ORRICK

Banking & Debt Capital Markets

Did an obscure remark in a recent regulatory publication signal a new interpretation of the anti-tying rules?

As discussed in this Orrick alert, federal bank regulators recently issued guidance to financial institutions concerning leveraged lending practices (the "Lending Guidance"). In most respects the Lending Guidance was anticipated, but it contains a surprising statement about the anti-tying provisions of the Bank Holding Company Act, which we hope signals a long-awaited change of view at the Federal Reserve.

The Lending Guidance states that "[t]he intent behind Section 106(b) [of the Bank Holding Company Act Amendments of 1970] is to prevent financial institutions from using their *market power* over certain products to obtain an unfair competitive advantage in other products."[1] The reference to "market power" was also included in the draft Lending Guidance released in March 2012 and it may be significant, because the Federal Reserve has previously declined to interpret that market power is a necessary element of an illegal tying arrangement under Section 106. In its 2003 proposed interpretation of Section 106 of the Bank Holding Company Act (the "Proposed Interpretation"),[2] the Federal Reserve specifically determined, based on its review of the legislative history of the section, that economic power and anti-competitive effects are *not* necessary elements of a Section 106 claim.[3]

The Federal Reserve's position in the Proposed Interpretation generated significant commentary. Even the Department of Justice, having power to enforce federal antitrust laws generally, submitted a comment letter stating that "[t]ying arrangements are per se illegal under the federal antitrust laws *only if the seller has sufficient market power* to make anticompetitive effects highly likely."[4] Comments expressing similar

[1] Interagency Guidance on Leveraged Lending, 78 Fed. Reg. 17,776 (March 22, 2013) (emphasis added), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-03-22/pdf/2013-06567.pdf.

[2] Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970, 68 Fed. Reg. 52,024, 52,027 FN 21 (Aug. 29, 2003), *available at* http://www.gpo.gov/fdsys/pkg/FR-2003-08-29/pdf/03-22091.pdf.

[3] *Id.* at 52,027 FN 21 ("Legislative history indicates that economic power [and] anticompetitive effects … are not necessary elements of a Section 106 claim.").

[4] Letter from the Antitrust Division of the United States Department of Justice to the Federal Reserve, at p. 3 (November 7, 2003) (emphasis added).

concerns were submitted by the Office of the Comptroller of the Currency, financial industry groups, banks, law firms, and three U.S. Senators (John Sununu, Elizabeth Dole, and Mike Crapo). Notwithstanding this commentary, however, the Federal Reserve did not revise or finalize the Proposed Interpretation. In fact, the Committee on Banking Law of the New York City Bar reminded the Federal Reserve more than two years later of the "urgent need to finish the process of issuing a final interpretation of Section 106," and in a manner that "brings Section 106 into line with the general federal antitrust laws."[5]

The statement in the Lending Guidance that the intent of Section 106 requires an abuse of market power for impermissible tying is at the end of the Lending Guidance,[6] and it would be easy to miss. Given the extensive discussion in response to the Proposed Interpretation, however, and the fact that the reference to market power was also in the draft of the Lending Guidance published more than a year ago, there is some basis for hope that including the reference to market power was thoughtfully considered, and that the Federal Reserve may be revisiting its earlier stance.

Jason White

* * * * * * *

[5] Letter from B. Sabel, Chair, Committee on Banking Law of the Association of the Bar of the City of New York, to the Federal Reserve , at p. 5 (March 31, 2006).

[6] Interagency Guidance on Leveraged Lending, *supra* note 1, at 17,776.

Ronan M. Wicks
New York
rwicks@orrick.com
+1-212-506-5005

Julian S.H. Chung
New York
jchung@orrick.com
+1-212-506-5101

Ramon P. Galvan
Los Angeles
rgalvan@orrick.com
+1-213-612-2383

Andrew Mattei
New York
amattei@orrick.com
+1-212-506-5025

Jason White
New York
jwhite@orrick.com
+1-212-506-3595

Alan G. Benjamin
Los Angeles
abenjamin@orrick.com
+1-213-612-2431

Patrick J. Flanagan
New York
pflanagan@orrick.com
+1-212-506-3525

William S. Haft
New York
whaft@orrick.com
+1-212-506-3740

B. J. Rosen
New York
bjrosen@orrick.com
+1-212-506-5246