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LUSE GORMAN

The Bankers' Bulletin

Regulatory and Enforcement Insights on ***Recent Bank Industry Developments***

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INDUSTRY SNAPSHOT

month over month

- ↑ OCC Charter Applications Filed: **1**
- ↓ FDIC Insurance Applications Filed: **1**
- ↓ FDIC Insurance Applications Approved: **1**
- ↑ Bank Enforcement Actions Announced: **4**
- ↓ Bank Enforcement Actions Terminated: **4**

Check out what Luse Gorman was up to last month here:

Proposed Merger ($241.3M) | Proposed Merger of Equals ($26.0M)
Closure of Merger of Equals ($1.1B) | Subordinated Debt Issuance ($25.0M)

FDIC Removes References to Disparate Impact in its Compliance Manual

Summary

On Aug. 29, the FDIC issued Financial Institution Letter 41-2025, which explained that the agency had updated its Consumer Compliance Examination Manual (Manual) to remove all references to disparate impact.

Highlights

1) The Manual now states that the FDIC only evaluates potential discrimination under the Equal Credit Opportunity Act and Fair Housing Act through overt evidence of, or comparative evidence of, disparate treatment.
2) The FDIC deleted the Manual's explanation of disparate impact liability and the corresponding instructions that the Manual had provided to agency examiners for developing support for fair lending law violation allegations.
3) A statement that UDAP (under the FTC Act) or UDAAP (under Dodd-Frank) violations could have a disparate impact implicating fair lending laws was also removed, evidencing the breadth of the changes to the Manual.

Practical Tips

- Banks will immediately be relieved of the burden of producing years of loan and other data the FDIC used for statistical comparisons of customer segments. Compliance staff will be in a less defensive posture during exams.
- To support a fair lending case, the FDIC will need to find evidence of actual customer discrimination, which is difficult in a typical exam setting. Banks can stay ahead by monitoring customer and whistleblower complaints.

Takeaway

Following the OCC's lead, the FDIC showed its readiness to promptly implement the Executive Order directing elimination of disparate impact government-wide. By removing an important legal angle to support fair lending violations, the FDIC's foray into statistically-based cases in auto and mortgage lending (among other areas) under the Biden Administration has ended. This will free banks up to continue to push larger strategic objectives ahead.

OCC Outlines Plans to Consider Debanking During Licensing & CRA Reviews

Summary

On Sept. 8, the OCC issued Bulletins 2025-22 and 2025-23 describing the OCC's consideration of debanking in licensing applications and CRA evaluations, and providing instructions on the appropriateness of voluntary SAR filings.

Highlights

1) The OCC will consider evidence of debanking in applications focused on fiduciary powers, branching, combinations, liquidation, changes in control, changes in directors and officers, charter conversions, and new charters.
2) Regarding CRA exams, the OCC states that the agency may consider debanking on a case-by-case basis as part of its evaluation of a bank's record of meeting the credit needs of the entire community, which may affect its CRA rating. This is similar to how the OCC had viewed fair lending violations vis-à-vis CRA evaluations in the past.
3) Banks should not voluntarily file SARs as a pretext to "improperly disclose" customer financial information. Rather, banks should only voluntarily file after identifying "concrete" suspicious activity—arguably setting a new standard.

Practical Tips

- Expect OCC licensing analysts on applications for nearly all corporate activities to request documentation regarding fair access, which may include copies of a bank's policies and procedures or account closure records.
- Management may need to explain or defend past account closure or service denial decisions in CRA evaluations. Negative findings on debanking could lead to a CRA rating downgrade and denial of planned strategic initiatives.

Takeaway

Implementing the Executive Order on debanking will clearly be an OCC supervisory priority in the year ahead. Expect the agency to continue to roll out guidance documents related to the Executive Order, with other aspects of licensing, supervision, and enforcement likely soon to be modified to incorporate measures to address debanking.

This month's big number:

6-8%

The proposed lowered range for the community bank leverage ratio (CBLR), down from 8-10%, in Rep. Young Kim's (R.-CA) Community Bank LIFT Act, which passed by a 33-19 vote in the House Financial Services Committee on Sept. 16. The bill would also allow banks up to $15B to use the CBLR.

Federal Circuit Court Rejects Application of *Jarkesy* to Bank Enforcement

Summary

On Sept. 8, in *Ortega v. OCC*, the Fifth Circuit Court of Appeals rejected petitions by two former officers and directors of a national bank in Texas challenging an order imposing civil money penalties and barring them from the industry.

Highlights

1) The Court concluded that the Supreme Court's 2024 *Jarkesy* decision was "distinguishable in important ways," and ruled the public rights exception to the 7th Amendment jury trial right applies to bank agency proceedings.
2) The Court endorsed several OCC arguments in favor of the exception: the authorizing statute for bank agency enforcement actions, § 1818, has never allowed them to go to federal court, unlike the SEC; bank agency actions have a public purpose of protecting the banking ecosystem; and national banks are created by federal statute.
3) In addition to rejecting the petitioners' 7th Amendment challenge, the Court also disagreed with a number of other arguments the defendants offered to undo the OCC actions, including assertions that the OCC had misapplied the statute of limitations, lacked evidence of culpability, and had set too low an evidentiary threshold for its findings.

Practical Tips

- While lower federal courts have waded into challenges to bank agency actions since *Jarkesy*, their decisions have mostly dismissed for lack of jurisdiction. *Ortega* instead takes the defendant's 7th Amendment claim head on.
- Because of its precedential effect, the *Ortega* decision should block challenges in courts within the Fifth Circuit and will likely carry weight across other federal circuits considering the same issue after *Jarkesy*.

Takeaway

A decision favoring an agency in the Fifth Circuit reverses a trend that, in recent years, had generated a perception that it was fertile ground for successful challenges to administrative actions. Both banks and individuals facing bank agency investigations should reassess the viability of *Jarkesy*-based defenses when deciding to challenge an action.

FDIC Loosens Standards for Removing Cease-and-Desist Orders

Summary

On Sept. 8, the FDIC issued Financial Institution Letter FIL-42-2025 announcing updates to its Formal and Informal Enforcement Actions Manual (Manual) to revise its procedures around terminating cease-and-desist (C&D) orders.

Highlights

1) The FDIC's modifications will allow termination of C&Ds if banks have achieved "at least substantial compliance" with an order, reversing a 2022 policy change that generally required "full compliance" with all provisions of the order. The FDIC explained that this policy shift is intended to allow the FDIC greater discretion to terminate a C&D.
2) A bank is deemed to have achieved "substantial compliance" when it has "satisfied the essential requirements of the order's purpose or objective, even if minor, isolated requirements have not been fully satisfied."
3) Notably, the Manual also now permits, in "rare situations," termination of a C&D even if a bank has not achieved substantial compliance, and even if a new or revised formal enforcement action is not issued to the institution.

Practical Tips

- The policy reversal should provide banks a greater incentive to quickly push to complete a C&D's main objective, as that will allow them an opportunity to petition the FDIC for an early release from the order's remaining terms.
- By allowing termination of a C&D at an earlier stage, banks should be able to significantly reduce the costs, burden and resource diversion of an order's often-lingering provisions governing oversight and reporting.

Takeaway

Although the CFPB has to date been the public face of the push to end active consent orders early, the FDIC's policy change is a meaningful shift that will provide state non-member banks, which had agreed to long-term resolutions under the prior Administration, a chance to lift actions that may be constraining branching or growth opportunities.

> FDIC Financial Institutions Letter 32-2023 (FIL 32), which covers multiple re-presentment NSF fees, **"**neither orders a covered institution to take specific action nor declares any particular practice unlawful. In an enforcement action, knowledge of FIL 32 may be evidence that an institution knowingly committed a violation of law, but the FDIC would be required to prove that the institution understood its practices to be unlawful based on the general information provided in FIL 32.**"**
>
> **The majority opinion of the Federal Eighth Circuit Court of Appeals,**
> agreeing with the agency that as non-binding guidance, FIL 32 cannot be used to bring enforcement actions, in an appeal by a bank and a trade group of a prior dismissal of their suit against the FDIC (Sept. 17).

OCC and FDIC Leaders Preview Further Agency Developments

Summary

On Sept. 10, both Comptroller Gould and Acting FDIC Chair Hill issued statements at the meeting of the Financial Stability Oversight Council (FSOC) outlining the agencies' key priorities and ongoing initiatives.

Highlights

1) Gould highlighted his intention to reverse the "de facto 'no' policy" on de novo charters and bank M&A, reassess the need for heightened standards, define by regulation the concept of unsafe and unsound practices, and to revise examination approaches for community bank third-party risk management, liquidity, and capital.
2) Hill announced that the FDIC will seek to modify the agency's continuous exam program by raising the threshold from $10B to $30B and reducing consumer compliance exams to once every five years, with a midcycle review, for most institutions with less than $3B in assets. He also previewed reforming the definitions of the CAMELS ratings.
3) Both Gould and Hill confirmed that their agencies are conducting reviews of their institutions for debanking issues.

Practical Tips

- Community banks supervised by both the OCC and FDIC stand to significantly benefit from the proposed changes, either through reduced exam cycle frequency or implementation of tailored supervisory expectations.
- By issuing regulations to establish definitions of the CAMELS component ratings and of "unsafe and unsound" practices, the agencies will provide much-needed clarity, and give banks clearer standards to work with when challenging examination conclusions.

Takeaway

Gould and Hill's statements evidence lockstep agreement on many themes—especially around refocusing exams on financial risks and avoiding box checking and process-based reviews—though each announced objectives that may only apply to their own agencies' respective subsets of the banking world. It remains to be seen how many of these initiatives will end up being rolled out in interagency fashion (with or without the FRB), which would slow them down.

Other Developments You May Have Missed Last Month . . .

FinCEN Issues Guidance on Cross-Border Information Sharing. On Sept. 5, FinCEN issued FIN-2025-G001 to encourage voluntary cross-border sharing of information with foreign financial institutions to combat money laundering and terrorist financing. The guidance provides a non-exhaustive list of the types of information and data that can be permissibly shared without violating the prohibition on SAR disclosure.

Bottom Line: FIN 2005-G001 clearly affirms the current FinCEN's position that cross-border information sharing reduces risks globally, and underscores the Administration's view that the dangers posed by drug trafficking organizations are on par with those of terrorist organizations. Because the federal banking agencies were consulted in preparation for the guidance being issued, those institutions with global operations should expect that they may get examination-related requests related to their efforts to facilitate cross-border sharing.

FinCEN Director Previews Reporting Threshold Changes in Congressional Testimony. On Sept. 9, FinCEN Director Gacki testified before the House Subcommittee on National Security, telling the panel that the agency recognized the need to modernize the SAR and CTR reporting requirements of the BSA, and suggesting that the dollar thresholds for submitting those reports could soon be modified.

Bottom Line: The industry has long noted that the SAR and CTR reporting thresholds have failed to keep up with inflation and artificially increase administrative burden and regulatory risk. While new bank agency leadership has also pledged to modernize the BSA, Director Gacki's testimony indicates real change could soon be on the horizon, though FinCEN's staffing limitations could slow down any new rule.

OCC Announces Changes to its Licensing and Supervision Functions. On Sept. 9, the OCC announced the elevation of its chartering and licensing function and promotion of its leader to Senior Deputy Comptroller. On Sept. 18, the OCC announced it will undo an earlier merger of its supervision group to create three bank subgroups: large/global ($500B+/foreign), regional/midsize ($30B-$500B), and community (<$30B).

Bottom Line: The OCC's licensing announcement confirms that it is placing organizational priority on reviewing and facilitating de novo bank formation, and an openness for less traditional M&A proposals; it also signals an expectation of an uptick in payment stablecoin issuer applications. The OCC's split of its supervisory division affirms new Comptroller Gould's pledge to tailor supervision to banks' risk profiles.

NYDFS Extends Blockchain Guidance to NY State Banks. On Sept. 17, NYDFS issued an industry letter advising its state-chartered banks that they should refer to previously-published guidance on the use of blockchain analytics to enhance their compliance programs when they engage in virtual currency activities. An accompanying press release states the guidance "make[s] clear compliance expectations."

Bottom Line: The guidance demonstrates NYDFS' continued effort to position itself as a leading authority on the supervision and regulation of digital asset activities, and sets a precedent for expanding guidance initially applicable to state-licensed virtual currency businesses to banks. Many of the non-exhaustive list of example use cases in the guidance echo traditional AML measures, using new technology tools.

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 federal banking and securities agencies and regularly engage with these agencies on a broad range of complex and novel compliance, regulatory, enforcement, transactional, application, and licensing issues. Our firm also specializes in mergers, acquisitions, and capital raising transactions, general corporate and securities issues, and tax, executive compensation and employee benefits matters.

Brendan Clegg
bclegg@luselaw.com

Brendan represents banks and individuals in agency agency enforcement actions, investigations, and administrative proceedings, assists clients in responding to supervisory findings and navigating examinations by federal and state regulators, and submits applications seeking approval for a range of transactions and activities. Prior to joining the firm, he was enforcement counsel at the OCC.

Marc Levy
mlevy@luselaw.com

Marc represents financial institutions in regulatory enforcement matters and has extensive experience in corporate transactions and engaging with federal agencies. Prior to joining the firm, he was a Senior Attorney at the SEC.

Scott Brown
sbrown@luselaw.com

Scott counsels financial institutions in a wide range of corporate and securities matters, including mergers and acquisitions, public and private securities offerings, Securities and Exchange Commission reporting compliance, and corporate governance matters.

Keeler Fina
kfina@luselaw.com

Keeler represents financial institutions in a range of corporate, transactional, and regulatory matters, including mergers, acquisitions, mutual-to-stock conversions, reorganizations, and enforcement cases, and prepares regulatory filings and assesses compliance with state and federal laws and regulations.

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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.

To be added to our distribution list, please contact Dara Liebel at dliebel@luselaw.com.

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