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THE BANKERS' BULLETIN

Regulatory & Enforcement Insights on Recent Bank Industry Developments

In This Issue

1 FRB Governor Bowman, CFPB Director Chopra Comment on Bank Merger Reform

- Expect advocates and detractors of the recent FDIC and OCC bank merger policy revisions to seize on the various concerns highlighted by each of these policy leaders in pushing for changes to the review process.

2 FTC Issues Final Rule Banning Non-Competes

- While banks are technically outside the Rule's scope, the federal bank agencies have authority to enforce Section 5 of the FTC Act and may choose to take actions against banks still utilizing non-competes.
- Removal of non-compete language could significantly impact executive employment agreement negotiation.

3 Michigan Federal Court Dismisses Fee-Related Breach of Contract Suit

- The decision reflects close scrutiny of fee-related disclosure language and consumers' actual conduct.
- While regulators continue to pressure banks on fee practices, courts have dismissed contract-based suits.

4 CFPB Highlights Its Continued Offensive Against Perceived Junk Fees

- The Bureau's latest publication continues to tout its work, this time focused on mortgage servicing fees.
- Notably, the CFPB framed its efforts to force termination of fee practices as supervisory, rather than enforcement, work, emphasizing the leverage the agency holds as a supervisor for covered institutions.

5 Colorado Bill Permitting Credit Union Acquisitions Stalled in State Legislature

- The bi-partisan bill's passage would upend a regulatory decision barring such acquisitions, but the state Senate voted to strip the provision from the bill circulating in the state legislature.
- State legislatures across the country will continue to be a forum for policy choices on CU-bank mergers.

About The Firm

Luse Gorman, PC is a Washington, D.C.-based law firm specializing in mergers, capital raising transactions, regulatory, enforcement, corporate, securities, employee benefits, executive compensation, and tax law for regional and community banks across the United States. Our attorneys have served with the major federal banking and securities agencies, and regularly engage with regulators on a range of novel and complex legal issues.

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FRB Governor Bowman, CFPB Director Chopra Comment on Bank Merger Reform

Summary. On Apr. 2 and Apr. 4, each of FRB Governor Bowman and CFPB Director Chopra issued public statements regarding recent regulatory activity around bank merger reviews.

Takeaways.

- Bowman identified a number of concerns with the FDIC's recently-proposed bank merger policy statement revisions that will likely be seized upon by public commenters to the proposal.
- First, she questioned the proposal to release statements accompanying application withdrawals, noting this may require the FDIC to disclose CSI or confidential business information. Second, she observed the damaging consequences of long delays in the review process, and advocated for improvement in the speed of decisions and use of review standards that are reasonable and consistent with statute. Third, she called out the use of commitments that function as additional regulatory requirements on merging banks, calling the practice "regulation by application."
- On the opposite side, Chopra honed in on the FDIC statement's revisions to the "convenience and needs" factor, clarifying that the agency intends to be forward-looking in assessing benefits to communities. He also suggested that the statement's focus on integration prep is due in part to a perception that consumer violations often stem from consolidation issues from M&A activity.

Bottom Line. Though predictable, these speeches will provide fodder for the ongoing reform debate.

FTC Issues Final Rule Banning Non-Competes

Summary. On Apr. 23, the FTC issued a final rule that bans employers from entering into non-competition agreements with employees on or after the effective date of the final rule. The FTC determined that such agreements were unfair methods of competition under the FTC Act, Section 5.

Takeaways.

- Although the final rule does not, by its own terms, apply to banks, the federal banking agencies may take enforcement actions against institutions subject to their supervision for violations.
- The agencies currently utilize Section 5 of the FTC Act to take UDAP enforcement actions. The FTC stated that although ultimate interpretive authority of the FTC Act rests with it, "[w]hether other agencies enforce Section 5 or apply the rule to entities under their own jurisdiction is a question for those agencies." Absent further public guidance or interpretation from the federal banking regulators, non-compliance with the final rule poses a regulatory risk for banks. Expect a staggered roll-out of interpretations (if any) by each agency for its own supervised entities.
- BHCs, SLHCs, and other bank affiliates are not excluded from the scope of the final rule.

Bottom Line. With lawsuits quickly following the rule's release, its long-term viability is unknown. Banks should remain vigilant for signs from their regulators regarding compliance expectations.

Michigan Federal Court Dismisses Fee-Related Breach of Contract Suit

Summary. On Apr. 16, a U.S. district court in Michigan granted defendant Flagstar Bank's motion for summary judgment in a 2023 class action asserting breach of contract claims relating to the bank's charges of overdraft and insufficient funds (NSF) fees.

Takeaways.

- The court relied on the specific language used in the account agreement and subsequent disclosures in siding with the bank, highlighting that the documents provided a "real-world example" of how a balance would be affected by the bank's practices. The court also relied on evidence from discovery suggesting the plaintiff failed to review relevant parts of the disclosures.
- The court concluded that the agreement was not a contract of adhesion under state law, as there was no evidence the plaintiffs was pressured into accepting the fee policies or unable to utilize a competitor. The court rejected claims that the fee practices demonstrated the bank's bad faith.

Bottom Line. While the CFPB and other regulators continue to try to reduce reliance on overdraft and NSF fees through rulemakings, enforcement, and supervisory pressure, this decision–and the litany of cases cited in the opinion–suggest that courts will continue to closely scrutinize the facts behind bank fee practices, rather than painting the practices with a broad brush.

CFPB Highlights Its Continued Offensive Against Perceived Junk Fees

Summary. On Apr. 24, the CFPB published its *Supervisory Highlights* focused on mortgage servicing, which detailed the Bureau's supervisory work conducted during 2023 to stop institutions from charging what it deemed "junk fees" around a number of servicing industry practices.

Takeaways.

- The CFPB framed the fees uncovered during its exam work as unfair practices, relying on the expansive UDAAP authority granted to the Bureau by Dodd-Frank.
- Examiners utilized the supervisory process to require institutions to identify and remediate borrowers, change procedures and practices, and implement additional testing and monitoring.
- By utilizing the supervisory process, the CFPB sidesteps the more adversarial enforcement arena.
- The CFPB continues to receive support from states in its battle against so-called junk fees, as evidenced by an Apr. 1 letter from 17 AGs supporting the Bureau's overdraft fee rule, and encouraging expansion to institutions under $10B, which are currently outside the proposal.

Bottom Line. For CFPB-supervised banks, expect fees charged to customers in nearly every area of operations to come under scrutiny during exams. As with other fee initiatives, this will likely trickle down to the prudential supervisors. Aggressive state AGs will also fill perceived gaps in supervision.

Colorado Bill Permitting Credit Union Acquisitions Stalled in State Legislature

Summary. On Apr. 14, Colorado's House of Representatives passed Bill No. 24-1351 that would amend state law to permit state banks to sell all, or substantially all, of their assets and businesses to credit unions. But after introduction in the state Senate, the provision was stripped from the bill.

Takeaways.

- The bill had bi-partisan support in the House and passed by a wide margin (44-18).
- Under the House version, the bill would upend the status quo in the state following a 2020 denial by the Colorado State Banking Board of a bank's request to sell to a credit union. The Board relied on language from existing state law–which only explicitly stated that banks could sell to other *banks*–in concluding that credit union sales were prohibited in the state.
- Passage of the bill would likely immediately open up the pool of potential buyers for the state's large population of state banks, but the Senate's changes could quash the movement for now.

Bottom Line. State legislatures are likely to become a more common battleground in the years ahead in the ongoing policy debate over credit union-bank acquisitions. Legislators may utilize simple statutory fixes to expand permissibility (as in Colorado), amend the process to encourage new applications, or increase burdens on applicants through new requirements. Politics will play a role.

Other Developments That You May Have Missed . . .

- **FRB Issues C&D Against Mode Eleven Bancorp.** On Apr. 4, the FRB announced a cease-and-desist order with Mode Eleven Bancorp in Wyoming featuring an expansive provision designed to improve the company's policies, procedures, and controls around its Change in Bank Control Act records. The provision can be read to reveal the FRB's expectations for holding companies owned by diverse investor groups, suggesting companies should proactively investigate and aggregate multiple aspects of investors' interests.
- **OCC Extends Bank Merger Statement Comment Period.** On Apr. 10, the OCC announced an extension of the comment period for its proposed bank merger policy statement and related rule changes from April 15 to June 15. This suggests the OCC expects additional, detailed comments from industry and other stakeholders, and pushback may ultimately materially influence the final versions.
- **FDIC Issues Advisory on Collecting CIP Information.** On Mar. 28, the FDIC issued an advisory to state-chartered non-member banks reiterating that the CIP Rule does not allow for an abbreviated collection of any required data element including, as highlighted, the taxpayer identification number (usually an SSN), and confirming the information must be collected "from" the customer. Release of the advisory should be seen as an additional warning against use of fintech partners that may skirt the plain language of the CIP Rule.
- **MA AG Provides Guidance on Use of AI.** On Apr. 16, MA AG Campbell issued guidance highlighting the continued application of the state's consumer protection, anti-discrimination and data security laws to AI uses. The guidance notes that state law prohibits users of AI systems from using algorithmic decision-making that discriminates against residents on the basis of protected characteristics. This echoes recent federal guidance on the fair lending risks posed by AI, and suggests the AG will aggressively police lenders in this area.