

FDIC Makes Bank Merger Policy a Priority This Year

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On February 7, Acting Chairman Martin J. Gruenberg announced the Federal Deposit Insurance Corporation's (FDIC) priorities for 2022, including undertaking a comprehensive review of the process of considering and evaluating bank mergers — a key priority since it has been over 25 years since such a review occurred.^[1]

Under the Bank Merger Act (Act), a bank seeking to merge with another must do so with the approval of a federal regulatory agency, including the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the FDIC.^[2] The Act requires federal regulators to consider a number of factors, including: (1) the merger's effects on competition; (2) the convenience and needs of the communities to be served; (3) the financial and managerial resources and future prospects of the existing and proposed institutions; and (4) the risk to the stability of the financial system.^[3] The Department of Justice plays a key role in the process, performing an independent review of bank mergers to report potential violations of antitrust laws.

This announcement is only the most recent example of renewed attention to evaluating bank merger policy. In July 2021, President Biden issued the "Executive Order on Promoting Competition in the American Economy" aimed at addressing competition issues across the country.^[4] The order urged federal agencies responsible for banking to review their current practices and plan for the "revitalization of merger oversight."^[5] The fact sheet accompanying the order encouraged federal agencies to "update guidelines on banking mergers to provide more robust scrutiny of mergers."^[6] Calling into question the effectiveness of current bank merger policies, the White House noted that no bank merger application has been formally denied in over 15 years.^[7]

In September 2021, Democratic U.S. Senator Elizabeth Warren and Congressman Jesús "Chuy" García proposed a bill to revise the bank merger framework by reintroducing the Bank Merger Review Modernization Act.^[8] The proposed legislation seeks to restrict "harmful consolidation in the banking industry and to protect consumers and the financial system from 'Too Big to Fail' institutions."^[9] It also would require Consumer Financial Protection Bureau approval when at least one institution offers consumer financial products.^[10] While the bill has not progressed, it gives important context to the policy views of key portions of the Democratic party.

The partisan split over bank merger policy was clear in December 2021 when the previous FDIC Chairman Jelena McWilliams, a Republican appointee of President Donald Trump, clashed with Democratic members of the FDIC's board after they released a statement announcing a request for public comment on bank merger regulations and policies.^[11] While the FDIC released a statement that bank merger review had yet to be approved, bank merger policy is back on the table with the new Acting Chairman Gruenberg after McWilliams stepped down on February 6.

All of these developments are signs that scrutiny of bank mergers will increase. How much the standards for

merger approval and related agency practices will change remains to be seen. Banks should prepare for more extensive processes and timelines, and in some cases heightened review.

[1] Press Release, Federal Deposit Insurance Corporation, “Acting Chairman Martin J. Gruenberg Announces FDIC Priorities for 2022” (February 7, 2022), <https://www.fdic.gov/news/press-releases/2022/pr22015.html>.

[2] 12 U.S.C. § 1828(c)(2)(A)-(C) (2018).

[3] 12 U.S.C. § 1828(c)(5).

[4] Exec. Order No. 14036, 86 Fed. Reg. 132 (July 14, 2021).

[5] *Id.*

[6] 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/>.

[7] *Id.* The fact sheet omitted the fact that bank regulators typically permit applicants to withdraw applications that would otherwise be denied (see, e.g., <https://www.federalreserve.gov/publications/files/semiannual-report-on-banking-applications-20210331.pdf>).

[8] Press Release, “Senator Warren and Rep. Chuy García 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>.

[9] *Id.*

[10] *Id.*

[11] Joint Statement of Martin J. Gruenberg and Rohit Chopra Members, “FDIC Board of Directors Request for Public Comment on the Bank Merger Act” (December 9, 2021),

https://files.consumerfinance.gov/f/documents/cfpb_bank-merger-act-rfi_joint-statement_2021-12.pdf.

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