

## THE BANKERS' BULLETIN

### Regulatory & Enforcement Insights on Recent Bank Industry Developments

#### In This Issue

##### 1 **FDIC Proposes Brokered Deposits Rule Revisions Amid Industry Pushback**

- The proposal effectively overturns or severely restricts recently-enacted exceptions banks have relied on since 2020, which contributed to the significant growth of bank-fintech deposit arrangements.
- The bank trade groups' opposition is expected to encourage industry criticism during the comment period.

##### 2 **Litigation Challenging New Laws and Regulations Continues With Twists and Turns**

- A CFPB victory for its Section 1071 small business lending rule, without *Chevron*, will give it momentum.
- In the post-*Chevron* void, trade groups and even banks will consider mounting new legal challenges at the federal and state level, utilizing novel constitutional theories and pushing preemption boundaries.

##### 3 **FRB Outlines Steps to Use the Discount Window as Congress Introduces Legislation**

- The proposed Act would require regulators give credit for successful prep, altering liquidity assessments.
- The FRB continues to try to erode the Window's stigma to get banks ready to utilize it in the next crisis.

##### 4 **Minneapolis Fed Outlines Benefits of a Formal Complaint Management Program**

- As stressed in the article, an adequate complaint program will depend on a bank's size and complexity.
- Emphasis on proactive restitution to affected consumers reflects the regulators' enforcement position.

##### 5 **FDIC Issues Guidance on Whether ITMs Qualify as Domestic Branches**

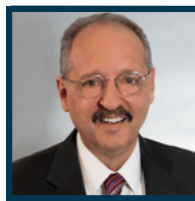
- The basic ITM will not require a branch application under the FDIC's guidance, if it complies with established parameters. Non-customers will only have limited ability to use ITMs to conduct activities.
- Agency interpretive opinions continue to plug holes left by outdated statutory references and concepts.

#### 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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**Summary.** On July 30, the FDIC released proposed revisions to its regulations related to brokered deposits amid a flurry of new regulations in advance of a potential change in leadership atop the agency, accompanying proposed changes to regulations governing ILC parent company supervision and change in control notices.

**Takeaways.**

- The proposal seeks to overturn or restrict the scope of a number of exceptions to the brokered deposit classifications established by 2020 rule revisions issued by the Trump administration, which the FDIC now concludes were “problematic.” The FDIC asserts the prior revisions caused inaccurate deposit reporting.
- If passed, banks could no longer rely on certain previously-approved applications or notices for exceptions. Instead, these banks would need to file a new application with the FDIC, or conclude a new exception can be relied on. Going forward, only banks, and not third parties, could file applications for exceptions.
- On Aug. 21, a coalition of 11 bank trade groups jointly requested the FDIC either withdraw its proposed rulemaking, or at least extend the comment period. The groups’ letter criticizes the level and quality of data supporting the revisions, as well as the underlying policy basis that prompted the agency’s action. The letter also highlights the negative impacts the rule would have on business practices that have developed in reliance on the 2020 exceptions, and the likely resulting service reductions and cost increases for consumers.

**Bottom Line.** The industry has been forceful in seeking the publication of additional data that prompted the proposal or its complete withdrawal. In light of SCOTUS’s decision overturning traditional agency deference, and the recent trend of challenging agency rules, expect litigation if the FDIC forges ahead without significant curtailment. In the meantime, banks should at least assess the potential impact on their liquidity planning if existing exceptions are changed, and sketch out contingencies if they will be limited in relying on such deposits.

## FDIC Proposes Brokered Deposits Rule Revisions Amid Industry Pushback



## Litigation Challenging New Laws and Regulations Continues With Twists and Turns



**Summary.** Litigation challenging recent federal and state laws and regulations continued across the country in a variety of forums. On Aug. 26, the CFPB won summary judgment against bank trade groups, as the Southern District of TX rejected the plaintiffs’ challenge under the APA to the Bureau’s Section 1071 small business lending rule. On Aug. 16, several bank and credit union trade groups filed a complaint in federal court challenging an Illinois law restricting interchange fees from card transactions on taxes and gratuities.

**Takeaways.**

- The TX court provided a noteworthy win for the CFPB, as the judge found, in a post-*Chevron* landscape, that the rule was promulgated in accordance with the Bureau’s authority, furthered the purposes of the statute, and was not arbitrary and capricious. The CFPB could build on this momentum in other suits.
- The court left open the possibility for a future challenge from the plaintiffs, who raised a recently-trending argument that the CFPB is not properly funded in light of several years of negative earnings by the Fed.
- The contours of preemption will be tested by the Illinois case, as the plaintiffs argue the state law is preempted for national banks, FSAs, and federal CUs. Due to constitutional and state law parity concepts, the plaintiffs also argue the law does not apply to state-chartered institutions. The decision could widen the perimeter of preemptive effects to state banks, and derail state attempts to regulate payments.
- On Aug. 7, in a surprising twist, CA-based Beneficial State Bank filed an amicus brief in support of the federal agencies in the ongoing CRA litigation in Texas, arguing the rule is better for banks and the public.

**Bottom Line.** SCOTUS’ recent decisions on agency deference and preemption will be put to the test in a variety of contexts nationwide, as trade groups continue to mount legal challenges and banks enter the legal fray.

**Summary.** On July 26, Sen. Warner (D-VA) introduced the Discount Window Enhancement Act to improve the effectiveness of the FRB’s Discount Window, a bill prompted by banks’ reluctance to rely on the Window during the March 2023 banking crisis. In August, staff from the Richmond and San Francisco Reserve Bank published an article outlining key steps banks should follow to be prepared to utilize the Discount Window.

**Takeaways.**

- If passed, the Act would require banks of \$10B+ to engage in test borrowing at the Discount Window 2-4 times a year. The Act would also require the federal banking agencies to give credit during exams to banks that demonstrate they can use the Window successfully. With sustained examiner focus on liquidity risk, the Act could meaningfully alter the landscape of how this component rating is graded by examiners.
- The Act would require the FRB to standardize Discount Window procedures across the Reserve Banks, and to modernize them, with an emphasis on simplifying collateral documentation requirements.
- The FRB article emphasizes the importance of completing necessary legal documents, updating internal procedures to specify borrowing mechanics, and testing the borrowing process, among other things, and details the typical application processing and review timelines to assist with effectively planning ahead.

**Bottom Line.** Although the entrenched stigma associated with the Discount Window will be difficult to erode, sustained efforts by the FRB and Congress—in combination with liquidity rating credit awarded to banks that effectively and proactively prepare—should put more banks in a better position to use all available tools to stave off future liquidity crunches. Using a ratings carrot to encourage participation may move the needle for some institutions. While not binding, the FRB article is a good goalpost to aim for in strategic preparations.

## FRB Outlines Steps to Use the Discount Window as Congress Introduces Modernizing Legislation



# Minneapolis Fed Outlines Benefits of a Formal Complaint Management Program



**Summary.** In early August, a senior staff examiner with FRB-Minneapolis authored an article on the benefits of a formal complaint management program published in the Fed's second quarter 2024 [edition](#) of its *Consumer Compliance Outlook*. As noted in the article, financial institutions are expected to have a system in place that adequately addresses complaints, and the written policy is an important part of a bank's CMS.

## Takeaways.

- While banks have flexibility in implementing complaint management programs, these five elements are "frequently" found in successful programs, according to the author: definition of a complaint; collection and tracking; classification and response; root cause analysis; and analysis of aggregated data.
- The article suggests using a broad definition of complaint is a sound practice, and banks should be capturing commercial as well as consumer complaints from both existing and potential customers.
- In addition, the article emphasizes the use of a classification system as a sound risk management practice to identify high-risk complaints for internal escalation. This can also inform the scope of the audit plan.
- The author opines that restitution should be provided to affected customers and that banks should proactively investigate and correct harm for consumers who have not yet complained. These positions reflect the regulators' general views on the importance of engaging in proactive remediation efforts.

**Bottom Line.** Logging and monitoring complaints can help banks get ahead of potential investigations by regulators, who rely on complaint logs as a starting point to identify compliance weaknesses during exams. The analysis to initiate voluntary restitution is nuanced, but can earn banks significant credit in a later action.

**Summary.** On Aug. 9, the FDIC published Financial Institution Letter (FIL) [53-2024](#) analyzing whether interactive teller machines (ITMs) will require a domestic branch application or are subject to a statutory exclusion for ATMs and other remote service units (RSUs). An ITM is similar to an ATM but allows customers to interact with live remote tellers from the bank's staff to complete various banking transactions.

## Takeaways.

- The guidance applies to state nonmember banks but will likely be considered instructive by the other federal banking agencies, and may be useful in guiding decisions by state regulators as well.
- Under FIL 53-2024, the FDIC will not consider an ITM to be a branch if it meets two conditions: (i) it is an automated, unstaffed facility owned or operated by, or operated exclusively for, the bank, which is equipped to enable customers to initiate an interactive session with remote bank personnel; and (ii) customers are able to perform their deposit, check, and loan-related transactions without the involvement of bank personnel, and those customers have sole discretion to initiate or terminate the sessions with staff.
- ITMs established at already-approved branch locations are permitted under the FIL to operate beyond these established parameters. ITMs can be accessed by non-customers, but only if the services are limited to ATM functions, and the non-customers cannot engage the live remote tellers, a meaningful limit.

**Bottom Line.** The federal banking agencies continue to try to keep up with the quickening pace of innovation by issuing interpretive opinions that attempt to fill the gaps left by outdated statutory references and requirements. As technology improves and customers continue to search out the most convenient ways to conduct their banking activities, expect interpretations like FIL 53-2024 to need further revisions to incorporate more nuance.

## FDIC Issues Guidance on Whether ITMs Qualify as Domestic Branches



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

- **Ninth Circuit Reaffirms Preemption Rejection.** On Aug. 22, after its decision was vacated by SCOTUS, the Ninth Circuit [reaffirmed](#) its ruling in *Kivett v. Flagstar*, rejecting preemption of CA's interest on escrow accounts law. Although SCOTUS suggested lower courts would set preemption contours after *Cantero*, this court's conclusory statement that it properly performed its analysis does little to explain how to apply the test in practice.
- **FDIC Publishes Q&As re: Signage Rules.** On Aug. 16, the FDIC [published](#) a series of Q&As in advance of the Jan. 1, 2025 compliance date for the updates to its regulation covering use of signage, insured status, and the agency's logo in advertising, among other things. The Q&As largely focus on the pages and functionalities of bank websites and mobile apps, reflecting the increasing predominance of digital advertising of financial services.
- **Senate Republicans Ask FDIC to Withdraw Corporate Governance Proposed Rule.** On July 31, 11 Republican Senators sent a [letter](#) to Chairman Gruenberg highlighting a "multitude of issues and flaws" with the FDIC's proposed rule to establish corporate governance standards for \$10B+ banks. The proposal, pending since October, was subject to heavy criticism; changes at the top of the FDIC may significantly alter, or kill, the action.
- **CFPB Limits CEO Comp Through Order.** On Aug. 21, the CFPB issued a [consent order](#) against nonbank mortgage servicer Fay Servicing, LLC, which includes a bar on compensation for its CEO if internal or external parties find he failed to take actions to ensure compliance with the order. The pay limitation may portend a new tool the CFPB will use to address executive culpability, without initiating an individual enforcement action.
- **Former Treasury Dept. Official Publishes Banking Reform Agenda.** On Aug. 1, the Roosevelt Institute [published](#) a whitepaper from former asst. secretary for financial institutions at the Treasury Dept., Graham Steele, outlining specific proposals for a progressive economic policy agenda, including increased GSIB capital and leverage requirements, creation of a classification for Domestic Systemically Important Banks, and limitations on brokered deposits and crypto activities. The agenda could serve as a policy roadmap for a future Democratic administration come November.