

The Bankers' Bulletin

*Regulatory & Enforcement Insights
on Recent Bank Industry Developments*

This Month's Big Number:

\$5

The dollar cap on overdraft fees set by the CFPB's final rule, issued Dec. 12. Covered banks can still charge a fee that covers estimated costs or losses, or a higher fee, if certain disclosures are made. The proposed rule considered caps of \$14, \$7, \$6, or \$3.

In This Issue

1. **OCC Issues Semi-Annual Risk Perspective Highlighting Key Risks to Banks**

- In addition to more traditional risk areas like BSA/AML and fair lending, the Fall 2024 report reflects the agency's awareness of the rapid increase in fraud-related risks, from both old and new forms of payment.
- The report reinforces the need to stay on top of new vulnerabilities through constant monitoring; these can surface in such diverse areas as new tech systems, third-party software use, and training of new operations staff.

2. **French Hill Selected as Chairman of House Financial Services Committee**

- The new Chairman quickly revealed his intentions to closely scrutinize the past and future activities of the bank agencies. His threat to use the Congressional Review Act to overturn late-term rules was an early volley.
- A former community bank CEO, Rep. Hill publicly pledged to "make community banking great again" as part of his campaign to lead the Committee. He will look to push reforms that could meaningfully impact bank supervision.

3. **Target of FDIC Enforcement Proceedings Settles After Legal Challenges Fail**

- The FDIC won its motion to dismiss in D.C. federal court in one of the first challenges to an agency enforcement action after the 2024 Supreme Court decision in *Jarkesy*, although the decision turned on the court's jurisdiction.
- While the agency abandoned its pursuit of civil money penalties, the defendant eventually agreed to both an industry prohibition and payment of \$1 million in restitution, allowing the FDIC to sidestep *Jarkesy* issues.

4. **OCC Updates Handbook on Unfair and Deceptive Acts and Practices**

- The updates reflect recent agency priorities pursued under the Biden administration, and evidence how the OCC uses the UDAP framework to cover an expansive array of activities, including the roll-out of new IT systems, the order in which fees are assessed, and the protection of sensitive customer information.
- The Handbook updates its list of red flags, providing a road map to the areas the OCC will look to in determining UDAP risk.

5. **GAO Report Urges FRB and FDIC to Fix Deficiencies in Supervisory Processes**

- The procedures used by both the FRB and the FDIC to escalate supervisory concerns come under fire by the GAO.
- The report's timing makes it unlikely the recommendations will be quickly enacted: both the FRB and FDIC are likely to prioritize publishing other rules and revising existing policies. The Senate Banking Committee, also under new leadership, is poised to take up new legislative priorities instead.



OCC Issues Semi-Annual Risk Perspective Highlighting Key Risks To Banks

Summary On Dec. 16, the OCC issued its Fall 2024 Semi-Annual Risk Perspective outlining the key risks facing banks. The report concluded that overall, the strength of the federal banking system remains sound.

- Key Insights**
- (1) The OCC's outlook on systemic commercial credit risk has improved, with signs of stabilizing, although the CRE office sector remains "stressed." The agency pointed to isolated pockets of risk in some markets.
 - (2) The report highlights that data governance gaps and reliance on customer and transaction exclusions have increased potential for non-compliance with suspicious activity reporting requirements under the BSA.
 - (3) Fraud risk has taken on elevated importance in the report, as the OCC notes an increase in novel and sophisticated fraud activities, while exploitation of traditional payment methods—checks and wires—continues to occur. The report cites AI use and product digitization as contributing factors to this increase.

Takeaway The report displays the OCC's heightened focus on the expansion of the risk "surface" through use of new tech, outsourcing activities to third parties, provision of digital services, and efforts to maximize speed in making new products available to consumers. Expect greater exam scrutiny in these areas.



French Hill Selected as Chairman of House Financial Services Committee

Summary On Dec. 12, French Hill (R-Arkansas) was selected as the Chairman of the House Financial Services Committee. He previously served as the Committee's vice chair and is a community bank proponent.

- Key Insights**
- (1) On Dec. 17, Rep. Hill issued letters to the FDIC, FRB, OCC, and CFPB instructing them to preserve documents for future congressional investigations, and cautioning them from finalizing new rules before the new administration. The letters suggested he won't hesitate to use the Congressional Review Act as a tool.
 - (2) At a policy event on Dec. 17, Rep. Hill and Sen. Scott (R-South Carolina) discussed plans to draft bills to create a regulatory structure for digital assets, which could impact the activities conducted by banks involving these assets.
 - (3) Bills with bipartisan support introduced late in 2024, including the AI Act of 2024—requiring financial regulators to study potential benefits of AI—and a deposit insurance reform bill, may be revived by Rep. Hill.

Takeaway Although Rep. Hill has publicly pushed for legislation in areas such as crypto and AI, he will likely work quickly to advance bills in the next Congress that aim to reduce the regulatory burden on banks and improve agency supervision and accountability, especially for delays in application reviews.



Target of FDIC Enforcement Proceedings Settles After Legal Challenges Fail

Summary On Nov. 29, the FDIC made public an October enforcement action against a former referral agent for a Rhode Island bank, barring him from the industry and requiring \$1MM in restitution to affected parties.

- Key Insights**
- (1) In October, a federal district court in D.C. granted the FDIC's motion to dismiss the defendant's suit against the agency, which had sought to block the FDIC's enforcement proceedings before an in-house ALJ.
 - (2) Although the defendant raised *Jarkesy*, the decision turned on whether the court could rule on a constitutional claim challenging the agency's in-house proceeding, not whether a jury trial was required. The judge held the *Jarkesy* argument was more appropriately raised after the FDIC's final action, suggesting courts may force defendants to play out the entire administrative process first, a years-long ordeal.
 - (3) Notably, the FDIC had dropped its pursuit of civil money penalties (CMPs) after *Jarkesy* was issued.

Takeaway Other cases percolating in the federal courts will need to be the vehicles to determine the extent of *Jarkesy*'s effects on the bank agency enforcement action processes and their use of CMPs.

They Said It:

The Trump administration's scaling back of federal regulations would "certainly increase the volume of consumer protection cases that we may bring on the enforcement side. . . . If there are new gaps that emerge because we don't have a partner then we'll work to fill those gaps as appropriate."

Adrienne Harris, Superintendent, New York Department of Financial Services
to the Financial Times (Dec. 24).



OCC Updates Handbook on Unfair and Deceptive Acts and Practices

Summary On Dec. 3, the OCC issued Bulletin 2024-33, updating its Comptroller's Handbook on Unfair and Deceptive Acts and Practices, and replacing the previous version of the Handbook issued in June 2020.

Key Insights

- (1) The revisions demonstrate the OCC's new focus on potential sources of UDAP (and UDAAP) risk for banks: reliance on new delivery channels or operational processes; turnover in staff that results in improperly trained personnel; and poor implementation of IT applications during roll-out of new systems.
- (2) The revisions also highlight UDAP risk stemming from fee practices, with numerous references to risks posed by transaction posting (and associated fees), overdraft protection, and "high" fee income generation.
- (3) The Handbook includes several references to whistleblower referrals as a source of potential UDAP actions, suggesting the OCC is encouraging and relying on referrals to spur investigations.

Takeaway

Banks should closely review the list of red flags, which has been updated, as a cheat sheet for OCC areas of scrutiny. Customer complaints, marketing and advertising scripts, inadequate information security practices, and Board and management oversight are critical additions to the Handbook's list.



GAO Report Urges FRB and FDIC to Fix Deficiencies in Supervisory Processes

Summary On Nov. 25, the GAO issued a report to the Senate Banking Committee identifying weaknesses in the FRB and FDIC's escalation procedures for supervisory concerns, and recommending improvements.

Key Insights

- (1) The GAO's findings for the FRB focused primarily on the agency's failure to implement regs that would give it more authority to take earlier supervisory actions and promote banks' remediation of issues.
- (2) The GAO criticized the FDIC's lack of a centralized system to track supervisory recommendations, preventing identification of risks across its sweeping portfolio. DC managers and staff did not have ready access to aggregate information on examiner recommendations. The FDIC committed to implementing such a system, which may facilitate its new policy to escalate identified concerns after just one exam cycle.
- (3) The report found that the OCC generally adheres to its procedures for escalating supervisory concerns.

Takeaway

Expect the FRB to focus on other regulatory priorities once the new administration arrives; the FDIC will be contending with new personnel at the top, a likely overhaul of internal policies, and its continuing efforts to resolve its cultural issues. The GAO's recommendations may linger a while.

Other Developments You May Have Missed . . .

Fifth Circuit Prohibits Nasdaq From Implementing Board Diversity Rules. On Dec. 11, a split panel of the federal Fifth Circuit vacated the SEC's order approving Nasdaq's rules to require listed companies to disclose diversity information about their boards and have at least 2 diverse directors.

Bottom Line: With DEI initiatives likely to come under fire from the new Congress and administration, the Fifth Circuit's ruling shows that industry challenges also have a receptive audience in the judiciary. The Fifth Circuit continues to be fertile ground for injunctions against financial agency rules and actions.

Federal Agencies Issue Statement on Elder Financial Exploitation. On Dec. 5, all federal and state banking agencies, the CFPB, and FinCEN issued an Interagency Statement on Elder Financial Exploitation to provide risk management practices to identify and prevent financial abuse of elders.

Bottom Line: While the Statement does not establish new supervisory expectations, banks should use the guidance to enhance their training, transaction monitoring, internal controls and SAR reporting processes. Banks should also consider increasing production and availability of consumer education materials.

Federal Judge Issues Partial Injunction for Illinois Fee Law. On Dec. 20, a federal judge in Illinois issued a preliminary injunction against Illinois' interchange fee prohibition law, finding it is preempted for national banks and FSAs. The injunction does not extend to state banks inside or outside IL.

Bottom Line: The decision is a win for the OCC, which filed an amicus brief against the state of Illinois, and an early marker of the preemption line post-*Cantero*. Other states considering similar laws will likely follow this litigation to determine whether trying to capture national banks and FSAs is sustainable.

FDIC Issues Additional Q&A Regarding Signage Rule. On Dec. 2, the FDIC updated its Q&As regarding its final signage rule, which has staggered compliance dates of Jan. 1 and May 1, 2025.

Bottom Line: In light of the compliance dates for the rule, banks should closely review the new FAQs and how they apply to signage posted in their branches, as well as on their websites and in other digital channels. The latest round of answers provides the agency's guidance regarding a number of individual product and service categories and whether they require specified signage in accordance with the rule. Because it's not politically sensitive, the rule will likely remain an area covered in exams this year.

About Us

Luse Gorman, PC is a Washington DC-based law firm that specializes in representing regional and community banks across the country. Our attorneys have served with the major federal banking and securities agencies and regularly engage with these agencies on a broad range of complex and novel compliance, regulatory, enforcement, and application issues. Our firm also specializes in mergers, acquisitions, and capital raising transactions, as well as general corporate and securities issues, tax law, executive compensation and employee benefits.

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If you have any questions about the topics covered in this volume of the Bankers' Bulletin, please reach out to any of the authors above or to your primary Luse Gorman contact.

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