

THE BANKERS' BULLETIN

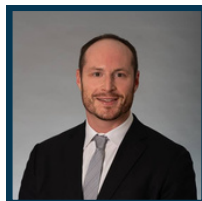
Regulatory & Enforcement Insights on Recent Bank Industry Developments

In This Issue

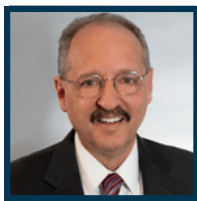
- 1 CFPB Issues Final Open Banking Rule; Trade Groups Sue to Block the Rule**
 - The CFPB's move to provide consumers with access to their banking data has drawn heavy criticism, as banks are left exposed to liability for fraud and data breaches by third parties accessing the data.
- 2 TD Bank Agrees to Multi-Agency Resolution for Systemic BSA/AML Failures**
 - Strategic opportunities are halted until the bank's broken BSA/AML program is completely rehabilitated. The OCC's consent order provides a roadmap to comprehensive remediation.
- 3 FRB Governors Issue Remarks on Regulatory Thresholds and Discount Window**
 - Gov. Bowman continues to take public aim at ill-fitting regulatory asset thresholds, examination focus on non-core risks, and examiners imposing standards from imprecise guidance on community banks.
 - Time will tell if the FRB's efforts to put the discount window in historical context prompts higher usage.
- 4 OCC Releases 2025 Bank Supervision Operating Plan**
 - The SVB failure and Fed interest rate hikes catalyze a number of areas of OCC focus in the year ahead.
- 5 NYSDFS Releases Guidance on Combatting Cybersecurity Risks from AI**
 - DFS recognizes the substantial cybersecurity benefits that can be gained from integrating AI, but expects integration of AI risks into the core components of the framework required by existing regulation.
- 6 OCC Issues Guidance for Commercial Lending Refinance Risks**
 - The agency expects banks to monitor refinance risk across and within commercial loan product portfolios. Portfolio-level monitoring will allow banks to identify industry or region-specific risk areas.

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.



Brendan Clegg
bclegg@luselaw.com



Marc Levy
mlevy@luselaw.com



Agata Troy
atroy@luselaw.com

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*.

Summary. On Oct. 22, the CFPB issued its final open banking rule under Section 1033 of the Dodd-Frank Act. On the same day, the Bank Policy Institute (BPI), joined by the Kentucky Bankers Association and Kentucky-based Forcht Bank, N.A., filed a complaint in federal court in Kentucky seeking an injunction.

Takeaways.

- The rule requires development of a new compliance framework and tailored policies and procedures.
- The final rule exempts banks with less than \$850M in assets and extends the staggered compliance dates out to at least April 2026; for most small banks, the relevant deadlines kick in between 2028-2030.
- Notably, the plaintiffs chose to file in the 6th Circuit rather than the 5th, where trade group challenges have had recent successes against the agencies, but also garnered criticism for forum shopping.
- The suit highlights the risks of fraud and misuse posed by sharing customer data with third parties.

Bottom Line. If a quick injunction is granted, the Bureau's open banking rule will join a growing list of regulations mired in litigation, prompting questions for banks as to when and how they should prepare.

CFPB Issues Final Open Banking Rule; Trade Groups Sue to Block the Rule



TD Bank Agrees to Multi-Agency Resolution for Systemic BSA/AML Failures



Summary. On Oct. 10, TD Bank and its holding company entered into a coordinated settlement with the DoJ, FRB, OCC, and FinCEN. The multi-pronged actions resulted from a guilty plea to charges of conspiracy to commit money laundering and to violate the BSA, and included penalties of approximately \$3.1 billion.

Takeaways.

- The OCC's order includes an asset cap, a rarely employed supervisory mechanism, that the Acting Comptroller said will ensure TD focuses on building proper controls commensurate with its risk profile.
- Notably, if TD fails to meet compliance deadlines established by the order, the OCC can require the bank to *reduce* its total assets by up to 7%, and the bank must submit a plan outlining how it would do so.
- Although no executives were criminally charged, the DoJ reduced its fine for executive bonuses the bank had clawed back, and the bank can receive further credit if it successfully claws back additional funds.

Bottom Line. The massive fine, asset cap, and wide-ranging orders demonstrate the agencies' full arsenal of criminal and administrative enforcement tools utilized to address BSA/AML compliance breakdowns.

Summary. On Oct. 2, FRB Gov. Bowman issued remarks on the supervision and regulation of community banks, and, on Oct. 8, Vice Chair Jefferson remarked on the history of the FRB's discount window.

Takeaways.

- Gov. Bowman signaled a desire to revisit and adjust on an ongoing basis the asset thresholds found throughout bank regulations to ensure they keep pace with the changing nature of bank activities.
- She highlighted the continued over-emphasis during exams of non-core and non-financial risks and the impacts on community banks from pushing down large bank standards through horizontal reviews.
- Gov. Jefferson's speech is one prong of the FRB's multi-faceted strategy to remove the discount window's stigma and prod banks to provide info to facilitate improvement of the window's operations.

Bottom Line. Gov. Bowman has recently made a sustained effort from inside the FRB to try to catalyze reform to bank regulation and supervision; Gov. Jefferson has shouldered the burden of trying to expand discount window usage and improve the FRB's operations; time will tell if either effort is successful.

FRB Governors Issue Remarks on Regulatory Thresholds and Discount Window



OCC Releases 2025 Bank Supervision Operating Plan



Summary. On Oct. 1, the OCC released its Bank Supervision Operating Plan outlining its 2025 priorities and objectives, and advised supervised banks it may utilize horizontal risk assessments to gauge agency-wide risks.

Takeaways.

- The OCC will carry into 2025 a focus on many of the same areas it has been closely scrutinizing in the wake of SVB's failure, including interest rate risk, liquidity risk, and contingency planning. Agency exams will also hone in on deposit stability and funding concentrations for uninsured and brokered deposits.
- Focus on bank-fintech relationships permeates the Plan, as the OCC eyes impacts on payments (new products and services), operations (delivery channels), and consumer compliance (partnership offerings).
- Cybersecurity has been elevated to the agency's primary operational risk area, with authentication and access controls highlighted. In fair lending, the OCC will probe appraisal bias and property valuations.

Bottom Line. The Plan provides a roadmap of the OCC's examination focus the next year, and the plan will likely remain in place regardless of the election results. Banks should prepare for questions in these areas.

Summary. On Oct. 16, the New York State Department of Financial Services (DFS) issued guidance to all regulated entities on combatting increased cybersecurity risks arising from artificial intelligence (AI).

Takeaways.

- The guidance explains that DFS is not imposing any new requirements beyond NY’s cybersecurity regulation (Part 500). Rather, the guidance explains how entities should assess and address AI cyber risks.
- For the risk assessments required by Part 500, banks should assess their use of AI and the AI technology used by third-party service providers, as well as the applications on which those vendors rely.
- DFS “strongly recommends” AI-related vendor due diligence before permitting their access to banks’ information systems. Third-party risk management policies should address access controls and encryption.
- Each entity’s senior leadership should have a sufficient understanding of AI-related risks and, in exercising oversight of the cybersecurity risk framework, receive regular reports on the risks posed by AI.

Bottom Line. Actions taken to comply with each of Part 500’s mandates should be made with AI risks in mind.

NYSDFS Releases Guidance on Combatting Cybersecurity Risks from AI



OCC Issues Guidance for Commercial Lending Refinance Risks



Summary. On Oct. 3, the OCC issued Bulletin 2024-29, Commercial Lending: Refinance Risk, providing guidance for managing credit risk associated with refinancing to banks and FSAs with commercial loans.

Takeaways.

- The timing of the Bulletin is appropriate, as the OCC cautions refinance risk “increases in rising interest environments” and can be amplified by large loan volumes set to mature in “underperforming markets.” Consistent with other agency guidance, CRE loans are highlighted as particularly susceptible to this risk.
- The OCC expects a bank/FSA to have processes, tailored to the institution’s size, complexity, and risk profile, to identify, measure, monitor, and control refinance risk at the transaction and portfolio levels.
- Although banks and FSAs are not directed to do so, the Bulletin suggests that banks should be performing multivariable stress testing at both the transaction and portfolio level, noting it is “common.”

Bottom Line. In another nod to recent conditions, the OCC expects a holistic risk assessment to catch “correlated exposures” across different lending products that can arise during times of economic stress.

Other Developments That You May Have Missed . . .

- **FRB Issues Personal Enforcement Action for Provision of CSI.** On Oct. 3, the FRB issued an individual consent order against a former IT department head of a Wyoming state member bank for providing copies of documents containing confidential supervisory information (CSI) to a former employee and his counsel. The action shows the significant risks related to unauthorized CSI disclosure for individuals.
- **FDIC Extends Comment Period for Proposed Brokered Deposit Rule.** On Oct. 8, the FDIC announced its extension of the comment period for its proposed brokered deposit rule revision from Oct. 22 to Nov. 21, 2024, suggesting the agency recognizes, to some degree, the extent of determined industry pushback. Where the proposal heads next will be determined in large part by the results of the election.
- **OCC Appoints FDIC as Receiver for First National Bank of Lindsay.** On Oct. 18, the OCC appointed the FDIC as receiver for the First National Bank of Lindsay, a \$108M Oklahoma bank. The OCC’s press release noted the closure was prompted by identification of false and deceptive records suggesting fraud and revealing a depletion of capital. The facts are reminiscent of the July 2023 failure of Kansas’ Heartland Tri-State Bank, which was precipitated by fraud by the CEO. Expect the DoJ to pursue criminal charges at First National.
- **Fiserv’s Bank Charter Application Approved.** On Sept. 27, the Georgia Department of Banking and Finance approved Fiserv’s application for a Merchant Acquirer Limited Purpose Bank (MALPB) charter, allowing Fiserv to directly access payment card networks. The approval may be a precursor to more novel bank charter applications and approvals at the state level for financial services companies.
- **DoJ Enters Into Redlining Settlement With Credit Union.** On Oct. 10, the DOJ and PA-based Citadel Federal Credit Union entered into a proposed consent order to resolve redlining allegations. The order would require Citadel to invest \$6M in a loan subsidy fund and open 3 new branches in Philadelphia. The action signals the extension of DoJ’s fair lending scrutiny to the CU industry—long cited by banks as a material gap in regulatory supervision—and the NCUA’s Chairman publicly emphasized CUs’ fair lending compliance obligations.
- **OCC Supports Bank Trade Groups in Illinois Suit.** On Oct. 2, the OCC filed an *amicus* brief in support of the plaintiff bank trade associations seeking a preliminary injunction of an Illinois law restricting the charging of certain interchange fees, arguing that the law meets the recently-articulated standard for preemption as applied to national banks. The brief makes good on recent statements by Acting Comptroller Hsu that the OCC would “vigorously” defend core preemption as state laws attempt to encompass national banks.