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THE BANKERS' BULLETIN

Regulatory & Enforcement Insights on Recent Bank Industry Developments

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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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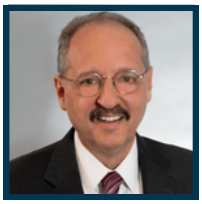

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Please reach out to any of our regulatory and enforcement attorneys above, or to your primary Luse Gorman contact, if you have any questions related to the topics covered in this edition of *The Bankers' Bulletin.*

CFPB Issues Final Rule on Credit Card Late Fees

Summary. On March 5, the CFPB issued its final rule on credit card late fees, applicable to card issuers that, together with their affiliates, had one million or more open credit card accounts in the prior year. The rule is slated to go into effect on May 14, but trade groups have filed suit to enjoin it.

Takeaways.

- Upsetting longstanding statutory interpretation and practice, the CFPB concluded that existing safe harbors permitting late fees of $30 and $41 (for subsequently-charged fees) were too high.
- Going forward, issuers subject to the rule will only be permitted to charge $8 late fees for first *and* subsequent late payments. That amount will not be adjusted annually for inflation. In the alternative, they can charge a fee in proportion to costs incurred as a result of the late payment.
- Smaller issuers lose their exemption 60 days after crossing the one million account threshold, even if they were below it in the prior year. Banks should monitor their total account numbers.
- Banks electing to base fees on costs should expect substantial scrutiny of their methodology.

Bottom Line. Although the rule currently applies only to large card issuers, the CFPB's view of what can reasonably be charged for a late fee will likely trickle down to its supervision of smaller institutions. The CFPB's ongoing encouragement to states to enforce federal consumer protection laws could prompt action from aggressive regulators, even if the federal rule is stymied by litigation.

FDIC Proposes Revised Statement of Policy on Bank Mergers

Summary. On March 21, the FDIC proposed revisions to its Statement of Policy on Bank Merger Transactions (SOP), which has not been updated since 2008. Chairman Gruenberg stated that the SOP would "update, strengthen, and clarify" the FDIC's approach to evaluating mergers.

Takeaways.

- Preparation prior to filing is critical. The FDIC will expect narratives in the application to be fully supported with detailed reports. Banks should hold pre-filing meetings with the FDIC.
- Unsatisfactory CRA or consumer compliance ratings at the acquirer will likely render the application dead on arrival. The SOP indicates the agency's expectation that the merger affirmatively *improves* the convenience and needs of the community, not just avoid a protest.
- Plan ahead for publicity: the FDIC may hold a hearing, and will do so if the combined entity is over $50B. If your bank ultimately withdraws, the FDIC may publicize the rationale behind it.
- Demonstrating a record of successful integrations for past deals, and a fully-developed integration plan for the proposed transaction, is important to management's capabilities.

Bottom Line. Though the agencies claim they're coordinating, the staggered rollout of guidance suggests the OCC and FDIC will follow different merger application procedures and interpretations.

Federal Court in Alabama Declares Corporate Transparency Act Unconstitutional

Summary. On March 1, a federal district court in Alabama granted plaintiffs, including the National Small Business Association, summary judgment in a suit against the U.S. Treasury Department, holding that the Corporate Transparency Act (CTA)–the most significant anti-money laundering legislation in decades–was unconstitutional. The government has appealed the court's decision.

Takeaways.

- FinCEN's regulations which implement the CTA govern access to reporting companies' beneficial ownership information, and a long-awaited rulemaking is anticipated to modify the CDD Rule.
- The court concluded that the CTA was not a proper exercise of Congress's enumerated powers.
- Following the decision, FinCEN issued a notice stating its view that, other than those entities and individuals covered by the injunction, covered companies must still comply with the CTA.
- Similar litigation is expected in other districts seeking the same relief, potentially creating a patchwork of applicability across the country. Banks seeking access to, or beneficial ownership information from, FinCEN's database could confront challenges based on these suits.

Bottom Line. While the appeals process continues, FinCEN's roll-out of its long-anticipated CDD Rule revisions will likely be further delayed, with the agency's limited resources stretched thin.

Acting Comptroller Previews Operational Requirements, Discusses Fairness in Risk Management

Summary. At an Institute of International Bankers conference on March 12, Acting Comptroller Hsu issued remarks on operational resiliency expectations. On March 25, he issued remarks at a Consumer Bankers Association conference on integrating fairness into compliance risk management systems.

Takeaways.

- Hsu described the OCC's expectation, derived from agency issuances over several decades, that banks be operationally resilient. That expectation has evolved with advances in technology.
- He also revealed that the federal banking agencies are considering issuing requirements for large banks with critical operations, including third-party service providers, covering testing and validation of capabilities and setting governance and risk management standards.
- Hsu advocated incorporating fairness principles to help banks anticipate compliance risk issues.
- Concerns with reliance on third-parties and addressing cyber risks permeate both speeches.

Bottom Line. Hsu has often used public speeches to preview future rulemakings and developments. Regulation-based resiliency requirements would add still more new compliance obligations for large banks; these expectations inevitably find their way to smaller banks via field examiners. Regulatory guidance on implementing fairness as a compliance management system element may be coming.

Trade Groups Challenge Colorado Law Limiting State-Chartered Banks Interest Rate Exportation

Summary. On Mar. 25, several consumer financial services trade groups filed a lawsuit in a federal district court in Colorado. They seek to stop the state from enforcing a recently-enacted statute that would allow it to impose its own interest-rate caps on loans made to CO-based consumers by non-CO state-chartered banks, even if those banks don't have a physical presence in CO.

Takeaways.

- The CO law is among several bills that have been recently passed, or are under legislative consideration, in states across the country.
- The suit pits CO's interpretation of where loans are made–essentially, in CO if a consumer is located there–against long-standing banking agency and judicial interpretation that loans are made where banks are located and the core functions of lending (*i.e.*, approval, disbursal of funds, notice to the customer) occur. The court's interpretation could have precedential impact.
- A victory by CO could, as plaintiffs claim, cause state-chartered banks to limit the array of services they offer in the state, allowing national banks unaffected by the case to fill the void.

Bottom Line. A decision favoring CO could lead to a spate of similar laws nationwide, and lead to a patchwork approach on interest rate caps that state-chartered banks must carefully navigate.

Other Developments That You May Have Missed . . .

- **California AG Issues Fee Warning Letter.** On Feb. 22, AG Bonta issued a letter to banks in CA under $10B, warning that their overdraft and returned check fees may be unfair practices under state and federal law. The AG is broadening the regulatory battle on fees occurring at the federal level to the states, while looking to use federal statute, and CFPB analysis, as a hook in future actions.

- **Congress Sends Letter to FDIC re: ILC Applications.** On Mar. 13, Sen. Romney (R-UT) led a bipartisan group's letter to the FDIC, urging it to more timely review submitted new ILC applications, and to evaluate pending applications under existing standards. Unless pressure is increased, it is likely more ILC applications will be withdrawn, and pending applications will continue to languish.

- **New Florida Bill Could Lead to Increased OFR Enforcement.** On Mar. 8, the FL Senate passed Bill No. 989 that, if signed into law, would give customers the ability to report suspected "unsafe and unsound" practices–a broad term under state law–to the OFR. The bill sets out procedures for an OFR investigation of the allegations. If passed, expect increased OFR activity around account closures.

- **Agencies Delay Early Applicability Dates from the CRA Final Rule.** On Mar. 21, the FRB, FDIC and OCC issued an interim final rule extending the applicability date of the facility-based assessment areas and public file provisions from April 1, 2024, to January 1, 2026. On Mar. 29, a federal court in Texas granted trade groups a preliminary injunction, pausing implementation of the rule.

- **GAO Publishes Report on Bank Supervision.** On Mar. 6, the GAO issued to Congress a report on the FRB and FDIC's escalation of supervisory concerns prior to the failures of SVB and Signature. The report adds yet another voice recommending the agencies clarify and improve their internal procedures to allow for more timely and forceful actions against banks with observed or repeat weaknesses.