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The Implications of a Whole-of-Government Approach: Why Financial Services Companies Ignore the FTC's Proposed Rule Banning Non-Competes at Their Peril

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The regulatory landscape for financial services companies ("FSCs") is complicated, with a panoply of federal regulatory agencies, including the Federal Deposit Insurance Corporation (FDIC), Federal Reserve Board ("FRB"), Office for the Comptroller of the Currency ("OCC"), Department of Justice and Consumer Finance Protection Bureau ("CFPB"), taking responsibility for the oversight and enforcement of a sophisticated network of statutes and regulations. But the administration's emphasis on a Whole-of-Government approach to competition policy has added a new dimension of complexity that FSCs must take seriously.

FSCs have long been subject to Section 5 of the FTC Act. One node in the FSC regulatory structure is found in the authorizing legislation that created the Federal Trade Commission ("FTC"). Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce, and it empowers the FTC to prevent such conduct.[2] But the statute expressly exempts banks, savings and loan institutions, and federal credit unions from FTC jurisdiction. The exemption does not render FSCs immune, however, as the banking agencies, specifically the FDIC, FRB, and OCC, have asserted authority to enforce Section 5 for the institutions that they supervise and other institution-affiliated parties ("IAPs").[3] Those agencies have used standards consistent with those of the FTC in assessing violations of Section 5, albeit with a focus on the prohibition against "unfair or deceptive acts or practice" and consumer

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[2] Federal Trade Commission Act of 1914, § 5(a), *codified at* 15 U.S.C. § 45(a).

[3] *See, e.g.*, Federal Deposit Insurance Corporation, *FDIC Consumer Compliance Examination Manual*, at VII-1.1 (June 2022).

unfairness.[4] That focus is understandable given the Department of Justice's ("DOJ's") role in using other competition laws, like the Sherman Act, "to police the financial markets"[5] for unfair methods of competition that also would be prohibited under Section 5. Working together, the banking agencies and DOJ have enforced consumer protection and competition principles of Section 5 and the Sherman Act against any FTC-exempt FSCs without notable gaps.

Under the Biden administration, that kind of agency collaboration has not merely continued—it is policy. In his July 2021 Executive Order ("EO"),[6] President Biden announced a Whole-of-Government Competition Policy, calling on executive departments and agencies "to protect conditions of fair competition," including by "promulgating rules that promote competition, including the entry of new competitors."[7] A Whole-of-Government Competition Policy is "necessary," he explained, "to address overconcentration, monopolization, and unfair competition in the American economy."[8]

Notably, the EO defines the statutory basis for the policy to include not only the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, but also the Acts that correspond to the entities exempted under Section 5 from FTC jurisdiction, including the Packers and Stockyards Act, the Bank Merger Act, the Telecommunications Act of 1996, and the Dodd-Frank Wall Street Reform and Consumer Protection Act.[9] Further, the EO specifically calls out the Department of the Treasury, the Federal Reserve System, and the

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[4] *See, e.g.*, *id.* ("The FDIC applies the same standards as the FTC in determining whether an act or practice is unfair."); Office of Comptroller for the Currency, OCC Advisory Letter AL 20-02-3, *Guidance on Unfair or Deceptive Acts or Practices* (Mar. 22, 2002) ("These principles are derived from the Policy Statement on Unfairness, issued by the Federal Trade Commission on December 17, 1983."); Board of Governors of the Federal Reserve System & Federal Deposit Insurance Corporation, *Statement on Unfair or Deceptive Acts or Practices by State-Chartered Banks* (Mar. 11, 2004) ("In analyzing a particular act or practice, the agencies will be guided by the body of law and official interpretations for defining unfair or deceptive acts or practices developed by the courts and the FTC. The agencies will also consider factually similar cases brought by the FTC and other regulators to ensure that these standards are applied consistently.").

[5] Deputy Assistant Attorney General Michael Murray, *The Muscular Role for Antitrust in Fintech, Financial Markets, and Banking: The Antitrust Division's Decision to Lean In* (October 14, 2020).

[6] *See* Exec. Order No. 14036, *Promoting Competition in the American Economy* (July 9, 2021), *published at* 86 Fed. Reg. 36987 (July 14, 2021).

[7] 86 Fed. Reg. at 36989.

[8] *Id.*

[9] *Id.*

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