FedFin Daily Briefing

Wednesday, July 19, 2023

FTC/DOJ Propose Sweeping M&A Rewrite

Following an extensive inquiry into a new U.S. merger construct, the Department of Justice and Federal Trade Commission today released a draft formal policy statement that would codify issues previously raised in areas such as a transaction's implications for workers. The policy also codifies an end to assessments based solely on consumer welfare based on price, with U.S. authorities instead looking at potential concentration and/or reductions in competition. As anticipated, large tech firms – or indeed any firm – wishing to acquire a small entrant would also face new obstacles, as would transactions in which a party acquires services other firms use to compete (a provision likely to govern payment systems and similar financial infrastructure). Vertical mergers resulting in market shares at or near fifty percent would also be problematic, as would transactions that create or extend dominant positions. Much of this affects all aspects of the financial-services sector; notably, acquisitions of partial control would also face obstacles that could significantly lesson the flexibility elsewhere afforded by the Federal Reserve's revised guidelines (see FSM Report **TAKEOVER10**). With specific regard to banks, these policies build on some of the issues also raised last month by Assistant AG Kanter, but there is now a formal change to the HHI threshold that mergers would need to clear for approval. We will assess the new policy in depth for financial-sector impact; comments on it are due sixty days after *Federal Register* publication.

White House Leaves Bank "Junk Fee" Attack As Is

Acting on President Biden's competition executive order (see *Client Report* **MERGER6**), the White House today announced a slate of actions aimed at lowering consumer costs and promoting competition. Among them is long-awaited draft merger guidelines from the FTC and the DoJ (see forthcoming FedFin analysis). The remaining two actions target competition in agriculture and rental junk fees, such as unreasonable application fees. The release only directly addresses financial services by detailing past CFPB, SEC, and DoJ actions targeting high consumer fees or promoting competition.

Bipartisan Senators Introduce New DeFi-AML/Sanctions Framework

Senator Reed (D-RI) yesterday introduced legislation along with Sens. Warner (D-VA), Rounds (R-SD), and Romney (R-UT) targeting DeFi-related money laundering and sanctions evasion. The bill requires like-kind AML and sanctions compliance for DeFi services compared to banks, modernizes and extends Treasury's AML authorities beyond the traditional banking system, and requires crypto-ATM record-keeping. Although bill text is not yet available, the measure appears different than the crypto-AML framework introduced by Sens. Warren (D-MA) and Marshall (R-KS) in the last Congress; Sen. Warren promised to reintroduce the bill in February (see *Client Report* **CRYPTO39**) but has yet to do so. While there appears to be considerable overlap on identity verification and ATMs, differences are evident in requirements for KYC and digital asset mixers, which the new measure does not address. The new bill would also require DeFi services to report suspicious activities to FinCEN and ensure that law enforcement has access to better information about cryptocurrency transactions. Senate Banking action will depend on agreement among these senators on common language; whether HFSC would then accept legislation in this area is uncertain given strong feelings evident yesterday regarding the need for FinCEN SAR and related reforms.

Dems Reintroduce Bill Requiring Instant Consumer Deposit Access

Sens. Van Hollen (D-MD) and Warren (D-MA) and Reps. Pressley (D-MA) and Lynch (D-MA) have reintroduced the Payments Modernization Act, which requires financial institutions to recognize deposited funds in real-time and clarifies the moot point of whether the Fed has existing authority to build a real-time payments system. The bill's chances are at best uncertain, but the measure points to an important challenge sure to get continuing attention as FedNow ramps up: whether payees have instant access to funds and, if so, how this affects bank income and, if not, whether the CFPB will intervene. The Democrats point to the fact that enabling consumers to have instant access to deposited funds will reduce overdraft and late fees, decrease reliance on risky financial products such as payday loans, and aid small businesses in making payroll. The bill will need a vehicle to overcome the problems that have impeded passage since a similar measure was first introduced in 2019, with one likely to merge only if widespread adoption of FedNow combined with private RTP systems leads to significant consumer-fund availability complaints.

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.

- **CLIMATE16:** As anticipated, Republicans continued their campaign against ESG at today's HFSC Financial Institution Subcommittee hearing on climate risks, reiterating arguments that a regulatory focus on climate risk signals financial institutions to cease lending to carbon intensive industries.

- **MMF20:** The SEC has significantly revised its proposed MMF-reform standards, eliminating a controversial swing-pricing approach to reduce first-mover advantage in favor of new redemption fees at institutional prime and tax-exempt funds.

- **GSE-071823:** Reuters is reporting today and other sources are echoing three regulatory sources saying that the impending capital rewrite will propose risk weighted assessments (RWAs) between 40 and 90%, up from the minimum 20 and 70% Basel standards.

- **GSE-071123:** As we detailed yesterday, FRB Vice Chair Barr laid out what he called a holistic view of bank capital standards that encompasses end-game rules, stress testing, post-SVB lessons, GSIB restrictions, and resolvability.

- **CAPITAL228:** FRB Vice Chairman Barr's speech today outlines near-term U.S. regulatory-capital policy, confirming our earlier assessment that a sweeping proposal will soon be released.

- **GSE-070523:** As an in-depth FedFin analysis today addresses (see FSM Report **REALESTATE25**), the banking agencies and NCUA late last week issued far-reaching guidance encouraging loan accommodations and even forbearance for troubled commercial real estate (CRE) projects, including multifamily obligations.

- **REALESTATE25:** The banking agencies and NCUA have agreed on a final policy statement providing guidance for how financial institutions are to handle troubled commercial real estate loans, giving banks considerable latitude to forbear when borrowers are unable to meet their obligations but are deemed to be able to pay at least some of it over time.

- **GSE-063023:** In non-public remarks ahead of a presentation by FedFin managing partner Karen Petrou, Sen. Jack Reed (D-RI) laid out what he thinks banking agencies will do next, doubtless based on what they've told him that they'll do next.

- **COMPENSATION37:** The Senate Banking Committee has overwhelmingly approved bipartisan legislation to reform executive compensation following larger insured-depository institution (IDI) failures, with parent-company executive compensation also at risk in some circumstances.

- **ESG4:** Late Friday, GOP HFSC Members issued a withering report criticizing the Biden Administration for using financial regulators to do its political bidding on ESG objectives that it believes “contort” financial regulators into political instrumentalities that put retail investors at risk.

- **GSE-062223:** A *Bloomberg* article tells a fascinating tale of high-flying personal real-estate investment and other alleged acts of self-dealing at the expense of the seemingly-hapless Federal Reserve Bank of San Francisco.

- **FEDERALRESERVE74:** Chairman Powell’s HFSC appearance today led to unusually substantive discussion of pending financial-policy actions.

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