FedFin Daily Briefing

Thursday, October 5, 2023

Kanter, Khan Mount Stout Defense of Draft Merger Guidelines

FTC Chair Khan and DOJ Assistant AG Kanter today defended the agencies' draft merger guidelines (see FSM Report **MERGER12**) on grounds that they are faithful to congressional intent, reflect core legal principles, are more accessible and easier to apply, and better reflect the modern competitive landscape. Both deflected criticisms that the guidelines are subjective, arguing that they are analytically valuable, fact-based, and likely mitigate litigation costs as well as simplify judicial decision-making. Here, Chair Khan also argued that bright-line rules and clear administrative principles are likely to better serve antitrust goals than economic analyses she said often disguise subjective assumptions. The regulators were also both emphatic that the Administration's focus on deterrence is working and that fewer "problematic" mergers are being proposed. In addition, Mr. Kanter argued that regulators have not yet developed an adequate toolkit to address competition beyond price considerations, noting that human impact considerations as well as monopsony power are both priorities in antitrust enforcement. Asked about PE roll-up deals as well as the industry's concentration threats, Mr. Kanter only highlighted the importance of fit for purpose tools, noting that PE deals warrant their own set of antitrust considerations. He would not, however, provide a timeline for finalization of the guidelines, only emphasizing that the regulators are taking a hard look at comments. Neither bank mergers nor controversial deals such as that of ICE/BKI were discussed.

Basel Plans NBFI Ops-Risk Supervisory Standards, Continuing Review of Bank Supervision, New Disclosures

The Basel Committee today released its long-awaited report on 2023 vulnerabilities, deciding based on it to prioritize new supervisory approaches and additional analytical tools. The report itself stresses the importance of fully implementing endgame reforms, monitoring domestic banks that may pose cross-border financial stability risks, and ensuring international cooperation. The Committee also focused on NBFIs, now looking at bank operational-risk exposures to these institutions and planning new supervisory practices and bank safeguards to address them. The Committee also announced that it now plans to issue consultations on bank climate-risk disclosures in November and "soon" also address crypto exposure disclosures based on recent principles (see FSM Report **CRYPTO37**). The latest list of GSIBs is complete and will now be submitted to the FSB.

Bipartisan Bill Provides Transaction Account Deposit Insurance

Following Chairman Gruenberg's remarks yesterday highlighting targeted deposit insurance reform, Sens. Manchin (D-WV), Braun (R-SD), and Hickenlooper (D-CO) yesterday introduced legislation to reinstate the Transaction Account Guarantee (TAG) program, expanding deposit insurance to non-interest bearing transaction accounts up to $10 million. The bipartisan bill would make the program permanent for all IDIs regardless of size. The release detailing the bill does not indicate any plans for near-term Senate Banking action, which we expect at this point in the current session might not begin in earnest until next year. That said, the measure stands a good chance of enactment if Chairman Brown (D-OH) moves it to mark-up and the next HFSC chairman should it not be Rep. McHenry (R-NC) prioritizes it. We will shortly provide clients with a detailed bill analysis.

FDIC Proposes Public-Good Policy for IDI Corporate Governance

The FDIC today announced the Board's 3-2 approval of an NPR establishing guidelines on corporate governance and risk management for FDIC-supervised IDIs with over $10 billion in assets. The guidelines would require boards of directors to take considerably more active and – opponents argued – unduly hands-on risk-management roles, also mandating ethics codes and governance based on the full range of stakeholders that FDIC Director McKernan argued could force state-chartered IDIs into conflicts with applicable state governance law. This goes farther than the OCC standards for national banks on which the FDIC bases its proposal (see FSM Report **RISKMANAGEMENT11**), also creating challenges with independent-director standards that could force senior holding-company personnel off IDI boards. FDIC Chairman Gruenberg defended the proposal on grounds that more sophisticated and formal corporate governance and risk management structures are necessary in light of this year's bank failures. Voting against, Vice Chairman Hill argued that breaches of what he called one-size-fits-all "best practices" should not constitute safety and soundness violations, while Director McKernan argued that the guidelines would undermine accountability for risk ownership, conflate the roles of board and management, and conflict with regulatory expectations applicable to parent companies. Comments are due sixty days after publication in the *Federal Register*.

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.

- **GSE-100223:** As we noted earlier today, the FRB has issued a seemingly technical FAQ liberalizing the treatment of certain credit-linked notes.
- **GSE-092523:** In her Congressional testimony last week, FedFin managing partner Karen Petrou focused on the unintended consequences wrought by new banking proposal based on their cumulative impact.
- **GSE-092023:** Or maybe it is, but not everyone has heard.
- **LIVINGWILL23:** Although a pending FDIC/FRB proposal imposes a raft of new requirements for resolution plans from IDIs with over $100 billion in assets, the FDIC has also issued a freestanding proposal doing the same, also setting information-filing standards for IDIs below $100 billion but above $50 billion.
- **CAPITAL235:** With HFSC Chairman McHenry (R-NC) leading the way, GOP Members of the panel's Financial Institutions Subcommittee today blasted the banking agencies' end-game proposal (see *Client Report* **CAPITAL234**).
- **LIVINGWILL22:** In conjunction with proposing a new long-term debt (LTD) requirement for categories II, III, and IV banks, the Fed and FDIC are pursuing other ways to enhance resolvability.
- **TLAC9:** Building on an advance notice of proposed rulemaking, the banking agencies have issued several proposals to enhance the resolvability of large banking organizations not covered by stringent GSIB standards.

Federal Financial Analytics, Inc.
2101 LStreet, N.W. – Suite 300, Washington, D.C. 20037
Phone (202) 589-0880
E-mail: info@fedfin.com www.fedfin.com