Bank counsel have their hands full. Normal times are accompanied by complex considerations in a heavily regulated environment. But these are not normal times. A series of high-profile regional bank failures, an administration thwarted by a divided Congress turning to administrative rulemaking and enforcement actions to advance its agenda, and a weakening economy have thrust banks into the spotlight. Here are some of the things keeping in-house bank counsel up at night.

1. Regulatory Scrutiny

Between March and May of this year, the rapid failure of three regional banks—Silicon Valley Bank, Signature Bank, and First Republic—raised fears that the country's banking sector would be facing a large-scale crisis. The Monday-morning quarterbacking blamed rising interest rates, individual management teams, the ability of runs to move even faster in our connected world, and regulator shortcomings.

The ripples have been intense for in-house bank counsel. Even for banks whose portfolios are quite different from the failing banks have been subjected to queries from interested parties, including regulators. Anecdotally, regulatory scrutiny has increased, likely in part because of the umbrage felt from suggestions that enhanced regulatory scrutiny may have avoided this spring's failures.

In-house counsel generally want to comply with regulator demands. Directly confronting regulators is generally thought to have negative boomerang effects. But sometimes they choose to fight back, often with trade associations who attempt to carry the weight of their individual members. For example, the Minnesota Bankers Association (along with an individual bank) this summer brought an action against the Consumer Financial Protection Bureau (CFPB) contending the agency engaged in impermissible rulemaking by issuing guidance about insufficient fund fees

charged by the banks. The crux of the action is the supervisory guidance constituted an end run on the legislative rule-making process as well as usurping powers delegated to the Federal Trade Commission to define unfair and deceptive acts and practices.

That challenge is not the only one targeting the CFPB. Other cases have challenged revisions to the CFPB's examination manual, through which the CPFB sought to instruct examiners to review companies for discrimination. Those revisions were blocked by a ruling in September 2023 in United States District Court of the Eastern District of Texas. A federal court in the Southern District of Texas blocked the CFPB From enforcing a new rule requiring lenders to collect demographic data. And of course the United States Supreme Court is set to hear argument regarding whether the CFPB's funding system is constitutional. These cases—and in particular the wins—are emboldening banks and trade groups to push back against regulators and eschew the heretofore dominant 'go along to get along' approach.

In-house bank counsel are faced with a quandary—cooperate or fight. The headlines may mislead some about the likelihood of success. And there is still the matter of the regulator still being there *after* the fight, primed for the next review or examination. How and where to draw any lines is a challenging decision.

2. Much Ado About Fees

Faced with the anticipated prospect of losings its congressional majority, the Biden Administration followed the lead of many prior administrations and began to focus on enforcement and rule-making through Executive Branch agencies. Arguably the current administration's biggest focus is on so-called "junk fees." https://www.whitehouse.gov/briefing-room/blog/2022/10/26/the-presidents-initiative-on-junk-fees-and-related-pricing-practices/. Generally speaking, the administration claims as junk fees any fee "designed either to confuse or

deceive consumers or to take advantage of lock-in or other forms of situational market power." The administration suggests there are different flavors—fees it claims "have little or no added value to the consumer," "hidden fees" that surprise the consumer later, and fees that conflict with advertisements. *See id.* At bottom, the administration appears to complain about fees it claims a customer cannot avoid.

Banks, per usual, are in the crosshairs. *Id.* Contemporaneous with the administration's announcement, the CFPB issued a circular focusing on "[u]nanticipated overdraft fee assessment practices." *See* Consumer Financial Protection Circular 2022-06 (Oct. 26, 2022) (available at https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf). The CFPB challenges the assessment of overdraft fees on certain transactions for which a consumer uses a debit card. *See id.* Specifically, the CFPB contends that if a consumer has sufficient available funds when a transaction was authorized, the transaction should not be assessed an overdraft fee regardless of the funds in the customer's account when the transaction settles. The CFPB suggests the assessment of fees in this scenario surprises the customer and, further, that the customer is unable to avoid the fee. The circular ignores that a customer must expressly "opt in" to be able to overdraft everyday debit card and ATM transactions on a form promulgated by the government. Should the consumer seek to avoid the imposition of fees, she could either *not* opt in, avoid further depleting her account before her pending transactions settle, or both. The CFPB has pursued and secured consent orders with, among others, Regions Bank. *See* https://files.consumerfinance.gov/f/documents/cfpb_Regions_Bank-_Consent-Order_2022-09.pdf.

Given the administration's approach to fees generally, it seems likely that regulators may target other fees charged by banks. For years, the focus was about disclosure. Provided that a

Title search: Why In-House Bank Counsel Cannot Sleep: Bank Litigation Trends and Considerations

First appeared as part of the conference materials for the
57th Annual William W. Gibson, Jr. Mortgage Lending Institute session
"Current Litigation Trends for In-House Bank Counsel"