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Three Noteworthy Aspects of the DOJ's Second Announcement Relating to a Bank Merger Under the Biden Administration

On September 2, 2021, the Antitrust Division of the U.S. Department of Justice ("DoJ") made its second public announcement (available here) regarding resolution of a bank merger under the Biden administration. Three aspects of the announcement are noteworthy:

First, although the press release does not delineate the geographic markets that the DoJ used to guide its divestiture demands, the Acting Assistant Attorney General's remarks in the press release tellingly focus on local communities: "Today's settlement underscores that all Americans, including those in rural communities and small towns, are entitled to access competitively priced banking products and services close to where they live and work." The DoJ's focus on small geographic areas, which may be smaller than the geographic markets defined by the Federal Reserve, highlights again the need to conduct careful assessments of any proposed merger's likely effects when planning for a transaction.

Second, the tone of the DoJ press release, and its characterization of the need to "protect" bank customers from merging banks, is in line with the tone of President Biden's recent Executive Order and its accompanying Fact Sheet. (Our previous memo to clients addressing the E.O. is available here.) The E.O. called for the DoJ to "adopt a plan … for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act" by early January 2022. Although it is too early to tell what that plan's details will look like, the DoJ enforcement action signals that bank mergers are already receiving heightened scrutiny at the DoJ.

Third, the DoJ did not include in this most recent resolution an unusual provision included in the first resolution determined under the Biden administration. As explained in our prior memo addressing that announcement (available here), it is common for the DoJ to require the merged entity to promise to make available to another financial institution the land and building associated with any branch that is closed within three years of the merger if that branch sits within the geographic markets in which the DoJ has determined the proposed merger threatens harm and demanded a divestiture. The purpose of that provision is to facilitate entry into the geographic markets in which the merger threatens harm (because it is easier for a new entrant to do business from a building that customers already associate with a bank branch). In its prior announcement, the DoJ stated that the merging parties agreed to a provision covering closure of branches in both regions where DoJ demanded divestitures and (unusually) certain regions where DoJ had not demanded divestitures. That provision has practical consequences for merging parties that plan to rationalize their branch footprint after a merger. The DoJ has not publicly explained the circumstances in which it will make such a demand in the future.

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