FedFin Daily Briefing

Wednesday, February 15, 2023

GOP Launches Anti-SEC Climate-Risk Legislative Attack

As anticipated, House Republicans have gone beyond blasting the SEC's pending climate-risk disclosure proposal to laying out a consensus bill to force Chairman Gensler in fact to retract it. H.R. 1018 has been introduced by HFSC member Lucas (R-OK) and 55 Republicans to prohibit climate-risk disclosures under securities law. Nothing in the measure bars the banking agencies from advancing public disclosures along the lines suggested, but not mandated, in pending climate-risk principles (see FSM Report **CLIMATE15**). Should final standards demand mandatory disclosures, it is likely that Republicans will move also to ban them even though policy issues raised in the banking context differ from those related to investors. However, despite all the hearings and demands sure to follow this bill's introduction, neither the SEC measure nor any pertaining to the banking agencies will advance in the Senate or be signed into law by this Administration.

FDIC Adds Punch to FDIC-Misrepresentation Enforcement Promise

Building on its insurance misrepresentation final rule (see FSM Report **DEPOSITINSURANCE113**), the FDIC today issued four cease and desist orders demanding the removal of false claims and thus made it clear that it is surveying the marketplace to take far more rapid action than has been the case thus far. Specifically, orders went to Zara Financial, a nonbank financial company; CEX.io, a cryptocurrency exchange; and Captainaltcoin.com and Banklesstimes.com, two websites claiming that CEX.io was FDIC-insured. The orders reiterate that the FDIC does not protect any cryptoassets nor anything besides dollar deposits at IDIs and demands that each company provide written confirmation within fifteen days that it has removed any misrepresentations. Despite issuing a circular barring false FDIC-insurance marketing, the CFPB has yet to take any parallel action. It may so join the FDIC in issuing enforcement orders in these cases as well as in another regarding "Compass Bank" that has recently come to our attention via questions about its deposit-like product and representations made pertaining to it.

Calling Out Hsu, Warren Demands Merger Reform

In a wide-ranging speech urging tough U.S. antitrust policy, Sen. Warren (D-MA) today reiterated her claims that banking agencies "rubber-stamp" mergers and pressed for immediate reform. She took particular aim at Acting Comptroller Hsu, urging him to prepare new guidelines for the banking industry and to block anticompetitive mergers. This would appear to be rejection of Mr. Hsu's efforts to limit big-bank mergers via new resolution and severability standards outlined in a recent FRB-FDIC proposal (see FSM Report **RESOLVE48**) as well as set a base-case demand for action before Sen.

Warren will support confirming Mr. Hsu as Comptroller should the White House finally nominate him to do so. The criticism also comes at a time when the OCC is taking the most direct action of the agencies; just last week, the OCC held a merger symposium at which Mr. Hsu stressed the need to update competition metrics as well as tackle the resolvability gap of large regional banks. However, there was no indication of when new merger policy would be released; in response, Sen. Warren demands quick action on a new policy from the OCC, failing also to note the role of the FRB and FDIC in setting it. Although the speech notes the senator's intention to introduce sweeping antitrust reforms in this Congress, she does not mention her measure also to tackle bank mergers (see FSM Report **MERGER8**).

Will SEC Custody Rules Kill Crypto?

Conceding that rulemaking is needed on at least one crypto question, the SEC today voted 4-1 to approve proposed changes to investment-advisor asset custody regulation. The measure would expand assets subject to custody requirements and the protections custody affords as well as revise related record-keeping requirements. These standards were last amended in the wake of the Madoff debacle, with many arguing that the update is overdue given authority granted to the Commission in 2010 (see FSM Report **CUSTODY3**) and growth of digital assets and the risks they clearly pose. Most significantly, the new custody standards would go beyond cash and securities to cover any asset in a customer's account or in advisor custody. Discretionary authority to trade a customer's assets would also come under custody requirements, with all funds in custody generally held in a "qualified custodian" – i.e., a bank or other regulated financial companies that would also be governed by tougher eligibility standards that would make it harder for state-chartered trust companies and foreign firms to qualify. The NPR also includes new requirements related to custody assets designed to ensure new written agreements, indemnification, and segregation protections.

We will shortly provide clients with an in-depth analysis of this proposal, which may have the effect – intended or not – of effectively banning investment advisers from engaging in crypto activities. As noted, the new standards required third-party, qualified custodians – i.e., not crypto platforms or offshore hedge funds, with segregation and other standards at the least also slowing the immediacy and inter-connectedness that have attracted many crypto investors to hold or trade cryptocurrency and stablecoin assets. It is unclear from our initial review if the new approach eases the separate capital requirements for bank custodians that have long blocked banks from engaging in this field, but other standards – i.e., indemnification and the nature of new written-agreement requirements – may dissuade all but regulated entities from engaging in crypto custody. Another challenge may be implementation –comments are due in sixty days after *Register* publication and implementation would be required of large advisers one year after finalization.

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Recent Files Available for Downloading

The following reports and analyses have been sent to retainer clients recently. Copies are also available to retainer clients on the Archives section of Federal Financial Analytics' website: www.fedfin.com or clients may obtain the reports/analyses by e-mailing info@fedfin.com giving the requested item name, firm, and e-mail address. To learn more about *GSE Activity Reports*, click here.

- **CRYPTO39:** Although Chairman Brown (D-OH) remained non-committal on the need for crypto legislation, he emphatically called for reform to protect consumers and investors.
- **GSE-021323:** Following our initial report, we turn here to a more detailed analysis of what's in store for the Home Loan Banks following the Brookings high-impact forum on Home Loan Banks that are also facing far more unflattering public attention than has been their fate for years.
- **CREDITCARD36:** Following on a controversial advance notice of proposed rulemaking, the CFPB has now released an NPR setting specific standards for credit-card late fees that also eliminates the inflation adjustments established by the Federal Reserve when implementing the 2009 credit-card law.
- **GSE-020623:** A new post from the Federal Reserve Bank of Atlanta summarizes key findings from recent pandemic-era mortgage refinancing research, reiterating prior findings that more White mortgage borrowers got lower refinancing interest rates in 2020 compared to Blacks.
- **CHARTER29:** In conjunction with rejecting an uninsured crypto bank's application for Federal Reserve membership, the Federal Reserve issued a policy statement conforming state member bank powers only to those authorized for national banks even if the state member is an uninsured depository institution.
- **CONSUMER49:** Using one of its controversial edicts to set what some consider a new rule, the CFPB has opined that negative-option or "subscription" marketing of consumer-financial products or services may be unfair, deceptive, or abusive (UDAAP) and thus subject to significant sanction for both the provider and any third parties with which it works.
- **GSE-012323:** Under Director Thompson, FHFA's top policy priority is equitable housing.
- **CONSUMER48:** Building on its proposed nonbank registry related to enforcement orders, the CFPB is now also proposing a public registry requiring posting of provisions in consumer-finance contracts the agency believes threaten consumer legal or free-speech rights when issued by supervised nonbanks.
- **GSE-011923:** We will shortly send clients an in-depth analysis of the CFPB's latest controversial proposal which would establish a public registry on which supervised nonbanks would file a lot of data on any form contracts they require which includes covered provisions the Bureau thinks unfairly and even dangerously lead consumers to abandon important protections.

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