reducing prices, and enhancing economic equality. It remains to be seen how quickly and completely executive-branch and independent agencies act on the EO's long list of requirements, but it is clear at the outset that new initiatives—be they acquisitions, industry collaborations, or even consumer-finance product launches—will face a far higher level of competition and consumer-protection analysis. The EO affects virtually every business sector; this report focuses on provisions with direct impact on financial services. Here, the order targets past, present, and prospective bank consolidations on grounds of growing monopolization and adverse implications for rural and majority-minority communities. This will reverse much of the thinking behind the 2020 request for views by the Department of Justice ([see Client Report MERGER5](#)) on bank M&A; unlike it, the merger-specific orders do not address growing nonbank competition. However, it does direct Treasury to study tech-platform entry into consumer finance, analysis that could lead to significant change given the EO's broad approach to curtailing tech-platform power. The CFPB is asked to ensure consumer-data portability, a move that could combine with broader work demanded of the FTC to rewrite the entire approach not just to who owns personally-identifiable data, but also how it is used by both individual companies and groups of them. Indeed, the EO is aimed in general terms at cross-company sharing of non-public data, a focus that could undermine recent efforts to craft debit scores to enhance financial inclusion, the use of alternative data, and many other data-heavy efforts in the banking sector.

Analysis

In addition to specific orders, the President has changed the overall focus of federal rulemaking under his purview. For example, OMB is ordered to consider if all

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rulemakings should in part be judged by their competitive impact. U.S. policy is also broadly reset to consider not just prospective M&A in a harsh new light, but also divestiture and remedies for anti-competitive behavior found to result from prior transactions.

Wherever applicable, the order notes that independent agencies need not do Mr. Biden's bidding, telling the agency only "to consider" his request. Regardless, most federal financial agencies will do what they can to satisfy the White House. Financial-sector orders include:

- The CFPB is to consider rulemaking on consumer-data portability, ramping up work that began in 2020 via an ANPR in this arena ([see FSM Report DATA](#)). The Bureau had already planned to move forward but now will likely do so more quickly.
- The CFPB is also told to enforce its authority against unfair, deceptive, or abusive practices, authority the current director already announced he plans to [deploy](#).
- Within 270 days, Treasury is to send a report to the White House assessing the entry of large technology firms in the consumer-finance sector.
- The Department of Justice, in consultation with the federal banking agencies, is "encouraged" to review how best to "revitalize" current M&A practices and report to the White House within 180 days. The fact sheet accompanying the EO makes it very clear that the goal here is to curtail even regional-bank mergers, a move reflecting recent [concerns](#) by FRB Gov. Brainard on at least one such deal. However, small acquisitions by very large banks into fintech or other arenas will likely now also get scrutiny regardless of the extent to which they transgress HHI-concentration thresholds. The FRB has indicated no plans to reverse its broad authority for banks to take controlling stakes in nonbanking ventures or for nonbanks to do the same in banks ([see Client Report TAKEOVER9](#)), but we would expect any controversial or novel transaction to be the focus of newly-critical attention if not by the Fed, then by DOJ and the FTC. CRA review will also be subject to new scrutiny, especially by the OCC and, most likely, also the Fed.
- The FTC is to review practices such as data surveillance that adversely affect competition or put consumers at risk. This is clearly directed at tech platforms but may well have significant financial-sector impact.