Banking and Finance Law Daily Wrap Up, TOP STORY—CFPB invites controversy along with comments on Bank Merger Act, (Dec. 10, 2021)

Banking and Finance Law Daily Wrap Up

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Controversy flares after Director Chopra issues a request for comment on Bank Merger Act without FDIC approval. Chopra issued the request in his capacity as a member of the FDIC Board of Directors, but the FDIC immediately disavowed the request.

On December 9, Consumer Financial Protection Bureau Director Rohit Chopra issued a Request for Public Comment on the Bank Merger Act, prompting a quick response by the FDIC that the request had not been approved by the FDIC, and there was no valid vote by the FDIC Board of Directors and no request for information and comment had been approved by the agency for publication in the *Federal Register*. Director Chopra briefly explained the impetus for the request in a blog post, in which he noted that "a bank's ability to merge with or acquire another bank is a privilege, not a right. There are a host of questions… to determine how to implement existing law more effectively to ensure that families and small businesses benefit from a competitive market."

Chopra joined with Federal Deposit Insurance Corporation internal director (and former FDIC chairman) Martin J. Gruenberg to issue a statement on the request for public comment. That statement notes that the FDIC has not addressed the financial stability provision which had been added to the Bank Merger Act under the Dodd-Frank Act of 2010. The statement also urged consideration of legislation contemplating prudential factors and convenience and needs factors in applying the Bank Merger Act. Given the extensive consolidation of the banking industry in the last three decades, Chopra and Gruenberg urged a review of the Bank Merger Act, and jointly "strongly supported" the filed Request for Comment.

Public comment requested. The Request features a lengthy discussion of the consolidation of the banking industry, noting that in 1990, there was a single insured depository institution with assets greater than $100 billion, but that the number had grown to 33 such institutions in 2020. During the same time frame, the number of institutions with assets less than $10 billion had declined from 15,099 to 4,851. Additionally, more assets were controlled by either U.S. or foreign global systemically important banks (GSIBs). While the Dodd-Frank Act did mandate financial stability as a factor in the Bank Merger Act, no real revision of the regulatory framework has occurred, even despite the bank failure issues within the past decade and a half.

The comment request concluded with ten questions, ranging from whether the existing regulatory framework properly considered all aspects of the Bank Merger Act to the use of quantitative measures in considering a merger application. Specific guidance was sought on implementation of financial stability consideration, prudential factors tests, and convenience and needs issues in considering merger applications. Another question posed considered means of contemplation of monopoly or anticompetitive transactions, and how such determinations might be assessed. The request concludes with a question asking how merger transactions should be considered if a small insured depository institution is involved, and whether the framework for consideration should be different for large or small institutions.

No sooner had the blog post, statement, and request appeared than controversy soon followed. The FDIC stated that in addition to the comment request not having been approved by the FDIC, that there was no valid vote by the FDIC Board of Directors and no request for information and comment had been approved by the agency for publication in the *Federal Register*.

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Republican response. Highly-ranking Republicans quickly weighed in on the matter. Senator Pat Toomey (R-Pa), Ranking Member of the Senate Banking Committee, issued a statement which was critical of what he termed a "failed, publicity-seeking attempted coup" and said that Chopra's behavior "undermines the independence and integrity of the FDIC." More directly, Toomey confirmed, "There's no legitimacy to this supposed 'vote.'" Senator Toomey further suggest that the Biden administration "should disavow this odious destruction of democratic norms."

Top-ranking House Financial Service Committee member Patrick McHenry (R-NC) likewise issued a critical statement, calling Chopra's action "highly problematic" and stating that it "flies in the face of the FDIC's 88-year history of independence." Representative McHenry likewise emphasized the lack of FDIC approval of the request and noted, "I hope Democrats will join Republicans in investigating this flagrant disregard for the role of independent regulatory agencies." Fellow Republican House member Blaine Luetkemeyer (R-Mo) also issued a press release, accusing Chopra of acting as a dictator and stating that he "is not only weaponizing the CFPB to attack U.S. industries, but he is not trying to control an entirely different regulatory agency."

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