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# THE BANKERS' BULLETIN

## Regulatory & Enforcement Insights on Recent Bank Industry Developments

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- A requirement to present applications to the Board that have remained outstanding after 270 days should catalyze staff movement on those pending applications and improve accountability within the agency.
- While the members approval rationales differed, this is a rare example of a unanimous Board decision.

### 2 SCOTUS Decision Outlines Test for National Bank Preemption

- While the Court's decision articulated the legal standard to be used in preemption cases, lower courts will be called on continually to decide whether an individual state law actually meets that standard.
- Expect state authorities to continue to try to apply various state laws to national banks, until challenged.

### 3 CFPB Publishes Guidance on Utilization of Unlawful Contract Terms

- Contract terms must be evaluated to understand whether they violate existing federal or state laws.
- The Circular sets out a standard that the Bureau encourages bank regulators and state AGs to rely on.

### 4 Agencies Propose Rules to Expand BSA/AML Compliance Program Requirements

- The risk assessment process has been elevated to a formal requirement, and must meet certain standards.
- The rule emphasizes the use of risk-based compliance programs and supports institutions directing attention and resources to high-risk customers and activities.
- The bank agencies' concurrently-issued rules will eliminate lingering differences with FinCEN standards.

### 5 FDIC Approves ILC Charter for Thrivent, while GM Withdraws its ILC Application

- The grant of a new ILC charter under the current administration is a surprise, given the agency's recent history and the length of time that pending applications have sat with the agency.
- The approval may generate some imitations that try to emulate the community bank model, but the FDIC's action will also lead to renewed industry and legislative pushback.

**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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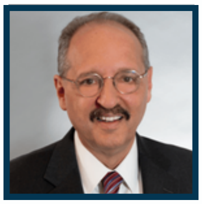

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Please reach out to any of our regulatory and enforcement attorneys above, or to your primary Luse Gorman contact, if you have any questions related to the topics covered in this edition of *The Bankers' Bulletin.*

## FDIC Backstops Merger Review Timelines While Congress Seeks More Agency Scrutiny

**Summary.** On June 18, FDIC Vice Chairman Hill presented a resolution to require full Board briefings on merger and deposit insurance applications that have been outstanding for more than 270 days. The full Board unanimously approved the resolution, though for varying reasons.

**Takeaways.**

- In proposing the resolution, Hill sought to address the recent trend of applications pending for months or years beyond the agency's target timeframes. The resolution was intended to get staff to process applications faster from the outset. The increased pressure should drive movement from the staff to avoid the briefings to the Board.
- In addition to the initial briefing, the resolution requires quarterly follow-up briefings while the applications remain pending. The updates must detail the steps taken to date, remaining steps, and the expected timeframes. The Board will now have a much better window into any delays.
- Sen. Sherrod Brown (D-OH) sent letters to the OCC and FDIC urging them to ensure their newly-proposed merger policies adequately analyze effects on consumers. If his views are adopted, additional regulatory scrutiny could extend processing timeframes, triggering the FDIC's new review process.

**Bottom Line.** The pressure to justify to the Board why specific applications have been pending for what Hill called an "extremely long time" will add accountability and timeliness to a review process that has significantly impacted both announced mergers, as well as acquisitions that parties have explored but ultimately decided against in light of regulatory uncertainty and delays.

## SCOTUS Decision Outlines Test for National Bank Preemption

**Summary.** On May 30, the Supreme Court vacated the Second Circuit's decision in *Cantero v. Bank of America*, holding that the appellate court failed to properly apply the appropriate legal analysis for national bank preemption. On June 10, the Supreme Court vacated a Ninth Circuit decision and remanded the case to the appellate court for further consideration in light of the *Cantero* test.

**Takeaways.**

- As the Court confirmed, state laws will be preempted if they prevent or significantly interfere with national bank powers. But the Court did not decide whether the New York state law at issue actually did so.
- Despite announcing the standard, the *Cantero* decision won't give national banks much support for their arguments that individual state laws are preempted. Although the Court acknowledged the parties wanted a "clearer preemption line," the Court punted to individual judges to engage in a case-by-case analysis comparing and contrasting new laws against a handful of previous cases.
- In an amicus brief, former OCC officials feared a case-by-case analysis would cause market disruption. National banks will now need to show how each state law meets this legal standard.

**Bottom Line.** The decision will likely embolden aggressive state officials seeking to apply their laws to national banks, knowing those banks may not credibly assert a preemption defense unless they receive a court finding concluding the laws at issue actually significantly interfere with bank powers–a costly endeavor to undertake.

## CFPB Publishes Guidance on Utilization of Unlawful Contract Terms

**Summary.** On June 4, the CFPB published Circular 2024-03, stating that the inclusion of unlawful or unenforceable terms in consumer financial product contracts can be prohibited "deceptive" acts.

**Takeaways.**

- The Circular noted other federal laws (including those administered by the CFPB), state laws, or even court decisions could be the source for a finding that certain terms are unlawful or unenforceable. The Circular highlighted waiver terms in particular, indicating the CFPB would give more scrutiny to contract terms where a consumer agreed not to exercise a legal right.
- Obviating one potential line of defense, the Circular asserts a company's inclusion of the phrases "subject to applicable law" or "except where unenforceable" will not cure a misrepresentation, if a contract includes an unenforceable term. Each statement must be evaluated individually.
- The Circular contains a list of examples where the inclusion of such terms in contracts has prompted enforcement actions, covering deposit and loan extension agreements, student tuition payment plans, and other disclosures. Banks should use this as an internal review guide.

**Bottom Line.** The CFPB continues to use diverse tools to influence and shape industry behavior, detailing its own enforcement precedent where it has taken actions against entities engaged in various business lines to demonstrate that the agency may scrutinize this issue across a range of operational areas within a single institution.

## Agencies Propose Rules to Expand BSA/AML Compliance Program Requirements

**Summary.** On June 28, FinCEN announced a proposed rule to implement the Anti-Money Laundering Act of 2020, seeking to strengthen and modernize financial institutions' AML programs. The federal banking agencies issued a concurrent proposed rule to make corresponding changes to their AML regulations and to eliminate existing disparities with FinCEN standards.

**Takeaways.**

- The new regulations will require that BSA/AML programs be effective, risk-based, and reasonably designed. Importantly, the new rule elevates the risk assessment (RA) process into a stand-alone regulatory requirement, so deficient or stale RAs may trigger violations. The rule also requires banks to review the federal government's AML/CFT priorities and incorporate them into their programs. The rule reinforces that banks should take a risk-based approach in designing their compliance programs.
- The rule articulates a goal to avoid one-size-fits-all methods of assessing customer risk, revealing FinCEN's desire to shake the perception that its rules encourage de-risking of specific industries or customers. The rule tepidly encourages innovation, but examiners may not give much grace to banks that seek to use innovative techniques to fulfill their obligations.

**Bottom Line.** Banks will need to update policies and procedures to incorporate new requirements. FinCEN believes these changes will focus banks on an outcomes-based approach rather than on "mere technical compliance," but the banking agencies may be slower to forgo technical scrutiny.

## FDIC Approves ILC Charter for Thrivent, while GM Withdraws its ILC Application

**Summary.** On June 20, after a 3-year wait, the FDIC approved the establishment of Thrivent Bank, a Utah ILC, through merger of Thrivent Federal Credit Union into the empty charter. On June 24, GM Financial Bank withdrew its FDIC application, which had been submitted in 2020. GM had just received approval by the Utah Department of Financial Institutions on June 14.

**Takeaways.**

- The FDIC's approval of an ILC charter was the first since 2020, an unexpected decision from the current administration and FDIC leadership. In his statement accompanying the approval, acting Comptroller Hsu underscored that the proposed ILC would look "a lot like a community bank," signaling that similarity to a traditional model likely was an important factor. The ILC will be completely digital, closing all the credit union's existing branches.
- Because it is an ILC, the bank's parent will not need to register as a bank holding company and comply with the FRB's supervisory and examination procedures for such entities.
- The approval will likely re-energize trade group opposition to the ILC charter, and may allow legislation seeking to eliminate the charter that has been stalled in Congress to gain momentum.

**Bottom Line.** The approval likely does not signal that a string of ILC charters will be authorized, at least under the current FDIC Board. For commercial entities seeking to establish a bank subsidiary via an ILC charter, hewing to a traditional community bank business model seems to be a prerequisite, leaving non-traditional business models seeking to use the charter in limbo.

## *Other Developments That You May Have Missed . . .*

- **FDIC Warns Consumers About Banking with Third Party Apps.** The FDIC issued its June 2024 Consumer News, focusing on advising consumers the easiest way to have confidence their money is safe is to open an account "directly with" an insured depository institution, and presenting the risks of fintech-bank partnerships. The publication serves as another tool through which the FDIC conveys its supervisory concerns raised by such partnerships and highlights the consumer-facing risks it views as most prevalent.

- **FDIC Takes Actions Against Arkansas State Bank and 9 Former Employees.** On May 17, the FDIC announced a $1.5 million CMP against the Bank of England and separate actions, including substantial CMPs, C&Ds, and two prohibitions against 9 former IAPs for referral, reporting, sales, and marketing practices at a loan production office in Michigan related to VA loan refinancings, which resulted in violations of the FTC Act, RESPA, FCRA, and HMDA. The actions reveal the breadth and scope of the FDIC's investigation, and the agency's willingness to pursue a range of Bank employees who the agency assessed had varying culpability.

- **CFPB files Amicus Brief in Case Announcing New EFTA Interpretation.** On May 29, the Bureau submitted an amicus brief in the S.D.N.Y, arguing that the EFTA applies when banks connect the capability to initiate wire transfers to a consumer-facing banking platform. The position upsets well-settled law, and the CFPB's choice to articulate its position in a legal filing in a case it is not a party to leaves the industry substantially in limbo about how the Bureau will examine for, and ultimately enforce, its novel interpretation.

- **SEC Highlights Prioritization of CRE Disclosures.** On June 24, Div. of Corporation Finance Director Gerding published a statement emphasizing the planned focus on banks' disclosure of various aspects of their CRE exposure, including concentrations, policies, and risk management. This dovetails with bank regulators' increasing scrutiny of CRE portfolios from a safety and soundness perspective.

- **Louisiana Prohibits Contracts for Firearms Discrimination.** On June 11, Louisiana Gov. Landry signed Act No. 581, prohibiting state contracts with companies that "discriminate" against the firearms industry. The bill continues a recent trend by states to try to utilize the state contract process to influence banks' internal policy decisions around customer onboarding and de-risking.