LUSE GORMAN

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The Bankers' Bulletin

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

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1 **OCC Proposes Rule to Clarify Authority of National Trust Banks**
- The agency's plan to amend its chartering regulation will fortify the agency's position that non-fiduciary activities, such as custody and safekeeping, can be performed by national trust banks, a boon to digital asset companies seeking new charters.

2 **FDIC Establishes Independent Appeals Office, Finalizes New Process**
- Final guidelines replacing the existing Supervision Appeals Review Committee with a new Office of Supervisory Appeals—to include members with industry experience—incorporate several process improvements suggested by public commenters.

3 **Community Bank Reform Legislation Proceeds Through House**
- The House continues to push forward both comprehensive reform legislation, largely with Republican support, and more manageable, targeted bills, with bipartisan backers. It remains to be seen whether either path will be successful.

4 **DOJ and CFPB Withdraw Statement on Immigration Status Under ECOA**
- While these agencies suggest that creditors can and should consider immigration or citizenship status in certain lending-related contexts, banks should remain vigilant of new developments at the state level that could broaden applicants' protections.

5 **FDIC Issues Final Signage Rule, Overturning Changes from Biden Admin**
- The agency's amendments are intended to grant banks more flexibility and replace overly-prescriptive, technical requirements suggested by the agency under the Biden Administration with more general standards that reflect a review of industry practices.

Also covered in this month's edition:

- **Trade Group Advocacy:** ABA Sends Letter to Bank CEOs Urging Action to Oppose Stablecoin Yield (Dec. 30)
- **Judicial Decision:** District Court Rejects Plaintiffs' Suit to Overturn Industry Ban Issued by SEC (Jan. 8)
- **Guidance:** Michigan Regulator Issues Guidance on Use of AI by Financial Services Providers (Jan. 14)
- **Speech:** Comptroller Calls for Overhaul of Resolution Planning Requirements (Jan. 16)

INDUSTRY SNAPSHOT

month over month

- OCC Charter Applications Filed: **3**
- FDIC Insurance Applications Filed: **2**
- FDIC Insurance Applications Approved: **4**
- Bank Enforcement Actions Announced: **0**
- Bank Enforcement Actions Terminated: **10**

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

Completed Merger || Completed Merger of Equals || Completed Merger ($241.3M)
Proposed Merger ($597.0M) || Proposed Bank Acquisition ($40.0M) || Subordinated Debt Issuance ($40.0M)

OCC Proposes Rule to Clarify Authority of National Trust Banks

Summary

On Jan. 8, the OCC issued a proposed rule to clarify the "longstanding authority" of national trust banks to engage in non-fiduciary activities in addition to fiduciary activities. Comments are due 30 days after publication in the Federal Register.

Highlights

1) Per the OCC, this rule will amend the agency's existing chartering regulation to more closely align with the statutory authorization to charter national banks that are limited to operations of a trust company and activities "related thereto." A prior amendment to this regulation had introduced confusion regarding the OCC's limits on national trust banks.
2) The OCC asserts that for decades, it has chartered trust banks that engage in non-fiduciary activities, including custody and safekeeping, which are authorized generally for all national banks under the "business of banking" umbrella.
3) Anticipating potential criticism from sectors of the industry opposed to the proliferation of new applicants, the proposal asserts this revision neither expands the OCC's existing authority nor deprives the public of applicants' information.

Practical Tips

- The rule, once finalized, will serve to bolster the position of digital asset companies that have been applying, and seem poised to continue to apply, to the OCC for charters allowing them to custody those digital assets on a nationwide basis.
- Applicants will have room to propose in their applications that their bank will engage in a range of activities that fall into the regulation's newly-added phrase—"activities related thereto"—and see where the OCC is willing to draw the line.

Takeaway

Bank trade group opposition to the OCC's recent trust charter approvals and this proposal may be a precursor to litigation against the agency that will test the agency's interpretations of its own authority. Between this proposal and recent actions around preemption, Comptroller Gould appears to be trying to fortify the agency's powers, not just against a challenge in court, but against a future Administration looking to unwind its predecessor's changes. Expect more formal rulemakings intended to shore up the OCC's authority in various areas likely to come under attack by a future Congress or Comptroller.

FDIC Establishes Independent Appeals Office, Finalizes New Process

Summary

On Jan. 22, the FDIC published amended Guidelines for Appeals of Material Supervisory Determinations, which become effective once the new Office of Supervisory Appeals (OSA) is fully operational and the FDIC has provided banks with notice.

Highlights

1) The final version of the Guidelines, which incorporate public comments received in response to a proposal issued in July, replaces the Biden-era Supervision Appeals Review Committee with the new OSA. As the highest level of appeal within the agency, each of OSA's three-person review panels will include one official with relevant industry experience.
2) In response to public comments, the FDIC will consider community bank experience "favorably" when considering applicants for the review panels, and the agency will publish the qualifications of its reviewing officials on its website.
3) Emphasizing a commitment to transparency, the final Guidelines outline a procedure for posting to its website anonymized summaries of decisions. The FDIC continues to explore other avenues to publish details on the process.

Practical Tips

- In response to comments, banks can now appeal facts underlying formal enforcement actions, except those related to safety and soundness or AML issues. But banks must still go to administrative litigation to fight the actions themselves.
- For the first time, banks will be allowed to appeal examiner conclusions regarding compliance with informal enforcement actions (e.g., MOUs). Banks should consider an appeal when an old action restrains strategic objectives.

Takeaway

Even more than the improvements made to its appeals process around scope, independence, expertise, and transparency, the FDIC's public vow to legitimize the process should spur more banks to consider utilizing this mechanism. One bank's announcement of an appeals win on a CRA rating should also drive interest, proving that targeted challenges through the process can be successful. It is unclear how closely the other banking agencies will align their processes, but the Comptroller pledged to propose a new process soon that incorporates the feedback the FDIC received.

This month's big number:

15%

The required tier 1 capital to assets leverage ratio in the FDIC's January 22 orders approving the deposit insurance applications of Utah-based industrial loan companies (ILCs) Ford Credit Bank and GM Financial Bank. Only 3 ILCs had been chartered since 2020 before these. Despite trade group opposition, ILC applications are likely to increase following these orders: at least one company (Affirm) is seeking an ILC charter in Nevada.

Community Bank Reform Legislation Proceeds Through House

Summary

On Jan. 7, the Main Street Capital Access Act (H.R. 6955) was introduced in the House Financial Services Committee, and on Jan. 22, the Community Bank Regulatory Tailoring Act (H.R. 7056) was reported to the full House of Representatives.

Highlights

1) H.R. 6955 combines several legislative proposals that have been floating around since Congress changed hands. Featuring 31 Republican co-sponsors, the bill seeks not only to encourage new bank formation and merger activity, but to tailor regulations applicable to community banks and to reform various aspects of agency supervision.
2) The more targeted H.R. 7056, which has progressed further in the House and has a pair of bipartisan co-sponsors, is designed to increase by meaningful degrees various asset thresholds found in the Bank Holding Company Act, Community Reinvestment Act, Dodd-Frank Act, and Federal Deposit Insurance Act, among other federal statutes.
3) H.R. 7056 prescribes a mechanism for five-year revisions to the dollar thresholds tied to the U.S. gross domestic product. The ABA pushed its support for the proposal, noting that indexing itself is a "low-cost, high-impact reform."

Practical Tips

- Statutory changes in the substantive areas covered by the more comprehensive reform package, H.R. 6955, would solidify many of the more piecemeal changes the federal agencies have made to date through regulation and guidance, giving banks more certainty against a pendulum swing many in the industry fear could occur after the next election.
- Targeted, bite-sized bills with bipartisan support, like H.R. 7056, may present a clearer reform path before the midterms.

Takeaway

Reform legislation has been percolating in both houses of Congress since the last election, aimed at changing many areas these bills focus on. So far, all the reform actions to date have taken place at the agency level, with Congress mostly on the sidelines. The next few months will be crucial in determining whether any individual idea can garner enough momentum to make permanent changes to the banking landscape, or whether other political priorities will subsume these reform bills.

DOJ and CFPB Withdraw Statement on Immigration Status Under ECOA

Summary

On Jan. 12, the CFPB and the DOJ announced that they withdrew a joint statement regarding the implications of a creditor's consideration of an individual's immigration status under the Equal Credit Opportunity Act (ECOA).

Highlights

1) The joint statement, published in 2023, warned creditors that policies related to credit applicants' immigration or citizenship status could implicate ECOA and Regulation B's bar on discrimination based on race and national origin.
2) The agencies' notice asserts that ECOA and Regulation B generally permit creditors to consider immigration and citizenship status. Per the agencies, withdrawal is therefore appropriate to correct any "misimpression" the statement had left with creditors suggesting these authorities actually imposed limits on considering these concepts.
3) The CFPB also explained that withdrawal was appropriate as part of its year-long effort to rescind its own previously-issued guidance across all subject areas that imposed, or appeared to impose, new or increased compliance burdens.

Practical Tips

- Although the agencies suggest that consideration of immigration or citizenship status could be "legitimate" in certain circumstances to fully assess underwriting risks, relaxation of current guardrails could introduce regulatory risk later.
- Beyond the potential that the next Administration resurrects the joint statement, banks should stay cognizant of state civil rights laws and court decisions that explicitly include immigration and citizenship status among protected classes.

Takeaway

Even prior to the current Administration, an increasing number of states had moved to expand the scope of their existing civil rights laws and regulations to encompass immigration and citizenship status, granting protective coverage to these characteristics in various financial services-related contexts. Therefore, state-chartered banks' ability to track developments at the state level will be crucial to ensuring that their underwriting or lending policies and procedures do not introduce heightened risk, especially as state regulators and law enforcement agencies continue to fill the federal vacuum.

> "The vague and over-broad definition and interpretation of [confidential supervisory information, or "CSI"] effectively prohibit constructive speech and information sharing. In addition to limiting valuable uses of information sharing, the limits can also serve to shield abusive supervisory behaviors. To address these weaknesses, we are reviewing approaches to better define or create circumstances in which CSI can be shared, including through creating limited use cases exempt from the definition of CSI."
>
> **Michelle W. Bowman, Vice Chair for Supervision, Federal Reserve Board**
> *at the California Bankers Association Bank Presidents Seminar* (Jan. 7)

FDIC Issues Final Signage Rule, Overturning Changes from Biden Admin

Summary

On Jan. 22, the FDIC issued its final rule amending signage requirements for banks' digital deposit-taking channels and ATMs. While the rule is effective March 2, 2026, banks are not required to comply with it until April 1, 2027.

Highlights

1) The issuance of this final rule follows a series of implementation date delays for a set of signage rule amendments finalized in 2023 under former Chair Gruenberg. Those planned changes had generated uncertainty within the industry.
2) The final rule will no longer prohibit inclusion of uninsured products on web pages bearing the FDIC official digital sign, reflecting the agency's shift away from prescriptive limitations towards reliance on banks' business judgment.
3) The rule also reflects the FDIC's adoption of common bank practices regarding web page disclosures, demonstrating leadership's willingness to both survey the industry and defer to those processes that work for a majority of institutions.
4) Beyond reducing banks' burdens, the rule suggests the changes should lead to a "less cluttered" customer experience.

Practical Tips

- Under the final rule, banks must "clearly, continuously, and conspicuously" display non-deposit signage on any page that is "primarily dedicated to" advertising or providing information about, or access to, non-deposit products.
- Interpreting this standard still depends to some degree on subjective judgment and circumstances. The FDIC explains that whether signage ultimately meets this test will be viewed in relation to other content on an individual page.

Takeaway

The issuance of a final rule will end the whiplash banks experienced in the wake of the 2023 rule, which was the subject of piecemeal deferrals over several years. This rule exemplifies Chairman Hill's deference to banks in implementing aspects of the regulatory framework, subject to staying within more general and less prescriptive guardrails. Due to the technical nature of this rule, it is unlikely that it will draw much focus either in examinations or in the public eye for banks—most of the action related to displaying FDIC signage will likely be in the fintech and digital asset provider space.

Other Developments You May Have Missed Last Month . . .

ABA Sends Letter to Bank CEOs Urging Action to Oppose Stablecoin Yield. On Dec. 30, American Bankers Association President and CEO Rob Nichols sent a letter to the group's member bank CEOs, pushing them to mobilize to oppose a move by crypto companies "seeking to exploit a loophole" in the recently-passed GENIUS Act by having those firms' partners offer yield-like rewards tied to stablecoins.

***Bottom Line*:** The ABA and other bank trade groups have been advocating strongly in the new year to close what they have labeled the "yield loophole" to prevent deposit flight from banks. The efforts to drive direct bank engagement with congressional representatives appears to have worked, as the planned finalization mid-month of market structure legislation governing the broader crypto industry was delayed. Unless the sides can resolve the impasse, the battle over stablecoin yield could knock the legislation off the 2026 congressional agenda entirely.

District Court Rejects Plaintiffs' Suit to Overturn Industry Ban Issued by SEC. On Jan. 8, the federal district court for the District of Columbia dismissed a complaint filed by two investment advisors against the SEC alleging that the agency's attempt to institute an industry ban against them via an administrative proceeding violated his Seventh Amendment jury trial right and the 2024 Supreme Court decision in *Jarkesy*.

***Bottom Line*:** The question of whether *Jarkesy*'s holding implicates the federal banking agencies' power to prohibit directors and officers from the banking industry is likely to surface the challenges still percolating in the federal courts. The D.C. district court's decision here establishes a precedent—even if not directly on point—that agency actions to ban individuals from a regulated industry are outside of *Jarkesy*'s scope. Future banker-defendants will likely face an uphill battle to rely on *Jarkesy* in agency prohibition cases, absent further action by the Supreme Court.

Michigan Regulator Issues Guidance on Use of AI by Financial Services Providers. On Jan. 14, the Michigan Department of Insurance and Financial Services (DIFS) issued Bulletin 2026-03-BT/CF/CU applicable to DIFS-regulated banks, among other financial services providers, advising them about the need for technologies such as AI to comply with all applicable laws and regulations and setting supervisory expectations.

***Bottom Line*:** Among other sources of authority, the Bulletin establishes an expectation for AI use's compliance with Michigan's civil rights law, which is broader in scope than parts of federal law, and points to a Biden-era report as a source of "fundamental principles" to guide banks in developing and using AI. DIFS will expect adoption and implementation of AI-specific controls and development of a written AI systems program, while it "encourages" verification and testing methods to identify bias in models. DIFS' commitment to investigate banks' use of AI systems, especially around potential discrimination, could invite conflict with the federal government, which has sought to block state-level efforts on AI.

Comptroller Calls for Overhaul of Resolution Planning Requirements. On Jan. 16, Comptroller Gould gave a speech to the American Bar Association calling for the end of resolution plan submissions to the FDIC, which are known as CIDIs and are required by a 2011 FDIC rule but are not required by Dodd-Frank. He also expressed support for significant changes to the content and frequency of so-called 165(d) plans, which are mandated by Dodd-Frank to be submitted by large bank holding companies and nonbank financial companies supervised by the FRB.

***Bottom Line*:** The Comptroller's advocacy for significant changes to large bank resolution planning obligations stem in part from their genesis in agency guidance. But his criticism was also practical: he observed that banks which failed in 2023 did not utilize the playbooks they had spent fortunes formulating. The OCC's consideration of the practicality of new and existing rules should help drive a net reduction in regulatory burden.

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 and acquisitions, capital raising transactions, general corporate and securities issues, and tax, executive compensation and employee benefits matters.

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