Regulatory Update

Community Bankers for Compliance

3rd Quarter 2023

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younginc.com

131 East Main Street ◆ P.O. Box 711 ◆ Kent, OH 44240 | P 330.678.0524 ◆ F 330.678.6219

Instructors for the CBC Program

Bill Elliott, CRCM, Senior Consultant and Director of Compliance Education, Young & Associates, Inc.

Bill Elliott has over 40 years of banking experience. As a senior compliance consultant and manager of the compliance division with Young & Associates, Inc., Bill works on a variety of compliance-related issues, including leading compliance seminars, conducting compliance reviews, conducting in-house training, and writing compliance articles and training materials.

Bill's career includes 15 years as a compliance officer and CRA officer in a large community bank, as well as working at a large regional bank. He has experience with consumer, commercial, and mortgage loans, and has managed a variety of bank departments, including loan review, consumer/commercial loan processing, mortgage loan processing, loan administration, credit administration, collections, and commercial loan workout.

Sharon Bond, CRCM, Consultant, Young & Associates, Inc.

Sharon Bond is a consultant in the compliance department at Young & Associates, Inc. where she specializes in Consumer Compliance. Sharon works on a variety of compliance-related issues, including leading compliance seminars, conducting compliance reviews for all areas of compliance, conducting in-house training, and writing compliance articles and training materials. With over 30 years of industry experience, she has a strong background in mortgage lending and in federal consumer compliance laws and regulations. Sharon was an Associate National Bank Examiner with the Office of the Comptroller of the Currency (OCC) for five years. She holds the designation of Certified Regulatory Compliance Manager (CRCM) and the Six Sigma Qualtec Black Belt certifications.

Dale Neiss, CRCM, Consultant, Young & Associates, Inc.

Dale Neiss is a compliance consultant with Young & Associates, Inc. With over 30 years of banking experience in Denver, CO, Dale has developed and implemented compliance management systems, loan review and community reinvestment act (CRA) programs, and enterprise risk management (ERM) framework for multiple banks. He has held the titles of Compliance and Loan Review Manager, BSA and CRA Officer, and Enterprise Risk Management Director. Prior to his Denver, CO banking experience, Dale began his banking career with the Office of the Comptroller of the Currency in Indianapolis, IN as an associate national bank examiner. At Young & Associates, Inc., he provides consulting and training, as well as writes articles and compliance manuals. He holds the designation of Certified Regulatory Compliance Manager (CRCM) by the Institute of Certified Bankers in Washington, D.C. Dale earned a Bachelor of Business Administration degree in Finance and Management from Kent State University.

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Agency News Items

Section 1: Supervisory Information

FDIC, FRB, CFPB: Semiannual Regulatory Agendas (Various)

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www.reginfo.gov

Text

Twice each year, the agencies publish an agenda of regulations to inform the public of its regulatory actions and to enhance public participation in the rulemaking process. Entries appear in one of five categories:

The first, ***Pre-rule Stage*** reports on matters the agencies are considering for future rulemaking.

The second section, ***Proposed Rule Stage***, reports on matters the agencies may consider for public comment during the next 6 months.

The third section, ***Final Rule Stage***, reports on matters that have been proposed and are under consideration.

The fourth section, ***Completed Actions***, reports on regulatory matters the agencies have completed or not expected to consider further.

And a fifth section, ***Long-Term Actions***, reports on matters where the next action is undetermined, 00/00/0000, or will occur more than 12 months after publication of the Agenda.

FDIC:

The Federal Deposit Insurance Corporation (FDIC) is hereby publishing items for the Spring 2023 Unified Agenda of Federal Regulatory and Deregulatory Actions. The agenda contains information about FDIC's current and projected rulemakings, existing regulations under review, and completed rulemakings.

Generally, the timetable reflecting when the FDIC anticipates taking future action on an item is an estimate only and is subject to change. Also, where the FDIC notes that an item is transitioning from the proposed rule stage to the final rule stage, the FDIC is only reporting the item's progress through the regulatory process. The item report does not dictate what a final rule will provide or how it might compare to the proposed version of the rule.

Agenda Stage of Rulemaking	Title
Proposed Rule	Quality Control Standards for Automated Valuation Models
Proposed Rule	Basel III Revisions: Amendments to the Capital Rule for Large Banking Organizations
Proposed Rule	Rescission of OTS Regulation Regarding Securities Offerings and New Regulation Regarding Securities Offering Requirements
Proposed Rule	Procedures for Monitoring Bank Secrecy Act Compliance
Proposed Rule	Resolution-Related Resource Requirements for Large Banking Organizations
Proposed Rule	Parent Companies of Industrial Banks and Industrial Loan Companies
Proposed Rule	Resolution Plans Required for Insured Depository Institutions (IDIs) With \$100B or More in Total Assets; Informational Filings Required for IDIs With at Least \$50B but less Than \$100B in Total Assets
Proposed Rule	Consent to Engage in Certain Covered Activities
Proposed Rule	Proposed Amendments to the FDIC's Section 19 Regulations
Final Rule	Uniform Rules of Practice and Procedure
Final Rule	FDIC Official Sign and Advertising Statement Requirements
Final Rule	Exemptions to Suspicious Activity Report Requirements
Final Rule	Tax Allocation Agreements
Final Rule	Brokered Deposits; Correction
Final Rule	Community Reinvestment Act

FRB:

The Board is issuing this agenda under the Regulatory Flexibility Act and the Board's Statement of Policy Regarding Expanded Rulemaking Procedures. The Board anticipates having under consideration regulatory matters as indicated below during the period May 1, 2023, through October 31, 2023. The next agenda will be published in fall 2023.

Agenda Stage of Rulemaking	Title
Pre-Rule Rule	Anti-Money Laundering and Countering the Financing of Terrorism Programs
Pre-Rule Rule	Source of Strength
Proposed Rule	Automated Valuation Models
Proposed Rule	Income Tax Allocation Agreements (Docket No: R-1746)
Proposed Rule	Regulatory Capital Rules: Risk-Based Capital Requirements for Depository Institution Holding Companies Significantly Engaged in Insurance Activities (Docket No: R-1673)
Proposed Rule	Resolution-Related Resource Requirements for Large Banking Organizations (Docket No: R-1786)
Proposed Rule	Regulation H--Membership of State Banking Institutions in the Federal Reserve System; Reports of Suspicious Activities Under Bank Secrecy Act (Docket No: R-1738)
Proposed Rule	Rules of Practice and Procedure (Docket No: R-1766)
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Proposed Rule	Regulation S--Proposed Rulemaking BSA Recordkeeping (Docket No: R-1726)
Proposed Rule	Regulation BB -- Community Reinvestment Act (Docket No: R-1769)
Proposed Rule	Regulation HH--Financial Market Utilities (Docket No: 1782)
Final Rule	Regulation Q and Y--Small Bank Holding Company and Savings and Loan Holding Company Policy Statement and Related Regulations; Changes to Reporting Requirements (Docket No: R-1619)

CFPB:

The Consumer Financial Protection Bureau (CFPB) is publishing this agenda as part of the Spring 2023 Unified Agenda of Federal Regulatory and Deregulatory Actions. The CFPB reasonably anticipates having the regulatory matters identified below under consideration during the period from June 1, 2023, to May 31, 2024. The next agenda will be published in Fall 2023 and will update this agenda through Fall 2024.

Agenda Stage of Rulemaking	Title
Pre-Rule Rule	Overdraft Fees
Pre-Rule Rule	Fair Credit Reporting Act Rulemaking
Pre-Rule Rule	Fees for Insufficient Funds
Proposed Rule	Amendments to FIRREA Concerning Automated Valuation Models
Proposed Rule	Required Rulemaking on Personal Financial Data Rights
Proposed Rule	Property Assessed Clean Energy Financing
Proposed Rule	Supervision of Larger Participants in Consumer Payment Markets
Final Rule	Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders
Final Rule	Registry of Supervised Nonbank That Use Form Contracts to Impose Terms And Conditions That Seek To Waive Or Limit Consumer Legal Protections
Final Rule	Credit Card Penalty Fees
Final Rule	Facilitating the LIBOR Transition Consistent with the Adjustable Interest Rate (LIBOR) Act (Regulation Z)

What You Need to Do

The Semiannual Regulatory Agendas for three agencies (FDIC, FRB, and CFPB) are provided. The ***Final Rule Stage*** section reports on matters that have been proposed and are under consideration. These are the most immediate area(s) requiring attention and include: **Community Reinvestment Act (FDIC); and Facilitating the LIBOR Transition Consistent with the Adjustable Interest Rate (LIBOR) Act (Regulation Z) (CFPB).** The ***Proposed Rule Stage*** reports on matters the agencies may consider for public comment during the next 6 months and include: Procedures for Monitoring Bank Secrecy Act Compliance (FRB); Regulation S--Proposed Rulemaking BSA Recordkeeping (FDIC); and Required Rulemaking on Personal Financial Data Rights (CFPB). Also note the CFPB's *Pre-rule Stage* items (matters under consideration for future rulemaking): Overdraft Fees; and Fees for Insufficient Funds.

FDIC: Consumer Compliance Supervisory Highlights (April 5, 2023)

Link

https://www.fdic.gov/regulations/examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2023.pdf

Text

Introduction

The COVID-19 pandemic continued to impact financial institutions, consumers, and communities in 2022. Financial institutions maintained operations to provide consumers access to products and services and increased opportunities for in-person interaction. The FDIC leveraged technology and file-sharing tools to conduct consumer compliance examinations in a virtual environment until September 6, 2022, when the FDIC returned to conducting consumer compliance examinations onsite at banks.

The FDIC has learned many lessons in conducting effective and efficient examinations virtually and will continue to utilize technology to allow a portion of the examination to be conducted offsite; however, we remain committed to having an onsite presence at every consumer compliance examination. Examiners consider a myriad of factors in determining activities to conduct onsite versus offsite, such as the bank's business model, risk profile, and complexity; available technological capabilities of the bank being examined; and other considerations, such as coordinating with other regulatory agencies.

This issue of the FDIC Consumer Compliance Supervisory Highlights includes:

- A summary of the overall results of the FDIC's consumer compliance examinations of supervised institutions in 2022;
- A description of the most frequently cited violations and other consumer compliance examination observations;
- Information on examination observations and regulatory developments;
- A summary of consumer compliance resources and information available to financial institutions; and
- An overview of trends in consumer complaints that were processed by the FDIC in 2022

Summary of Overall Consumer Compliance Performance in 2022

The FDIC supervises approximately 3,000 state-chartered banks and thrifts that are not members of the Federal Reserve System (supervised institutions). Most of these institutions are community banks that provide credit and services locally. The FDIC, through its Division of Depositor and Consumer Protection (DCP), is responsible for evaluating supervised institutions for compliance with consumer protection, antidiscrimination, and community reinvestment laws.

The FDIC's consumer compliance examination program focuses on identifying, addressing, and mitigating the greatest potential risks to consumers, based on the business model and products offered by a particular institution. The FDIC conducts periodic risk-based examinations of supervised institutions for compliance with over 30 Federal consumer protection laws and regulations. In 2022, the FDIC conducted approximately 1,000 consumer compliance examinations. Overall, supervised institutions demonstrated effective management of their consumer compliance responsibilities.

The FDIC uses the Federal Financial Institutions Examination Council's (FFIEC) Uniform Interagency Consumer Compliance Rating System to evaluate supervised institutions' adherence to consumer protection laws and regulations. As of December 31, 2022, 99 percent of all FDIC-supervised institutions were rated satisfactory or better for consumer compliance (i.e., ratings of "1" or "2"), as well as for the Community Reinvestment Act (CRA) (i.e., CRA ratings of "Outstanding" or "Satisfactory").

Institutions rated less than satisfactory for consumer compliance (i.e., ratings of "3," "4," or "5") had overall compliance management system (CMS) weaknesses, which often resulted in violations of law and the risk of consumer harm. Institutions rated "needs to improve" or "substantial noncompliance" for CRA represent a weak performance under the lending, investment and service tests, the community development test, the small bank performance standards, or an approved strategic plan, as applicable.

Most Frequently Cited Violations

During 2022, FDIC consumer compliance examiners identified regulatory violations that ranged in severity from highest to lowest level of concern (i.e., Levels 3, 2, and 1, with Level 1 representing the lowest level of concern). This publication focuses on the five most frequently cited instances of Level 3 or Level 2 violations.

The most frequently cited violations (representing approximately 73 percent of the total violations cited in 2022) involve:

- the Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1666j, and its implementing regulation, Regulation Z, 12 C.F.R. Part 1026;
- Section 5 of the Federal Trade Commission Act (Section 5 of FTC Act), 15 U.S.C. § 45;
- the Flood Disaster Protection Act (FDPA), 42 U.S.C. §§ 4001- 4129, and its implementing regulation, 12 C.F.R. Part 339;
- the Electronic Fund Transfers Act (EFTA), 15 U.S.C. § 1693 et seq., and its implementing regulation, Regulation E, 12 C.F.R. Part 1005 et seq.; and
- the Truth in Savings Act (TISA), 12 U.S.C §§ 4301 – 4313, and its implementing regulation, Regulation DD, 12 C.F.R. Part 1030.

This list is similar to the top violations cited for the previous year, with the exception of Section 5 of FTC Act, which replaced violations of the Real Estate Settlement Procedures Act (RESPA) and section 1024.37(c) of Regulation X, as one of the top five violations, and section 1026.38(f)-(k) of Regulation Z, replacing section 1026.19(e) of Regulation Z, as the top TILA-related violation cited.

Because the FDIC conducts consumer compliance examinations using a risk-focused methodology, the most frequently cited violations generally involve regulations that represent the greatest potential for consumer harm. For example, TILA requires disclosures about mortgage costs and calculation errors that could result in consumer harm and require reimbursements to harmed consumers. Moreover, the flood insurance provisions included in the FDPA could result in civil money penalties if the supervised institution does not take appropriate steps to ensure compliance. Given the heightened risk for potential consumer harm, these five areas of the law generally represent a center of focus for consumer compliance examiners.

Of the top regulatory areas cited for violations, the following list describes the most frequently cited violation in each area:

- **TILA/Regulation Z:** 15 U.S.C § 1604 of TILA and section 1026.38(f) – (k) of Regulation Z, which implements TILA, requires the creditor to disclose certain closing cost information on the Closing Disclosure using specified headings and tables.

- **Section 5 of FTC Act:** Section 5 of FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce. The FDIC identified this violation most frequently when financial institutions charged multiple non-sufficient funds (NSF) fees for the re-presentment of the same transaction and disclosures did not fully or clearly describe the financial institution's re-presentment practice, including not explaining that the same unpaid transaction might result in multiple NSF fees if an item was presented more than once.

- **FDPA/12 C.F.R Part 339:** Section 102 of the FDPA, 42 U.S.C § 4012(b) and section 339.3(a) of the FDIC Rules and Regulations, which implements the FDPA, requires adequate flood insurance be in place at the time a covered loan is made, increased, extended, or renewed.

- **EFTA/Regulation E:** 15 U.S.C. § 1693f of the EFTA and section 1005.11(c) of Regulation E, which implements the EFTA, requires a financial institution to investigate allegations of electronic fund transfer errors, determine whether an error occurred, report the results to the consumer, and correct the error within certain timeframes.

- **TISA/Regulation DD:** 12 U.S.C. § 4304 of TISA and sections 1030.4(a) and (b) of Regulation DD, which implements TISA, sets forth timing and content requirements for deposit account disclosures.

In 2022, the FDIC initiated 21 formal enforcement actions and 10 informal enforcement actions to address consumer compliance examination findings. During this period, the FDIC issued civil money penalty (CMP) orders against institutions to address violations of the FDPA, RESPA Section 8, Fair Credit Reporting Act (FCRA), and Section 5 of FTC Act, totaling $1.3 million. Supervised institutions provided voluntary restitution payments to more than 61,000 consumers for violations of various laws and regulations totaling $13.6 million.

Table and Graph - omitted

Consumer Compliance Examination Observations

The following describes some of the more significant consumer compliance issues identified by FDIC examiners during DCP's supervisory activities conducted in 2022. The issues include matters involving referral arrangements, trigger leads, servicemember protections, and fair lending compliance.

Real Estate Settlement Procedures Act Section 8: Referral Arrangements

Background

RESPA was enacted in 1974 to eliminate abusive practices in the real estate settlement process that can inflate the cost of obtaining a mortgage or other settlement services in connection with a real estate transaction. RESPA prohibits kickbacks for business referrals involving a federally related mortgage loan. Specifically, RESPA Section 8(a) prohibits the giving and accepting of kickbacks (e.g., cash or other "things of value" as defined in RESPA and Regulation X) pursuant to any agreement or understanding to refer settlement service business or business incident to a real estate settlement service in connection with those loans.

The Spring 2021 edition of the Consumer Compliance Supervisory Highlights discussed RESPA Section 8(a) violations and the difference between paying for a lead (which is generally acceptable) and paying for a referral (which is prohibited). True leads permissible under RESPA are often lists of customer contacts that are not conditioned on the number of closed transactions resulting from the leads, or any other consideration, such as endorsement of the settlement service. While a service may be characterized as a lead generation service, the activity could actually be a referral arrangement depending on the facts and circumstances. If the payment for the lead is in exchange for activity directed to a person that has the effect of affirmatively influencing the consumer to select a particular lender, then it becomes a referral fee. Banks often contract with third parties to provide what are characterized as lead generation services, but in some cases, the FDIC has found that the banks are actually paying for referrals.

Findings

In 2022, the FDIC identified RESPA Section 8(a) violations where a bank contracted with third parties that took steps to identify and contact consumers in order to directly steer and affirmatively influence the consumer's selection of the bank as the settlement service provider. In some cases, this process involved the third party calling identified consumers and directly connecting and introducing them to a specific mortgage representative on the phone. This process is often referred to as a "warm transfer." In other cases, the process involved operation of a digital platform that purported to rank lender options based on neutral criteria but where the participating lenders merely rotated in the top spot. Although each case is fact specific, indicators of risk in these arrangements include a third party that does one or more of the following activities:

- Initiates calls directly to consumers to steer them to a particular lender;
- Offers consumers only one lender or will only transfer the consumer to one lender;
- Describes the lender in non-neutral terms such as preferred, skilled, or possessing specialized expertise;
- Receives payment from the lender only if a "warm transfer" occurs; or
- On a consumer-facing digital platform that purports to rank settlement service providers based on objective factors, providers that pay to take turns appearing in the top spot in a round robin format.

Payment for activities that go beyond the simple provision of a "lead" may be improper payment for referrals when the activity affirmatively influences the consumer towards the selection of a particular lender.

Mitigating Risk

DCP has observed certain risk-mitigating activities that may assist supervised institutions in complying with RESPA requirements. Illustrative examples include:

- Training staff on RESPA Section 8, including the differences between a permitted lead and an illegal referral (including a warm transfer).

- Understanding the programs that lenders are involved with, how the programs function, and how the cost structure works.
- Developing policies and procedures that provide guidance to comply with regulatory requirements and management's expectations with regard to lead generation programs.
- Requiring loan officers to annually certify applicable relationships to ensure that the bank is aware of the arrangements used by loan officers to generate loans and that these arrangements have been vetted and controls put in place for associated risks.
- Monitoring lead generation activities regularly to ensure compliance with the bank's policies and procedures, and regulatory requirements.

Fair Credit Reporting Act: Trigger Leads

Background

FCRA helps ensure the accuracy, fairness, and privacy of information collected by consumer reporting agencies such as credit bureaus. FCRA regulates the way credit reporting agencies can collect, access, use, and share the data they collect in consumer reports. Accordingly, consumer reporting agencies may only furnish a consumer report under enumerated circumstances. One of the permissible purposes for furnishing a consumer report allows a requestor to ask for and to use the information under FCRA in connection with a credit transaction not initiated by the consumer for the purpose of "prescreening." Prescreening is the process whereby a consumer reporting agency compiles or edits a list of consumers who meet specific criteria and provides the list to a lender or third party (such as a mailing service) on behalf of the lender for use in soliciting these consumers to avail themselves of the lender's products or services.

In order for a consumer reporting agency to furnish credit information, the prescreened solicitation must include a "firm offer of credit." Per 15 U.S.C. 1681a(l), a "firm offer of credit" is generally defined as "any offer of credit … to a consumer that will be honored if the consumer is determined, based on information in a consumer report on the consumer, to meet the specific criteria used to select the consumer for the offer." Prescreened solicitations are associated with a wide variety of lending products including credit cards and mortgage loans.

One kind of prescreening, commonly referred to in the industry as a "trigger lead," involves a lender paying credit reporting agencies to produce a report on certain consumers' credit activity. The lender provides credit criteria, either directly or through third parties, to the credit reporting agencies, which then provide the lender with a list of consumers who both match the lender's criteria and had a "trigger" activity, such as recently applying for a mortgage loan. These "trigger leads" are a type of prescreened consumer report that is subject to FCRA. As such, purchasers of trigger leads must comply with FCRA requirements that pertain to prescreened reports, including the requirement to make a firm offer of credit. These offers must, at a minimum, convey that (1) an offer of credit is being made, and (2) that the offer is guaranteed so long as the consumer continues to meet the credit criteria.

Findings

In 2022, the FDIC examiners noted issues involving financial institutions that purchased "trigger leads," but failed to provide consumers with "firm offers of credit." By listening to recorded phone calls, reviewing scripts and consumer complaints, and interviewing loan officers, examiners identified instances where financial institution representatives were contacting consumers during sales calls, but did not communicate that (1) an offer of credit was being made, (2) the offer was guaranteed as long as the consumer met the credit criteria, (3) the offer was a prescreened offer based on the consumer's credit report, and (4) the consumer could opt out of future prescreened offers. FCRA does not state that a firm offer of credit must be in writing and does not explicitly prohibit verbal offers. However, these disclosure requirements of FCRA must still be met.

Mitigating Risk

DCP has observed certain risk-mitigating activities that may assist supervised institutions in complying with FCRA requirements. Illustrative examples include:

- Developing and implementing comprehensive oversight of marketing materials, including content approval and ongoing monitoring, to ensure compliance with applicable rules and regulations.
- Implementing an effective compliance management system for FCRA and the use of prescreen credit report information to ensure bank staff comply with regulatory requirements.
- Developing scripts that comply with FCRA prescreening requirements to use when calling consumers identified through the trigger lead process.
- Developing and implementing offer letters meeting all regulatory requirements to send to all consumers meeting prescreening criteria. The letters should provide firm offers of credit that are clear and accurate, avoid misleading representations, and include the opt-out language found in Section 615(d) of FCRA.

Servicemembers Civil Relief Act: Automatically Applying Excess Interest Payments to Principal Loan Balance

Background

The Servicemembers Civil Relief Act (SCRA) was created to provide extra protections for servicemembers in the event that legal or financial transactions adversely affect their rights during military or uniformed service. Among various protections provided to servicemembers under SCRA is the right to have the interest rate on any pre-service loans capped at a maximum of 6 percent. Any reduction of the interest rate must be implemented as a reduction in the periodic payments rather than a reduction in principal. SCRA defines interest to include service charges, renewal charges, fees, or any other charges other than bona fide insurance with respect to an obligation or liability. To obtain SCRA interest rate benefits, the servicemember must provide notice and a copy of the military orders. The interest rate benefit applies during the period of active-duty service for most loans and, for mortgages, for an additional year after the end of active duty. For reservists and National Guard members, the benefit also applies during the period starting on the date the servicemember received their military orders through the date they begin military service. Any interest that accrues at a rate in excess of 6 percent—including during the period between the benefit start date and the date the bank lowers the interest rate—must be forgiven, and not simply deferred.

Findings

During 2022, the FDIC identified violations of SCRA's anti-acceleration provision when banks unilaterally applied excess interest to the servicemember's principal loan balance without giving the servicemember an option of how to receive the funds. While SCRA does not require a specific method for reimbursing the excess interest, and does not prohibit a creditor from providing it to the servicemember as a cash refund or timely applying it to current or future monthly payments, or applying it to past-due amounts, SCRA prohibits accelerating principal (i.e., applying accrued interest savings or excess interest directly to principal), for both open-end and closed-end credit. Therefore, applying the excess interest to the principal balance of the loan is permitted only if the servicemember affirmatively chooses that method after being offered other options (such as cash refund and/or timely application to current or future payments). One of the central purposes of SCRA is to ease financial burdens on servicemembers during periods of military service. While reducing principal does provide some benefit to the servicemember, the choice of how to receive that benefit must be made by the servicemember and not unilaterally decided by the bank. In these cases, the bank would benefit from having procedures in place that document the options provided to the servicemember and the choice selected by the servicemember as to how the forgiven excess interest reimbursement is to be handled.

Mitigating Risk

DCP has observed certain risk-mitigating activities that may assist supervised institutions in complying with SCRA requirements. Illustrative examples include:

- Developing and implementing formal policies and procedures that comply with the provisions of SCRA.
- Reviewing, monitoring, and auditing SCRA loans to ensure policies and procedures are implemented and followed.
- Providing servicemembers with the option of how to receive the excess interest, or at a minimum, providing the excess interest in a cash payment.

Fair Lending

Background

The FDIC conducts a fair lending review as part of every consumer compliance examination. The fair lending review evaluates a supervised institution's compliance with the anti-discrimination laws and regulations, including the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA). While the vast majority of FDIC-supervised institutions maintain effective compliance programs, the FDIC does occasionally identify violations related to discrimination. In the rare instance when the FDIC has reason to believe a creditor is engaged in a pattern or practice of discrimination in violation of ECOA, the FDIC is required by law to refer the matter to the Department of Justice (DOJ). In 2022, the FDIC referred 12 fair lending matters to the DOJ.

Findings

In general, these DOJ referral matters involved a range of discrimination findings relating to redlining, pricing for indirect automobile financing, and overt policies for the pricing or underwriting of credit. The redlining matters generally involved instances where the banks' levels of lending did not penetrate geographies consisting of more than 50 percent minority populations (majority-minority census tracts) consistent with other lenders operating in the same markets. These lending issues were generally the result of a combination of issues involving branching activity that did not penetrate majority-minority areas, a lack of marketing and outreach in those areas, or the delineation of a market area that reflected illegal credit discrimination. The indirect automobile pricing matters generally involved issues where the banks incentivized dealer discretion in the pricing of credit. This unmonitored discretion led to borrowers being priced differently on a prohibited basis. Other matters involved the use of third parties in the credit process to underwrite or price credit. Some of these third parties operated online lending platforms that included various policies or application screening methods that violated anti-discrimination rules by including prohibited bases (such as the applicant's marital status or the exercising of a right under a consumer credit protection act) in the credit decision process.

Mitigating Risks

An effective compliance management system helps ensure financial institutions treat consumers fairly by operating in compliance with fair lending laws. The FDIC's Banker Resource Center provides information to help support fair lending compliance. In addition, DCP has observed certain mitigating actions bankers may consider, including, for example:

- Evaluating written credit policies and procedures, including those of any third party with which the bank has a relationship, to ensure decision criteria and pricing methodologies do not reflect illegal credit discrimination.
- Reviewing any requirements or other criteria used to screen potential applicants to ensure there is no discriminatory impact.
- Conducting monitoring efforts or audits to ensure credit is not being priced in a discriminatory manner.
- Understanding the bank's reasonably expected market area and the demographics of the geographies within that area.
- Evaluating the methods by which the bank obtains loan applications, including through branches or any marketing or outreach efforts.
- Assessing the bank's lending performance within its reasonably expected market area.

Regulatory and Other Developments

There were several regulatory and other developments involving consumer compliance laws and regulations, including rules, statements, or other guidance that were issued or finalized in 2022 or scheduled to become effective in 2023. Below is information on several such developments, including the FDIC's efforts to address appraisal bias in property appraisals, efforts to modernize CRA, and assessment of crypto-asset-related activities. This section is meant to highlight important developments and is not intended to provide an exhaustive discussion of recent developments involving consumer compliance matters.

Omitted – items discussed in previous CBC sessions.

Resources for Financial Institutions

The FDIC provides technical assistance and resources for financial institutions to support their efforts to serve and meet the needs of their communities. In addition, these resources may provide information that can help institutions stay current with regulatory developments and provide guidance on consumer compliance topics.

Banker Resource Center

The FDIC's Banker Resource Center provides supervisory resources for banking professionals. The site includes links to supervisory topics such as CRA, Consumer Compliance, and Third-Party Relationships. The site also provides general information on educational programs, publications, forms, financial data and other information to support general operations of FDIC-insured financial institutions. Bankers can also refer to this site for the FDIC calendar that details FDIC hosted webinars and Director College events.

In 2022, the FDIC worked with other agencies to provide up-to-date important information affecting the banking industry. The 2022 Fair Lending Interagency Webinar discussed a variety of fair lending topics including redlining, appraisal bias, Special Purpose Credit Programs, and other supervision or enforcement related updates from the agencies. Additionally, the 2022 Interagency Flood Insurance Q&A Webinar discussed updates to the Q&As that reflected significant changes to the federal flood insurance requirements in recent years.

An Overview of Consumer Complaint Trends

The FDIC's National Center for Consumer and Depositor Assistance's (NCDA) Consumer Response Unit (CRU) closed and responded to 22,207 written complaints and telephone calls from consumers in 2022, which represents a 25 percent increase from the 17,714 case records in 2021. The CRU closed and responded to 19,094 written consumer complaints in 2022 by investigating the complaint or referring the complaint to the appropriate FDIC division/office or other agency. The CRU acknowledged 100 percent of written complaints within 14 days and investigated and responded to 98.8 percent of non-fair lending complaints within established timeframes.

Of the 19,094 written complaints, the CRU investigated 9,926 of the written complaints or inquiries. Of the 9,926 investigated complaints, 7,638, or 77 percent, were sent to the applicable bank for a response. The other 23 percent of cases did not need a bank response as the consumer had previously contacted the CRU regarding the same matter and did not provide any new information that could be acted upon. Additionally, a consumer may have asked a general banking question or did not reference a bank. The completed investigations of the noted products, issues, and applicable regulations found 662 apparent bank errors and 271 apparent violations. Fair lending complaints investigated by the CRU increased from 63 in 2021 to 71 in 2022, a 13 percent increase.

The volume of third-party providers (TPPs) associated with complaints increased from 4,678 in 2021 to 5,093 in 2022, or 9 percent. These relationships generally involve contractual agreements between banks and entities that perform a variety of services, such as credit card servicing and processing deposit account transactions and error disputes. The CRU identified 4,328 complaints that involved a TPP. TPPs were associated with 171 complaints reflecting an apparent violation of a federal consumer protection law or regulation.

The CRU's interactions with consumers and banks resulted in consumers receiving $6,211,984 in total voluntary restitution and compensation through December 2022, compared to $2,467,803 received for the same period in 2021, a 152 percent increase. In addition to monetary compensation, the CRU's interactions also resulted in 967 cases receiving some sort of non-monetary remediation. The types of non-monetary remediation provided included: updating bank records and credit reports, reinstating an account or releasing a block on a card, ceasing collection calls or actions, loan modifications, and forgiving debt.

The CRU coded each complaint within the Enterprise Public Inquiries and Complaints (EPIC) system with at least one product, issue, regulation, and finding. In 2022, the CRU determined the top five products to include: *credit cards* (3,822), *checking accounts* (3,614), *installment loans* (1,426), *consumer line of credit* (1,066), and *residential real estate* (870). The following chart provides the breakdown of the top products in 2022.

[Chart omitted.]

The following table provides a five-year analysis of the top products and the associated top issues for those products.

[Table omitted.]

***Credit card* complaints** increased to 3,822, or 26 percent to become the top product complained about in 2022. Complaints regarding *credit reporting error* involve concerns regarding the reporting of inaccurate information and fraudulent accounts.

Loan forgery/ID theft concerns increased 14 percent through December 31, 2022. The CRU noted an increase in *loan forgery/ID theft* concerns across several loan products, not just credit cards, in 2022.

Checking account complaints dropped to the second top product in 2022, reflecting a decrease since it peaked in 2019. The CRU will monitor this decrease to see if the availability of alternative banking products may be responsible for the decline.

Residential real estate complaints decreased 15 percent in 2022. The CRU did not receive an increase in complaints regarding COVID-19 forbearance exit plans in 2022.

The CRU associated 16,112 issues with the complaints received. The top 15 issues of 2022 are noted below:

[Table omitted.]

Two top issues reflect connections with three other top issues. *Credit reporting* remained the top issue in 2022, with a 3 percent increase from 2021. Four products comprise 94 percent of the credit reporting concerns: *credit cards, consumer line of credit, installment loans, and residential real estate.* Of the complaints noting *credit reporting error* concerns, approximately a third of the complaints also reflected *loan forgery/ID theft* concerns. Overall, *loan forgery/ID theft* concerns increased 14 percent in 2022. Three products reflected 95 percent of the concerns: *credit cards, consumer line of credit, and installment loans*. In most instances, consumers claimed that accounts were established in their name without their permission.

Concerns regarding *account blocks* increased by 65 percent through December 31, 2022. This issue involves cases where the bank blocked an account due to fraud concerns or because customer identification supporting documents were needed. Four products reflect 94 percent of the concerns: *checking accounts, savings accounts, prepaid cards, and virtual wallets*. Concerns regarding discrepancy transaction error increased by 57 percent. This issue involved instances regarding the investigation of unauthorized transaction and resulted in several apparent violations of Regulation E. The products *checking accounts, savings accounts, prepaid cards, and virtual wallets* comprised 91 percent of the concerns regarding this issue.

What You Need to Do

Given the heightened risk for potential consumer harm, these five areas generally represent a center of focus for consumer compliance examiners: Reg Z (TILA); Section 5 of the FTC Act (UDAP/UDAAP); Reg E (EFTA); Flood Disaster Protection Act (FDPA); and Reg DD (TISA). Some of the more significant consumer compliance issues identified include: RESPA (Section 8); FCRA; SCRA; and Fair Lending. Please review the findings and mitigating risks provided and implement if necessary. The remainder of this report is informational; please review and share with appropriate team members as necessary.

Joint Agencies: Host State Loan-to-Deposit Ratios (May 19, 2023)

Link

https://www.fdic.gov/news/press-releases/2023/pr23038a.pdf

Text

The Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) (collectively, the agencies) today are making public the host state loan-to-deposit ratios that the agencies will use to determine compliance with section 109 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Interstate Act). In general, section 109 prohibits a bank from establishing or acquiring a branch or branches outside of its home state primarily for the purpose of deposit production. Section 106 of the Gramm-Leach-Bliley Act of 1999 amended coverage of section 109 of the Interstate Act to include any branch of a bank controlled by an out-of-state bank holding company.

To determine compliance with section 109, the appropriate agency first compares a bank's estimated statewide loan-to-deposit ratio to the estimated host state loan-to-deposit ratio for a particular state. If the bank's statewide loan-to-deposit ratio is at least one-half of the published host state loan-to-deposit ratio, the bank has complied with section 109. A second step is conducted if a bank's estimated statewide loan-to-deposit ratio is less than one-half of the published ratio for that state or if data are not available at the bank to conduct the first step. The second step requires the appropriate agency to determine whether the bank is reasonably helping to meet the credit needs of the communities served by the bank's interstate branches. A bank that fails both steps is in violation of section 109 and subject to sanctions by the appropriate agency.

Section 109 of the Interstate Banking and Branching Efficiency Act	
Host State Loan-to-Deposit Ratios **Using Data as of June 30, 2021** **(Excludes wholesale or limited purpose Community Reinvestment Act-designated banks, credit card banks, and special purpose banks)**	
State or U.S. Territory	**Host State Loan-to Deposit Ratio**
Illinois	74%
Indiana	79%
Kansas	72%
Michigan	86%
Missouri	72%
Montana	65%
North Dakota	76%
Ohio	72%
Wisconsin	82%

Due to the legislative intent against imposing regulatory burden, no additional data were collected from institutions to implement section 109. However, since insufficient lending data were available on a geographic basis to calculate the host state loan-to-deposit ratios directly, the agencies used a proxy to estimate the ratios. Accordingly, the agencies calculated the host state loan-to-deposit ratios using data obtained from the Consolidated Reports of Condition and Income (call reports) and Summary of Deposits Surveys (summary of deposits), as of June 30, 2022. For each home state bank, the agencies calculated the percentage of the bank's total deposits attributable to branches located in its home state (determined from the summary of deposits), and applied this percentage to the bank's total domestic loans (determined from the call reports) to estimate the amount of loans attributable to the home state. The host state loan-to-deposit ratio was then calculated by separately totaling the loans and deposits for the home state banks, and then dividing the sum of the loans by the sum of the deposits.

Section 109 directs the agencies to determine, from relevant sources, the host state loan-to-deposit ratios. As discussed in the preamble to the joint final rule, Prohibition Against Use of Interstate Branches Primarily for Deposit Production (62 FR 47728, 47731, September 10, 1997), implementing section 109, banks designated as wholesale or limited purpose banks under the Community Reinvestment Act (CRA) were excluded from the host state loan-to-deposit calculation, recognizing that these banks could have very large loan portfolios, but few, if any, deposits. Likewise, credit card banks, which typically have large loan portfolios but few deposits, were also excluded, regardless of whether they had a limited purpose designation for CRA purposes. Beginning in 2001, special purpose banks, including bankers' banks, were excluded because these banks do not engage in traditional deposit taking or lending.

The estimated host state loan-to-deposit ratios, and any changes in the way the ratios are calculated, will be publicized on an annual basis.

What You Need to Do

Section 109 of the Interstate Banking and Branching Efficiency Act prohibits a bank from establishing or acquiring a branch or branches outside of its home state primarily for the purpose of deposit production. If your financial institution is subject to the Section 109, please share this information with the appropriate team members.

Section 2: COVID-19 Pandemic

Note: This section is a continuation of Pandemic Preparedness that appeared in last quarter's Regulatory Update. These articles cover April 1, 2023, through June 30, 2023.

There are no items for this Quarter. This marks several quarters with no COVID related issues, so this section will be removed in future manuals.

Lending Issues

Section 1: Home Mortgage Disclosure Act

FFIEC: 2023 Guide to HMDA Reporting – Getting It Right! (April 13, 2023)

Link

https://www.ffiec.gov/hmda/pdf/2023Guide.pdf

Text

The Guide is a valuable resource for assisting all institutions in their HMDA reporting. It includes a summary of responsibilities and requirements, directions for assembling the necessary tools, and instructions for reporting HMDA data.

What You Need to Do:

The Getting It Right Guide is a very useful resource; please share with appropriate team members if your financial institution is subject to HMDA.

FFIEC: Availability of 2022 Data on Mortgage Lending (June 29, 2023)

Link

https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-of-2022-data-on-mortgage-lending/

Text

he Federal Financial Institutions Examination Council (FFIEC) announced the availability of data on 2022 mortgage lending transactions reported under the Home Mortgage Disclosure Act (HMDA) by 4,460 U.S. financial institutions, including banks, savings associations, credit unions, and mortgage companies.

The HMDA data are the most comprehensive publicly available information on mortgage market activity. The data are used by industry, consumer groups, regulators, and others to assess potential fair lending risks and for other regulatory and informational purposes. The data help the public assess how financial institutions are serving the housing needs of their local communities and facilitate federal financial regulators' fair lending, consumer compliance, and Community Reinvestment Act examinations.

The Snapshot National Loan-Level Dataset (https://ffiec.cfpb.gov/data-publication/snapshot-national-loan-level-dataset/2022) released contains the national HMDA datasets as of May 1, 2023. Key observations from the Snapshot include the following:

- For 2022, the number of reporting institutions increased by about 2.63 percent from 4,338 in the previous year to 4,460.
- The 2022 data include information on 14.3 million home loan applications. Among them, 11.5 million were closed-end and 2.5 million were open-end. Another 287,000 records are from financial institutions making use of Economic Growth, Regulatory Relief, and Consumer Protection Act's partial exemptions and did not indicate whether the records were closed-end or open-end.
- The share of mortgages originated by non-depository, independent mortgage companies has decreased and, in 2022, accounted for 60.2 percent of first lien, one- to four-family, site-built, owner-occupied home-purchase loans, down from 63.9 percent in 2021.
- In terms of borrower race and ethnicity, the share of closed-end home purchase loans for first lien, one- to four-family, site-built, owner-occupied properties made to Black or African American borrowers rose from 7.9 percent in 2021 to 8.1 percent in 2022, the share made to Hispanic-White borrowers decreased slightly from 9.2 percent to 9.1 percent, and those made to Asian borrowers increased from 7.1 percent to 7.6 percent.
- In 2022, Black or African American and Hispanic-White applicants experienced denial rates for first lien, one- to four-family, site-built, owner-occupied conventional, closed-end home purchase loans of 16.4 percent and 11.1 percent respectively, while the denial rates for Asian and non-Hispanic-White applicants were 9.2 percent and 5.8 percent respectively.

The FFIEC also released several other data products to serve a variety of data users:

The HMDA Dynamic National Loan-Level Dataset is updated on a weekly basis to reflect late submissions and resubmissions. (https://ffiec.cfpb.gov/data-publication/dynamic-national-loan-level-dataset/2022)

Aggregate and Disclosure Reports provide summary information on individual financial institutions and geographies. (https://ffiec.cfpb.gov/data-publication/2022)

The HMDA Data Browser allows users to create custom tables and download datasets that can be further analyzed. (https://ffiec.cfpb.gov/data-browser/)

In addition, since mid-March 2023, the FFIEC has made available Loan/Application Registers for each HMDA filer of 2022 data, as well as a combined file for all filers, modified to protect borrower privacy. (https://ffiec.cfpb.gov/data-publication/modified-lar/2019)

Additional summary information regarding the 2022 data may be found here. (https://www.consumerfinance.gov/data-research/hmda/summary-of-2022-data-on-mortgage-lending/)

More information about HMDA data reporting requirements is also available here. (https://ffiec.cfpb.gov/data-publication/2021)

What You Need to Do:

This report is informational; the data on 2022 mortgage lending transactions reported 4,460 U.S. financial institutions is available. The data are used by industry, consumer groups, regulators, and others to assess potential fair lending risks and for other regulatory and informational purposes. Take note of the "key observations" and compare/evaluate to your financial institution. Also note the other resources that are available that serve a variety of uses.

CFPB: SBL Help (April 5, 2023)

Link

SBLHelp@cfpb.gov

Text

On March 30, 2023, the CFPB issued the small business lending rule.

To help financial institutions implement and comply with the small business lending rule, the CFPB has launched a dedicated regulatory and technical support program called SBL Help. SBL Help can provide oral and written assistance to financial institutions about their data collection and reporting obligations under the final rule. SBL Help is the latest resource from the CFPB to help financial institutions implement and comply with the small business lending final rule.

As previously announced, the CFPB published a small business lending implementation and guidance webpage, which contains several regulatory implementation resources about the final rule, and a small business lending data webpage, which contains several technical resources about submitting small business lending data to the CFPB.

The CFPB plans to publish additional resources to help financial institutions implement and comply with the small business lending final rule.

The CFPB has published a video that introduces the types of implementation and compliance support it provides and the timeline these materials are typically released. You can watch the Introduction to Regulatory Implementation and Guidance video here:

https://www.youtube.com/watch?v=cKc_BBxqOwM.

What You Need to Do:

SBL Help is the latest resource from the CFPB to help financial institutions implement and comply with the small business lending final rule; there are other resources available as well. Please review and share with appropriate team members. The SBL Rule will be discussed in greater detail at the Q4 2023 CBC.

CFPB: Small Business Lending – Small Entity Compliance Guide (May 12, 2023)

Link

https://files.consumerfinance.gov/f/documents/cfpb_small-business-lending-rule_small-entity-compliance-guide.pdf

Text

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, (Dodd-Frank Act). Section 1071 of the Dodd-Frank Act (Section 1071) amended the Equal Credit Opportunity Act (ECOA) to require that financial institutions compile and report certain data regarding certain business credit applications to the Consumer Financial Protection Bureau (CFPB) and to meet certain other requirements. Following notice and comment, the CFPB issued the small business lending rule to implement Section 1071 on March 30, 2023. The small business lending rule is referred to as the "final rule" in this guide.

This guide includes a detailed summary of the final rule's requirements. Except when specifically needed to explain the final rule, this guide does not discuss other laws, regulations, or regulatory guidance that may apply. The content of this guide does not include any rules, bulletins, guidance, or other interpretations issued or released after the date on the guide's cover page.

Users of this guide should review the final rule as well as this guide. The final rule is available on the CFPB's website at

www.consumerfinance.gov/compliance/compliance-resources/smallbusiness-lending-resources/small-business-lending-collection-and-reporting-requirements/.

This guide has examples to illustrate some portions of the final rule. The examples do not include all possible factual situations that could illustrate a particular provision, trigger a particular obligation, or satisfy a particular requirement.

Additional resources to help industry understand and comply with the final rule are available on the CFPB's website at

www.consumerfinance.gov/compliance/compliance-resources/smallbusiness-lending-resources/small-business-lending-collection-and-reporting-requirements.

There is a link on this website to sign up for an email distribution list that the CFPB will use to announce additional resources as they become available.

If you have a specific regulatory question about the final rule after reviewing these resources, you can submit the question to the CFPB on its website at reginquiries.consumerfinance.gov.

CFPB staff provides only informal responses to regulatory inquiries, and the responses are not official interpretations or legal advice. CFPB staff is not able to respond to specific inquiries within a particular requested timeframe. Actual response times will vary based on the number of questions that staff is handling and the amount of research needed to respond to a specific question.

What You Need to Do:

Note: this guide has examples to illustrate some portions of the final rule. The examples do not include all possible factual situations that could illustrate a particular provision, trigger a particular obligation, or satisfy a particular requirement. Users of this guide should review the final rule as well. Additional resources to help the industry understand and comply with the final rule are available on the CFPB's website. Please review and share with appropriate team members. The SBL Rule will be discussed in greater detail at the Q4 2023 CBC.

CFPB: Methodology for Determining Average Prime Offer Rates (April 14, 2023)

Link

https://files.consumerfinance.gov/f/documents/cfpb_methodology-for-determining-average-prime-offer-rates_2023-04.pdf

Text

The Consumer Financial Protection Bureau (CFPB) announced a revised version of its "Methodology for Determining Average Prime Offer Rates." The revised methodology describes the calculations used to determine average prime offer rates (APOR) for purposes of federal mortgage rules.

APORs are annual percentage rates derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage loans that have low-risk pricing characteristics.

The methodology statement has been revised to address the upcoming unavailability of certain data the CFPB previously relied on to calculate APORs. On or after April 21, 2023, the CFPB will begin using ICE Mortgage Technology data and the CFPB's revised methodology to calculate APORs.

The CFPB will continue to post the survey data used to calculate APORs on the Federal Financial Institutions Examination Council's website, and the CFPB will continue to identify the source of the data on that page.

Methodology for Determining Average Prime Offer Rates

The calculation of average prime offer rates (APORs) is based on survey data for eight mortgage products (the eight products):

(1) 30-year fixed-rate;

(2) 20-year fixed-rate;

(3) 15-year fixed rate;

(4) 10-year fixed-rate;

(5) 10/6 variable rate;

(6) 7/6 variable rate;

(7) 5/6 variable rate; and

(8) 3/6 variable rate.

The survey data includes data for "best quality," 80 percent or less loan-to-value, first-lien loans. All four variable-rate products adjust to an index based on the 30-day Secured Overnight Financing Rate (SOFR) plus a margin and adjust every six months after the initial, fixed-rate period. The Consumer Financial Protection Bureau (CFPB) makes available the survey data used to calculate APORs. This Methodology first describes all the steps necessary to calculate average prime offer rates and then provides a numerical example illustrating each step with data from the week of March 5, 2023.

The survey data includes nationwide average offer prices each week. For each loan type the average commitment loan rate and points are reported, with the points expressed as percentages of the initial loan balance. For the fixed-rate products, the commitment rate is the contract rate on the loan; for the variable-rate products, it is the initial contract rate. For the variable-rate products, the average fully-indexed rate, which is the index plus margin, is also reported.

The survey data are used to compute an annual percentage rate (APR) for the eight products. See Regulation Z official commentary, 12 CFR part 1026, Supp. I, comment 17(c)(1)-10 (creditors to compute a composite APR where initial rate on variable-rate transaction not determined by reference to index and margin). In computing the APR for the eight products, a fully amortizing loan is assumed, with monthly compounding. A two-percentage-point cap on the annual interest rate adjustments is assumed for the variable-rate products. For the eight products, the APR is calculated using the actuarial method, pursuant to appendix J to Regulation Z. A payment schedule is used that assumes equal monthly payments (even if this entails fractions of cents), assumes each payment due date to be the 1st of the month regardless of the calendar day on which it falls, treats all months as having 30 days, and ignores the occurrence of leap years. See 12 CFR 1026.17(c)(3). The APR calculation also assumes no irregular first period or per diem interest collected.

The survey data cover fixed-rate loans with terms to maturity of 30, 20, 15, and 10 years and variable-rate mortgages with initial, fixed-rate periods of 10, 7, 5, and 3 years. The CFPB uses interpolation and extrapolation techniques to estimate APRs for seven additional products (2/6 and 1/6 variable-rate loans and 7-, 5-, 3-, 2-, and 1-year fixed-rate loans) to use along with the eight products in the survey data.

The Treasury Department makes available yields on its securities with terms to maturity of, among others, one, two, three, five, seven, and ten years (see

http://www.treas.gov/offices/domestic-finance/debt-management/interest-rate/yield.shtml).

The CFPB uses these data to estimate APRs for 2/6 and 1/6 variable-rate mortgages. These two additional variable-rate products are assumed to have the same terms and features as the 10/6, 7/6, 5/6, and 3/6 variable-rate products in the survey data other than the length of the initial, fixed-rate period.

The fully-indexed rate and points for the 2/6 and 1/6 variable-rate products are set equal to the fully-indexed rate and points for the 3/6 variable-rate product from the survey data. The initial interest rate for the 2/6 and 1/6 variable-rate products is estimated by a two-step process. First, the spread between the initial interest rate on the 3/6 variable-rate product and the three-year Treasury yield is used as the Treasury spread. The second step is to add the Treasury spread to the Treasury yield for the appropriate initial, fixed-rate period. All Treasury yields used in this two-step process are the Monday-Wednesday close-of-business averages, as described above.

Thus, for example, for the 2/6 variable-rate product the estimated Treasury spread is added to the average two-year Treasury rate, and for the 1/6 variable-rate product the Treasury spread is added to the average one-year Treasury rate. Thus estimated, the initial rates, points, and fully-indexed rates are used to construct an APR for the 2/6 and 1/6 variable-rate products. To estimate APRs for 7-, 5-, 3-, 2-, and 1-year fixed-rate loans, respectively, the CFPB uses the initial interest rates and points, but not the fully-indexed rates, of the 7/6, 5/6 3/6, 2/6, and 1/6 variable-rate loan products discussed above.

For any loan for which an APR of the same term to maturity or initial, fixed-rate period, as applicable, (collectively, for purposes of this paragraph, "term") is not included among the 15 products derived or estimated from the survey data by the calculations above, the comparable transaction is identified by the following assignment rules: For a loan with a shorter term than the shortest applicable term for which an APR is derived or estimated above, the APR of the shortest term is used. For a loan with a longer term than the longest applicable term for which an APR is derived or estimated above, the APR of the longest term is used. For all other loans, the APR of the applicable term closest to the loan's term is used; if the loan is exactly halfway between two terms, the shorter of the two is used. For example: For a loan with a term of eight years, the applicable (fixed-rate or variable-rate) seven-year APR is used; with a term of six months, the applicable one-year APR is used; with a term of nine years, the applicable ten-year APR is used; with a term of 11 years, the applicable ten-year APR is used; and with a term of four years, the applicable three-year APR is used. For a fixed-rate loan with a term of 16 years, the 15-year fixed-rate APR is used; and with a term of 35 years, the 30-year fixed-rate APR is used.

The eight APRs obtained directly from survey data for the eight products, the seven additional APRs estimated from survey data in the manner described above, and the APRs determined by the foregoing assignment rules are the average prime offer rates for their respective comparable transactions. The survey data needed for the above calculations generally are made available on Thursday of each week. APRs representing average prime offer rates derived, estimated, or determined as above are posted in tables on the FFIEC's rate spread calculator page the following day. Those average prime offer rates are effective beginning the following Monday and until the next posting takes effect.

Numerical Example:

The week of March 5th through March 11th , 2023 is used to illustrate the average prime offer rate calculation methodology. On Thursday March 2nd, the following survey data reflecting national mortgage rate averages for the latest week (each variable is expressed in percentage points) were available:

Product	**Rate**	**Points/Fees**	**Fully-Indexed Rate**
30-year fixed-rate	6.54	1.21	NA
20-year fixed-rate	6.29	0.87	NA
15-year fixed-rate	5.98	1.21	NA
10-year fixed-rate	5.63	1.59	NA
10/6 variable rate	5.84	0.34	7.44
7/6 variable rate	5.74	0.49	7.37
5/6 variable rate	5.62	0.56	7.35

3/6 variable rate	5.74	0.11	7.31

The survey data contract rate and points for the 30-year, 20-year, 15-year, and 10-year fixed-rate mortgages are used to compute APRs for these four products:

Product	**APR**
30-year fixed-rate	6.66
20-year fixed-rate	6.40
15-year fixed-rate	6.17
10-year fixed-rate	5.98

The survey data initial rate, points, and fully-indexed rate are used to compute APRs for the 10/6, 7/6, 5/6, and 3/6 variable-rate products:

Product	**APR**
10/6 variable rate	6.42
7/6 variable rate	6.57
5/6 variable rate	6.71
3/6 variable rate	6.91

As a preliminary step in estimating APRs for the 2/6 and 1/6 variable-rate products, average close-of-business Treasury yields for Monday-Wednesday of the latest week are calculated (the three yields summed before dividing by three are the close-of-business yields reported for February 27th, February 28th, and March 1st):

Product	**Rate**
One-year Treasury	(5.03+5.02+5.06)/3=5.04
Two-year Treasury	(4.78+4.81+4.89)/3=4.83
Three-year Treasury	(4.49+4.51+4.61)/3=4.54

Data for the 2/6 and 1/6 variable-rate products are estimated using the survey data for the 3/6 variable-rate product and yields on the one-, two-, and three-year Treasuries:

Product	**Initial Rate**	**Points/Fees**	**Fully-Indexed Rate**
2/6 variable rate	(5.74-4.54)+4.83=6.03	0.11	7.31
1/6 variable rate	(5.74-4.54)+5.04=6.24	0.11	7.31

The foregoing initial rates, points, and fully-indexed rates are used to calculate APRs for the 1/6- and 2/6 variable-rate products:

Product	APR
1/6 variable rate	7.22
2/6 variable rate	7.09

The initial rate and points of the variable-rate mortgages calculated above are used to estimate APRs for fixed-rate products with terms to maturity of seven years or less:

Product	Initial Rate	Points/Fees	APR
7-year fixed	5.74	0.49	5.89
5-year fixed	5.62	0.56	5.85
3-year fixed	5.74	0.11	5.81
2-year fixed	6.03	0.11	6.14
1-year fixed	6.24	0.11	6.45

The APRs for the remaining fixed-rate and variable-rate products are determined as follows:

Product	APR
4-year fixed rate	3-year fixed rate
6-year fixed rate	5-year fixed rate
8-year fixed rate	7-year fixed rate
9-year fixed rate	10-year fixed rate
11-year fixed rate	10-year fixed rate
12-year fixed rate	10-year fixed rate
13-year fixed rate	15-year fixed rate
14- year fixed rate	15-year fixed rate
16-year fixed rate	15-year fixed rate
17-year fixed rate	15-year fixed rate
18-year fixed rate	20-year fixed rate
19-year fixed rate	20-year fixed rate

21-year fixed rate	20-year fixed rate
22-year fixed rate	20-year fixed rate
23-year fixed rate	20-year fixed rate
24-year fixed rate	20-year fixed rate
25-year fixed rate	20-year fixed rate
26-year fixed rate	30-year fixed rate
27-year fixed rate	30-year fixed rate
28-year fixed rate	30-year fixed rate
29-year fixed rate	30-year fixed rate
31-year – 50-year fixed rates	30-year fixed rate
4/6 variable rate	3/6 variable rate
6/6 variable rate	5/6 variable rate
8/6 variable rate	7/6 variable rate
9/6 variable rate	10/6 variable rate
11/6 – 50/6 variable rates	10/6 variable rate

What You Need to Do:

This is informational; no action required.

Section 4: Fair Housing

FDIC: Fair Housing Rule; Technical Correction (April 24, 2023)

Link

https://www.govinfo.gov/content/pkg/FR-2023-04-24/pdf/2023-08609.pdf

Text

Summary: The Federal Deposit Insurance Corporation (FDIC) is making a technical correction to the FDIC's Fair Housing Rule to reinsert a previous instruction regarding the Equal Housing Lending Poster.

Date: Effective on June 23, 2023.

Background

The Fair Housing Rule prohibits FDIC-supervised institutions from engaging in discriminatory advertising involving residential real estate-related transactions. The rule was last amended in August 2022 through a technical correction to reflect a reorganization and change in the name of the FDIC's former Consumer Response Center to the National Center for Consumer and Depositor Assistance and to add web addresses.

In February 2021, the FDIC amended part 338 to make it applicable to State savings associations, and revised § 338.4 by removing the mailing address for the former Consumer Response Center and replacing it with a bracketed instruction to insert on the Equal Housing Lending Poster the address for the former Consumer Response Center as stated on the FDIC's website at www.fdic.gov.2 Historically, the required language for the Equal Housing Lending Poster included only the mailing address for the former Consumer Response Center, now renamed the National Center for Consumer and Depositor Assistance.

In August 2022, the FDIC updated 12 CFR part 338 through a technical correction to replace the reference to "Consumer Response Center" in the bracketed instruction with its new name, the "National Center for Consumer and Depositor Assistance," and to add the web address for the National Center for Consumer and Depositor Assistance complaint portal. When updating 12 CFR part 338 in August 2022, the bracketed instruction to include the mailing address was inadvertently removed.

Therefore, the FDIC is making a further technical correction to 12 CFR part 338 to reinsert the bracketed instruction for FDIC-supervised institutions to insert on their Equal Housing Lending Posters the mailing address for the National Center for Consumer and Depositor Assistance as stated on the FDIC's website at www.fdic.gov. Including the instruction for FDIC-supervised banks to insert the mailing address, rather than listing the National Center for Consumer and Depositor Assistance's current mailing address, helps ensure that posters contain the Center's up-to-date mailing address. Banks (and the public) can find the National Center for Consumer and Depositor Assistance's current mailing address by visiting www.fdic.gov and searching for "National Center for Consumer and Depositor Assistance" with the website's search tool. Banks that experience difficulty in determining the appropriate mailing address for the National Center for Consumer and Depositor Assistance for inclusion on the Equal Housing Lending Poster may contact the FDIC for assistance.

Regulatory Text

PART 338—FAIR HOUSING

§ 338.4 Fair housing poster.

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(b) The Equal Housing Lender Poster shall be at least 11 by 14 inches in size and have the following text:

We Do Business in Accordance with Federal Fair Lending Laws.

UNDER THE FEDERAL FAIR HOUSING ACT, IT IS ILLEGAL, ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, RELIGION, SEX, HANDICAP, OR FAMILIAL STATUS (HAVING CHILDREN UNDER THE AGE OF 18) TO:

- Deny a loan for the purpose of purchasing, constructing, improving, repairing or maintaining a dwelling or to deny any loan secured by a dwelling; or
- Discriminate in fixing the amount, interest rate, duration, application procedures, or other terms or conditions of such a loan or in appraising property.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Washington, DC 20410, for processing under the Federal Fair Housing Act;

AND TO:

Federal Deposit Insurance Corporation, National Center for Consumer and Depositor Assistance, [FDIC-supervised institution should insert mailing address for National Center for Consumer and Depositor Assistance found at www.fdic.gov], https://ask.fdic.gov/fdicinformationandsupportcenter, for processing under the FDIC Regulations.

UNDER THE EQUAL CREDIT OPPORTUNITY ACT, IT IS ILLEGAL TO DISCRIMINATE IN ANY CREDIT TRANSACTION:

- On the basis of race, color, national origin, religion, sex, marital status, or age;
- Because income is from public assistance; or
- Because a right has been exercised under the Consumer Credit Protection Act.

IF YOU BELIEVE YOU HAVE BEEN DISCRIMINATED AGAINST, YOU SHOULD SEND A COMPLAINT TO:

Federal Deposit Insurance Corporation, National Center for Consumer and Depositor Assistance, [FDIC-supervised institution should insert mailing address for National Center for

Consumer and Depositor Assistance found at *www.fdic.gov]*, *https://ask.fdic.gov/fdicinformationandsupportcenter*.

* * * * *

What You Need to Do:

This is a technical correction to the FDIC's Fair Housing Rule to reinsert the bracketed instruction for FDIC-supervised institutions to insert on their Equal Housing Lending Posters the mailing address for the National Center for Consumer and Depositor Assistance as stated on the FDIC's website at www.fdic.gov.

FHFA: Updates to the Enterprises' Single-Family Pricing Framework (January 19, 2023)

Link

https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Updates-to-Enterprises-SF-Pricing-Framework.aspx

Text

The Federal Housing Finance Agency (FHFA) announced further changes to Fannie Mae's and Freddie Mac's (the Enterprises) single-family pricing framework by introducing redesigned and recalibrated upfront fee matrices for purchase, rate-term refinance, and cash-out refinance loans.

The priorities outlined in the **2022** and **2023** Scorecards for the Enterprises include developing a pricing framework to maintain support for single-family purchase borrowers limited by wealth or income, while also ensuring a level playing field for large and small sellers, fostering capital accumulation, and achieving commercially viable returns on capital.

The pricing changes broadly impact purchase and rate-term refinance loans and build on upfront fee changes announced by FHFA in **January** and **October** 2022, which have been integrated into the new grids. The new fee matrices consist of three base grids by loan purpose for purchase, rate-term refinance, and cash-out refinance loans—recalibrated to new credit score and loan-to-value ratio categories—along with associated loan attributes for each.

The updated fees will take effect for deliveries and acquisitions beginning May 1, 2023, to minimize the potential for market or pipeline disruption.

Fannie Mae Lender Announcement:

https://singlefamily.fanniemae.com/media/33241/display

Lenders may contact their Fannie Mae Account Team if they have questions about this Lender Letter.

Freddie Mac Guide Bulletin Announcement:

https://guide.freddiemac.com/app/guide/bulletin/2023-1

If you have any questions about the changes announced in this Bulletin, please contact your Freddie Mac representative or call the Customer Support Contact Center at 800-FREDDIE.

What You Need to Do:
If this will affect your financial institution, please contact either your Fannie Mae Team and/or Freddie Mac representative. This could also impact the entries on the LE and CD. Please review and share with appropriate team members.

Depository Issues

There are no Depository Issues for this period.

Other Issues

CFPB: Policy Statement on Abusive Acts and Practices (April 3, 2023)

Link

https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/

Text

Background

In 2010, Congress passed the Consumer Financial Protection Act of 2010 (CFPA) and banned abusive conduct. The CFPA's prohibition on abusive conduct was the most recent instance of congressional tailoring of the Federal prohibitions intended to ensure fair dealing and protect consumers and market participants in the United States.

Since the beginning of the 20th century, Congress has amended these prohibitions in response to evolving norms, economic events, and judicial interpretations, guiding those tasked with enforcing the law. Beginning with the creation of the Federal Trade Commission, and the development of the "unfair methods of competition" and "unfair or deceptive acts or practices" prohibitions, Congress has passed laws to regulate fair dealing, and the agencies tasked with administering those laws have issued policy statements to offer guidance on the agencies' approach to enforcing those prohibitions.

For centuries, lenders and investors generally had an incentive to ensure that a borrower had the ability to repay a debt. But innovations in capital markets and fixed income instruments altered this alignment of incentives. The advent of complex securitization led to lenders no longer bearing risk when a borrower defaulted because they had sold the underlying asset, and passed on the exposure to investors. Fair dealing laws in the U.S. have long sought to address the risks and harms from market failures.

The 2007-2008 financial crisis tested U.S. consumer protection laws, government watchdogs, and the ability of the existing authorities to address the predatory lending that was a root cause of the collapse. The financial crisis was set in motion by a set of avoidable interlocking forces—but at its core were mortgage lenders profiting (by immediately selling on the secondary market) on loans that set people up to fail because they could not repay. Millions of Americans saw their home values drop and their jobs eliminated as a result of forces largely out of their control.

In response, Congress concluded that the manner in which agencies had enforced the prohibitions on unfair and deceptive acts or practices was too limited to be effective at preventing the financial crisis, and once again amended existing law to better meet new challenges. In the CFPA, Congress granted authority over unfair or deceptive acts or practices to the States, the Federal banking agencies, and the newly created Consumer Financial Protection Bureau (CFPB). Congress also added a prohibition on abusive acts or practices.

Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. The CFPB is issuing this Policy Statement to summarize those actions and explain how the CFPB analyzes the elements of abusiveness through relevant examples, with the goal of providing an analytical framework to fellow government enforcers and to the market for how to identify violative acts or practices.

Analysis

Under the CFPA, there are two abusiveness prohibitions. An abusive act or practice: (1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) Takes unreasonable advantage of:

- A lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
- The inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
- The reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

The statutory text of these two prohibitions can be summarized at a high level as: (1) obscuring important features of a product or service, or (2) leveraging certain circumstances to take an unreasonable advantage. The circumstances that Congress set forth, stated generally, concern *gaps in understanding, unequal bargaining power, and consumer reliance*.

Unlike with unfairness but similar to deception, abusiveness requires no showing of substantial injury to establish liability, but is rather focused on conduct that Congress presumed to be harmful or distortionary to the proper functioning of the market. An act or practice need fall into only one of the categories above in order to be abusive, but an act or practice could fall into more than one category.

<u>Materially interfering with consumers' understanding of terms and conditions</u>

The first abusiveness prohibition concerns situations where an entity "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service." Material interference can be shown when an act or omission is intended to impede consumers' ability to understand terms or conditions, has the natural consequence of impeding consumers' ability to understand, or actually impedes understanding.

<u>Acts or omissions</u>

Material interference may include actions or omissions that obscure, withhold, de-emphasize, render confusing, or hide information relevant to the ability of a consumer to understand terms and conditions. Interference can take numerous forms, such as buried disclosures, physical or digital interference, overshadowing, and various other means of manipulating consumers' understanding.

Buried disclosures include disclosures that limit people's comprehension of a term or condition, including but not limited to, through the use of fine print, complex language, jargon, or the timing of the disclosure. Entities can also interfere with understanding by omitting material terms or conditions.

Physical interference can include any physical conduct that impedes a person's ability to see, hear, or understand the terms and conditions, including but not limited to physically hiding or withholding notices.

Digital interference can include impediments to a person's ability to see, hear, or understand the terms and conditions when they are presented to someone in electronic or virtual format. This form of interference includes but is not limited to user interface and user experience manipulations such as the use of pop-up or drop-down boxes, multiple click-throughs, or other actions or "dark patterns" that have the effect of making the terms and conditions materially less accessible or salient.

Overshadowing includes the prominent placement of certain content that interferes with the comprehension of other content, including terms and conditions.

Material interference

There are a number of methods to prove material interference with a consumers' ability to understand terms or conditions, including but not limited to those described below. First, while intent is not a required element to show material interference, it is reasonable to infer that an act or omission materially interferes with consumers' ability to understand a term or condition when the entity intends it to interfere. Second, material interference can be established with evidence that the natural consequence of the act or omission would be to impede consumers' ability to understand. And third, material interference can also be shown with evidence that the act or omission did in fact impede consumers' actual understanding. While evidence of intent would provide a basis for inferring material interference under the first method, it is not a required element to show material interference.

Certain terms of a transaction are so consequential that when they are not conveyed to people prominently or clearly, it may be reasonable to presume that the entity engaged in acts or omissions that materially interfere with consumers' ability to understand. That information includes, but is not limited to, pricing or costs, limitations on the person's ability to use or benefit from the product or service, and contractually specified consequences of default.

Additionally, an entity's provision of a product or service may interfere with consumers' ability to understand if the product or service is so complicated that material information about it cannot be sufficiently explained or if the entity's business model functions in a manner that is inconsistent with its product's or service's apparent terms.

Taking unreasonable advantage

The second form of "abusiveness" under the CFPA prohibits entities from taking unreasonable advantage of certain circumstances. Congress determined that it is an abusive act or practice when an entity takes unreasonable advantage of three particular circumstances. The circumstances are:

1. A "lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service." This circumstance concerns *gaps in understanding* affecting consumer decision-making.

2. The "inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." This circumstance concerns *unequal bargaining power* where, for example, consumers lack the practical ability to switch providers, seek

more favorable terms, or make other decisions to protect their interests.

3. The “reasonable reliance by the consumer on a covered person to act in the interests of the consumer.” This circumstance concerns *consumer reliance* on an entity, including when consumers reasonably rely on an entity to make a decision for them or advise them on how to make a decision.

Under the CFPA, it is illegal for an entity to take unreasonable advantage of one of these three circumstances, even if the condition was not created by the entity.

The ordinary meaning of the phrase “take advantage of” is generally “to make use of for one’s own benefit.” An advantage can include a variety of monetary and non-monetary benefits to the entity or its affiliates or partners, including but not limited to increased market share, revenue, cost savings, profits, reputational benefits, and other operational benefits to the entity.

The CFPA prohibits taking “unreasonable” advantage of the specified statutory circumstances. The term “reasonable” means “[f]air, proper, or moderate under the circumstances,” and conversely, “unreasonable” means “exceeding the bounds of reason or moderation.”

In crafting the abusiveness prohibition, Congress identified categories of practices that distort the market and ultimately harm consumers. Therefore, unlike unfairness, government enforcers do not need to independently prove that an act or practice caused substantial injury in order to establish liability under the abusiveness prohibition.

Evaluating unreasonable advantage involves an evaluation of the facts and circumstances that may affect the nature of the advantage and the question of whether the advantage-taking was unreasonable under the circumstances. Such an evaluation does not require an inquiry into whether advantage-taking is typical or not. And even a relatively small advantage may be abusive if it is unreasonable. There are also a number of analytical methods, including but not limited to those described below, that can be used to evaluate unreasonable advantage-taking.

First, when Congress formulated the CFPA, one of its main concerns was financial products and services that may be “set up to fail.” Before the 2007-2008 financial crisis, mortgage lenders were willing to make loans on terms that people could not afford in part due to the ability to off-load default risk into the secondary market. This led to significant harm to the household sector, which was ultimately transmitted to the broader financial system.

The CFPA’s legislative history explains that, had the CFPB existed, “the CFPB would have been able to see and take action against the proliferation of poorly underwritten mortgages with abusive terms.” Partly in response to the financial crisis, Congress prohibited certain abusive business models and other acts or practices that—contrary to many consumer finance relationships where the company benefits from consumer success—misalign incentives and generate benefit for a company when people are harmed. In many circumstances, it is unreasonable for an entity to benefit from, or be indifferent to, negative consumer outcomes resulting from one of the circumstances identified by Congress.

Second, the CFPA’s legislative history emphasized that, as a result of CFPB oversight, “a consumer can shop and compare products based on quality, price, and convenience without having to worry about getting trapped by fine print into an abusive deal.” Unreasonable advantage-taking includes using the statutory circumstances to acquire particular leverage over people or deprive consumers of legal rights. Relatedly, advantage-taking may be unreasonable when an entity caused one of the circumstances described in CFPA section 1031(d)(2).

One may also assess whether entities are obtaining an unreasonable advantage by considering whether they are reaping more benefits as a consequence of the statutorily identified circumstances, or whether the benefit to the entity would have existed if the circumstance did not exist. In other words, entities should not get a windfall due to a gap in understanding, unequal bargaining power, or consumer reliance. Having said that, section 1031(d)(2) does not require an investigative accounting of costs and benefits or other form of quantification to make a finding. Instead, one may rely on qualitative assessment to determine whether an entity takes an unreasonable advantage.

Lack of Understanding

The first circumstance, of which entities cannot take "unreasonable advantage," as defined in the CFPA, concerns "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service." When there are *gaps in understanding* regarding the material risks, costs, or conditions of the entity's product or service, entities may not take unreasonable advantage of that gap. Such gaps could include those between an entity and a consumer. Certain types of gaps in understanding can create circumstances where transactions are exploitative.

Gaps in understanding as to "risks" encompass a wide range of potential consumer harms. "Risks" include but are not limited to the consequences or likelihood of default and the loss of future benefits. Gaps in understanding related to "costs" include any monetary charge to a person as well as non-monetary costs such as lost time, loss of use, or reputational harm. And gaps in understanding with respect to "conditions" include any circumstance, context, or attribute of a product or service, whether express or implicit. For example, "conditions" could include the length of time it would take a person to realize the benefits of a financial product or service, the relationship between the entity and the consumer's creditors, the fact a debt is not legally enforceable, or the processes that determine when fees will be assessed.

While acts or omissions by an entity can be relevant in determining whether people lack understanding, the prohibition in section 1031(d)(2)(A) does not require that the entity caused the person's lack of understanding through untruthful statements or other actions or omissions. Under the text of section 1031(d)(2)(A), the consumer's lack of understanding, regardless of how it arose, is sufficient. If people lack understanding, entities may not take unreasonable advantage of that lack of understanding. The lack of understanding can be caused by third parties and can exist even when there is no contractual relationship between the person and the entity that takes unreasonable advantage of the person's lack of understanding.

The statutory text of the prohibition does not require that the consumer's lack of understanding was reasonable to demonstrate abusive conduct. Similarly, the prohibition does not require proof that some threshold number of people lacked understanding to establish that an act or practice was abusive.

A person may lack understanding of risks, costs, or conditions, even if they have an awareness that it is in the realm of possibility that a particular negative consequence may follow or a particular cost may be incurred as a result of using the product or service. But consumers generally do not expect companies to benefit from or be indifferent to certain negative consequences, including but not limited to default. Moreover, consumers may not understand that a risk is very likely to happen or that—though relatively rare—the impact of a particular risk would be severe. The inquiry under section 1031(d)(2)(A) is whether some consumers in question have a lack of understanding, not all consumers or even most consumers. Since there can be differences among consumers in the risks, costs, and conditions they face and in their understanding of them, there may be a violation with respect to some consumers even if other consumers do not lack understanding.

Lastly, one can demonstrate a person's lack of understanding in a number of ways. For example, direct evidence of lack of understanding, including but not limited to complaints and consumer testimony, can suffice. Evidence or analysis showing that reasonable consumers were not likely to understand can likewise be used to establish lack of understanding. One can also demonstrate lack of understanding by considering course of conduct and likely consequences. For example, if a transaction would entail material risks or costs and people would likely derive minimal or no benefit from the transaction, it is generally reasonable to infer that people who nonetheless went ahead with the transaction did not understand those material risks or costs.

Inability of Consumers to Protect their Interests

The second circumstance, of which entities cannot take "unreasonable advantage," as defined in the CFPA, concerns "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service." When people are unable to protect their interests in selecting or using a consumer financial product or service, they can lack autonomy. In these situations, there is a risk that entities will take unreasonable advantage of the *unequal bargaining power*. Thus, Congress has outlawed taking unreasonable advantage of circumstances where people lack sufficient bargaining power to protect their interests. Such circumstances may occur at the time of, or prior to, the person selecting the product or service, during their use of the product or service, or both.

The consumer "interests" contemplated in section 1031(d)(2)(B) include monetary and non-monetary interests, including but not limited to property, privacy, or reputational interests. People also have interests in limiting the amount of time or effort necessary to obtain consumer financial products or services or remedy problems related to those products or services. This includes, but is not limited to, the time spent trying to obtain customer support assistance.

A consumer's "inability" to protect their interests includes situations when it is impractical for them to protect their interests in selecting or using a consumer financial product or service. For example, when the steps a person would need to take to protect their interests are unknown to the person or are especially onerous, they are likely unable to protect their interest. Furthermore, people who do not have monetary means may be unable to protect their interests if the only practical method for doing so requires payment of money. Of course, merely serving people without monetary means is not abusive. However, it may be abusive to take unreasonable advantage of a person's lack of monetary means to protect their interests.

The nature of the customer relationship may also render consumers unable to protect their interests in selecting or using a consumer financial product or service. People are often unable to protect their interests when they do not elect to enter into a relationship with an entity and cannot elect to instead enter into a relationship with a competitor. These consumer relationships, including but not limited to those with credit reporting companies, debt collectors, and third-party loan servicers, are generally structured such that people cannot exercise meaningful choice in the selection or use of any particular entity as a provider. In these circumstances, people cannot protect their interests by choosing an alternative provider either upfront (i.e., they have no ability to select the provider to begin with) or during the course of the customer relationship (i.e., they have no competitive recourse if they encounter difficulty with the entity while using the product or service). Obviously, such relationships are not *per se* abusive; however, entities may not take unreasonable advantage of the absence of choice in these types of relationships. In addition, entities may not take unreasonable advantage of the fact that they are the only source for important information or services.

Consumers may also lack power to protect their interests in selecting or using a consumer financial product or service when entities use form contracts, where contractual provisions are not subject to a consumer choice. Similarly, where the person is unable to bargain over a clause because it is non-negotiable, they may be deprived of the ability to protect their interests.

Consumers are often unable to protect their interests in selecting or using a consumer financial product or service where companies have outsized market power. When an entity's market share, the concentration in a market more broadly, or the market structure prevents people from protecting their interests by choosing an entity that offers competitive pricing, entities may not use their market power to their "unreasonable advantage."

In addition, people are often unable to protect their interests in using a product or service if they face high transaction costs to exit the relationship. For example, the time, effort, cost, or risks associated with extricating oneself from a relationship with entities may effectively lock people into the relationship.

Reasonable Reliance

The third circumstance, of which entities cannot take "unreasonable advantage," as defined in the CFPA, concerns "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." This basis for finding abusiveness recognizes that sometimes people are in a position in which they have a reasonable expectation that an entity will act in their interest to make decisions for them, or to advise them on how to make a decision. Where people reasonably expect that a covered entity will make decisions or provide advice in the person's interest, there is potential for betrayal or exploitation of the person's trust. Therefore, Congress prohibited taking unreasonable advantage of reasonable *consumer reliance*. There are a number of ways to establish reasonable reliance, including but not limited to the two described below.

First, reasonable reliance may exist where an entity communicates to a person or the public that it will act in its customers' best interest, or otherwise holds itself out as acting in the person's best interest. Where an entity communicates to people that it will act in their best interest, or otherwise holds itself out as doing so, including through statements, advertising, or any other means, it is generally reasonable for people to rely on the entity's explicit or implicit representations to that effect. People reasonably assume entities are telling the truth. The entity in these situations creates an expectation of trust and the conditions for people to rely on the entity to act in their best interest.

Second, reasonable reliance may also exist where an entity assumes the role of acting on behalf of consumers or helping them to select providers in the market. In certain circumstances entities assume the role of acting on behalf of people as their agents or representatives, and people should be able to rely on those entities to act on their behalf. In other circumstances entities often act as intermediaries to help people navigate marketplaces for consumer financial products or services. In these situations, the entity, acting as an intermediary, can function as a broker or other trusted source that the person uses in selecting, negotiating for, or otherwise facilitating the procurement of consumer financial products or services provided by third parties. Where the entity's role in the marketplace is to perform these kinds of intermediary functions, people should be able to rely on the entity to do so in a manner that is free of manipulation. In both circumstances, entities that engage in certain forms of steering or self-dealing may be taking unreasonable advantage of the consumers' reasonable reliance.

What You Need to Do:

Since the enactment of the CFPA, government enforcers and supervisory agencies have taken dozens of actions to condemn prohibited abusive conduct. The CFPB is issuing this Policy Statement to summarize those actions and explain how the CFPB analyzes the elements of abusiveness through relevant examples. There are two abusiveness prohibitions and can be summarized at a high level as: (1) obscuring important features of a product or service, or (2) leveraging certain circumstances to take an unreasonable advantage.

The first abusiveness prohibition concerns situations where an entity "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service." Material interference can be shown when an act or omission is intended to impede consumers' ability to understand terms or conditions, has the natural consequence of impeding consumers' ability to understand, or actually impedes understanding.

The second form of "abusiveness" under the CFPA prohibits entities from taking unreasonable advantage of certain circumstances. Congress determined that it is an abusive act or practice when an entity takes unreasonable advantage of three particular circumstances.

Everyone should review this information, share and train and train appropriate team members.

FDIC: Supervisory Guidance on Charging Overdraft Fees for Authorize Positive, Settle Negative Transactions (April 26, 2023)

Link

https://www.fdic.gov/news/financial-institution-letters/2023/fil23019a.pdf

Text

The Federal Deposit Insurance Corporation (FDIC) is issuing guidance to ensure that supervised institutions are aware of the consumer compliance risks associated with charging an overdraft fee on a transaction that was authorized against a positive balance but settled against a negative balance, a practice commonly referred to as "Authorize Positive, Settle Negative" (APSN). The FDIC previously identified concerns with this practice in its June 2019 Consumer Compliance Supervisory Highlights. This guidance expands on the 2019 Supervisory Highlights article by discussing the FDIC's concerns with both the available and ledger balance methods used by institutions when assessing overdraft fees. This guidance also clarifies that disclosures describing transaction processing may not mitigate these concerns.

Background

Overdraft programs, transaction clearing, and settlement processes are complex. In the case of APSN transactions, which involve consumers being assessed overdraft fees for transactions where they had sufficient account balances at the time the transactions were initiated, it may not be possible for consumers to determine when fees will be assessed and how they may be avoided.

Financial institutions' processing systems generally use either a ledger balance method or an available balance method, including for the purpose of assessing overdraft-related fees. An account's available balance may be impacted by pending debit transactions. Some banks assess overdraft fees on debit card transactions that authorize when a customer's available balance is positive but later post to a customer's account when their balance is negative. In this scenario, a customer's account has a sufficient available balance to cover a debit card transaction when the transaction is authorized but, due to one or more intervening transactions, has an insufficient balance to cover the transaction at the time it settles.

In addition to assessing an overdraft fee on the APSN transaction, some banks also assess overdraft fees on intervening transactions that exceed the customer's account balance. In this scenario, for example, the bank reduces a customer's balance to account for the initial authorized debit card transaction, and subsequently, an intervening transaction further reduces the customer's available balance so that the account no longer has a sufficient balance. The bank charges an overdraft fee on both the intervening transaction and the initial APSN transaction when posted to the customer's account.

During consumer compliance examinations, the FDIC has determined that certain overdraft practices related to APSN transactions were unfair.

Potential Risks

Failure to take steps to avoid assessing overdraft-related fees when transactions are authorized on positive balances but settle on negative balances results in heightened risks of violations of Section 1036(a)(1)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. § 5536(a)(1)(B)), which prohibits any covered person or service provider from engaging in any unfair, deceptive, or abusive acts or practices in connection with a consumer financial product or service (Dodd-Frank UDAAP) and Section 5 of the Federal Trade Commission (FTC) Act, which prohibits unfair or deceptive acts or practices (FTC UDAP). The FDIC applies the same standards as the Consumer Financial Protection Bureau (CFPB) and FTC in determining whether an act or practice is unfair under the respective statutes. An act or practice is unfair when it (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition. Public policy may also be considered in the analysis of whether a particular act or practice is unfair.

Unanticipated and unavoidable overdraft fees can cause substantial injury to consumers. A consumer is likely to suffer injury when charged more overdraft fees than may have been anticipated based on the consumer's actual spending. While not all overdraft fees may be attributable to APSN transactions, the likely presence of intervening transactions may cause additional injury.

The consumer cannot reasonably avoid the injury because the consumer does not have the ability to effectively control payment systems and overdraft processing systems practices. Due to the complicated nature of overdraft processing systems and payment system complexities outside the consumer's control, consumers may be unable to avoid injury. Additionally, in some cases, the institutions' methodology for assessing overdraft fees on APSN transactions resulted in unanticipated and unavoidable overdraft fees that were not outweighed by a countervailing benefit to consumers or competition. Dodd-Frank UDAAP and FTC UDAP risks exist in both available balance and ledger balance methods of assessing overdraft fees, but may be more pronounced in situations where institutions use available balance methods. For example, the use of available balance to assess overdraft fees may exacerbate the injury, as temporary holds may lead to consumers being assessed multiple overdraft fees when they may have reasonably expected only one.

Risk Mitigation Practices

Institutions are encouraged to review their practices regarding the charging of overdraft fees on APSN transactions to ensure customers are not charged overdraft fees for transactions consumers may not anticipate or avoid.

Third parties often play significant roles in processing transactions, identifying and tracking balances at the time of authorization, and providing systems that determine when overdraft fees are assessed. Institutions should ensure overdraft programs provided by third parties are compliant with all applicable laws and regulations. Such third-party arrangements may present risks if not properly managed by financial institution management. Institutions are encouraged to review these third party arrangements, as institutions are expected to maintain adequate oversight of third-party activities and appropriate quality control over products and services provided through third-party arrangements. Institutions are also encouraged to review and understand the risks presented from third-party system settings for overdraft-related fees, as well as understand the capabilities of their core processing system(s), such as identifying and tracking transactions authorized on a positive balance but settled on a negative balance and maintaining data on such transactions. Some third parties offer data processing system enhancements aimed at preventing overdraft-related fees from being charged for a transaction when a debit hold authorizes against a positive balance. Note that some third parties may offer these enhancements as optional or require client financial institutions to take action in order to implement them.

In addition, institutions are also generally encouraged to review disclosures and account agreements to ensure the financial institution's practices for charging any fees on deposit accounts are communicated accurately, clearly, and consistently. However, disclosures generally do not fully address Dodd-Frank UDAAP and FTC UDAP risks associated with APSN transactions and related overdraft fees.

What You Need to Do:

This guidance expands on the 2019 Supervisory Highlights article by discussing the FDIC's concerns with both the available and ledger balance methods used by institutions when assessing overdraft fees. This guidance also clarifies that disclosures describing transaction processing may not mitigate these concerns.

Financial institutions are encouraged to review disclosures and account agreements to ensure the financial institution's practices for charging any fees on deposit accounts are communicated accurately, clearly, and consistently.

OCC: Guidance on Overdraft Protection Programs (April 26, 2023)

Link

https://www.occ.gov/news-issuances/bulletins/2023/bulletin-2023-12.html

Text

Summary

The Office of the Comptroller of the Currency (OCC) is issuing this bulletin to banks to address the risks associated with overdraft protection programs. Overdraft protection programs can present a variety of risks, including compliance, operational, reputation, and credit risks. Specifically, this bulletin discusses certain practices that may present heightened risk of violating prohibitions against unfair or deceptive acts or practices.

The bulletin also describes practices that may assist banks with managing overdraft protection program risks. When supported by appropriate risk management practices, overdraft protection programs may assist some consumers in meeting short-term liquidity and cash-flow needs. The OCC recognizes that some banks have announced changes to their overdraft protection programs that may be consistent with appropriate risk management practices.

This bulletin's focus is consistent with the OCC's mission to ensure that banks operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations. This bulletin also furthers the OCC's support for innovation by banks to meet the evolving needs of consumers, businesses, and communities.

Background

The OCC and other agencies set out safety and soundness considerations, legal risks, and best practices for overdraft protection programs in the "Joint Guidance on Overdraft Protection Programs" (2005 Guidance) conveyed by OCC Bulletin 2005-9, "Overdraft Protection Programs: Interagency Guidance." The agencies issued the 2005 Guidance to address concerns raised by institutions, financial supervisors, and the public about the marketing, disclosure, and implementation of overdraft protection programs. Since 2005, the OCC has observed significant developments in the consumer banking landscape, such as

- changes in overdraft protection program-related legal requirements and consumer behavior, including the increased and more frequent use of overdrafts as, in effect, a form of short-term credit.
- overdraft protection programs resulting in consumers paying high costs relative to the face value of items being presented and to deposit amounts and average account balances.

The OCC continues to observe evolution in the consumer banking landscape, such as

- banks offering deposit accounts that do not allow overdrafts.
- banks offering deposit accounts with no fees for overdrafts.

- banks reducing the amount of overdraft fees in existing overdraft protection programs.
- ongoing efforts by banks and other stakeholders to identify opportunities for modifying existing overdraft protection programs in ways to manage the risks of such programs.

The OCC encourages banks to explore offering low-cost accounts, as well as other lower-cost alternatives for covering overdrafts, such as overdraft lines of credit and linked accounts. The OCC recognizes, however, that some consumers with short-term liquidity needs may benefit from the availability of funds from overdraft protection programs via deposit accounts.

Based on examinations of overdraft protection programs at a number of banks in recent years, the OCC has observed that certain overdraft protection program practices may present a heightened risk of violations of Section 5. These include practices known as APSN and representment fees.

Authorize Positive, Settle Negative Fee Practices

Banks generally maintain a "ledger balance" and an "available balance" on customer deposit accounts for numerous purposes, including assessing overdraft fees. The ledger balance refers to the actual amount of funds in a customer's deposit account after accounting for all items that have settled and posted. The available balance generally reflects the ledger balance minus "holds" for recently deposited funds that have not yet cleared and for authorized but pending debit card transactions. Some banks assess overdraft fees on debit card transactions that authorize when a customer's available balance is positive but that later post to the account when the available balance is negative.

In this scenario, a customer's account has a sufficient available balance to cover a debit card transaction when the transaction is authorized but, due to one or more intervening transactions, has an insufficient available balance to cover the transaction at the time it settles. This is commonly referred to as an APSN transaction. In addition to assessing an overdraft fee on the APSN transaction, some banks also assess an overdraft fee on intervening transactions that exceed the customer's available balance. In this scenario, for example, the bank reduces a customer's available balance by an amount that is more than, equal to, or less than the initial authorized debit card transaction, and subsequently, an intervening transaction further reduces the customer's available balance so that the account no longer has a sufficient available balance. The bank charges an overdraft fee on both the intervening transaction and the initial APSN transaction when posted to the customer's account.

The OCC has reviewed a number of overdraft protection programs that assess overdraft fees on APSN transactions. In some instances, the OCC has found account materials to be deceptive, for purposes of Section 5, with respect to the banks' overdraft fee practices. In these instances, misleading disclosures contributed to findings that the APSN practice was also unfair for purposes of Section 5. In addition, and based on subsequent analysis, even when disclosures described the circumstances under which consumers may incur overdraft fees, the OCC has found that overdraft fees charged for APSN transactions are unfair for purposes of Section 5 because consumers were still unlikely to be able to reasonably avoid injury and the facts met the other factors for establishing unfairness.

The OCC recognizes that compliance risk may exist when banks assess overdraft fees based on either a negative ledger balance or negative available balance for APSN transactions.

Representment Fee Practices

When a bank receives a check or automated clearing house (ACH) transaction that is presented for payment from a customer's deposit account, and the account has insufficient funds to pay the check or ACH transaction, the bank may decline to pay the transaction and charge the customer an NSF fee. If the same check or ACH transaction is presented to the bank again and the customer's account still has insufficient funds, some banks will either again return the transaction unpaid and assess an additional NSF fee or pay the transaction and assess an overdraft fee. This practice of charging an additional fee each time a single transaction (e.g., ACH transaction or check) is presented for payment by a third party without further action by the customer contributes to customer costs in circumstances in which those customers cannot reasonably avoid the additional charges. Through ongoing supervision, the OCC has identified concerns with a bank's assessment of an additional fee on a representment transaction, resulting in findings in some instances that the practice was unfair and deceptive. Disclosures may be deceptive, for purposes of Section 5, if they do not clearly explain that multiple or additional fees (NSF or overdraft) may result from multiple presentments of the same transaction. Even when customer disclosures explain that a single check or ACH transaction may result in more than one fee, a bank's practice of assessing fees on each representment may also be unfair, for purposes of Section 5, if consumers cannot reasonably avoid the harm and the other factors for establishing unfairness under Section 5 are met. Consumers typically have no control over when a returned ACH transaction or check will be presented again and lack knowledge of whether an intervening deposit will be sufficient to cover the transaction and related fees.

Additional Practices That May Present Heightened Risk

- **High limits or lack of daily limits on the number of fees assessed:** In the OCC's supervisory experience, charging overdraft or NSF fees with a high limit (or without limit) for multiple transactions in a single day has contributed to determinations that banks' overdraft protection programs as a whole were unfair for purposes of Section 5 because the lack of limits results in high costs for consumers and difficulty in bringing accounts positive.
- **Sustained overdraft fees:** In the OCC's supervisory experience, charging a fixed, periodic fee for failure to cure a previous overdrawn balance has contributed to findings of unfairness and deception, for purposes of Section 5, especially when the bank does not accurately disclose the circumstances under which the customer could incur these fees. These practices make it more difficult for customers facing liquidity challenges to reasonably avoid these fees by bringing their account balances positive.

Risk Management Practices

A bank's risk management systems should be commensurate with the bank's size, complexity, and risk profile. Therefore, as part of sound risk management of overdraft protection programs, the OCC encourages a bank to assess and analyze the risks posed by the bank's overdraft protection program activities; adjust the bank's risk management practices; and incorporate oversight of overdraft protection programs into the bank's compliance management system. An effective compliance management system typically should include processes and practices designed to manage compliance risk, ensure compliance with applicable laws and regulations, and prevent consumer harm.

Board and Management Oversight

A bank's board of directors has ultimate responsibility for overseeing management's implementation of a bank's overdraft protection program. Effective board and management oversight generally includes

- setting and confirming the bank's strategic approach and risk appetite for offering overdraft protection programs.
- providing guidance to senior management.
- ensuring that the bank has an effective change management process.
- performing ongoing monitoring to self-identify and self-correct weaknesses.
- monitoring the program's performance and measures relative to the bank's objectives and risk appetite.
- periodically reviewing information on a bank's overdraft protection program, including an assessment of customer impacts and overdraft product analyses to confirm that these services are fair and transparent.
- ensuring proper and accurate customer disclosures.

Bank management is responsible for developing, implementing, and effectively managing overdraft protection programs in line with the board's direction, the bank's objectives, and the bank's risk appetite, and in compliance with all applicable laws and regulations. Sound risk management generally should include appropriate policies, processes, personnel, and control systems that focus on consumer protection requirements and consider customer outcomes.

New Activities Processes and Third-Party Risk Management

Banks should have processes in place to manage the risks associated with offering new, modified, or expanded products or services (collectively, new activities), including new overdraft protection programs or changes to existing overdraft protection programs. Effective new activity development processes typically consider the financial attributes of consumers using the products, consumer disclosures, use of new technologies, use of alternative underwriting information, and use of third-party relationships. An effective risk management program should be in place if banks use third-party relationships as part of their overdraft protection programs. Third-party relationships include a bank's arrangement with its service providers that often play a significant role in processing and reprocessing transactions, processing of payments, and providing systems that determine when overdraft or NSF fees are assessed.

Policies, Processes, and Control Systems

A bank's processes and control systems should align with established policies and incorporate appropriate procedures and practices for managing risks associated with overdraft protection programs. The following non-exhaustive list outlines examples of potentially appropriate risk management practices that banks may consider adopting:

- **Eligibility:** Overdraft limits and account agreement terms that are aligned with eligibility and underwriting criteria that promote fair treatment and fair access. Product structures, including short-term single payment structures, support consumer affordability and successful repayment of negative account balances in a reasonable time frame rather than reliance on regular or repeated reborrowing.

- **Opt-in status:** Policies and procedures that fully comply with the requirements of 12 CFR 1005.17 for one-time debit card and automated teller machine transactions. Policies and procedures should address compliance with these requirements. For other types of transactions (e.g., paper checks and recurring ACH or debit card transactions), consumers are provided the opportunity to affirmatively opt in to and opt out of overdraft protection at any time.

- **Consumer disclosures:** Disclosures that effectively convey policies and practices related to accounts and products offered to consumers via transparent, understandable, and timely communication of account features. These disclosures support informed decision making with regard to overdraft protection programs and their related costs. Banks periodically test operating system settings and parameters to determine whether transaction postings are aligned to disclosures.

- **Overdraft protection product analysis:** A process for reviewing data and analyzing whether overall overdraft protection program revenues are reasonably related to the product risks and costs, as appropriate, at the portfolio, account, and transaction levels. Such analyses can also inform (1) modifications to overdraft protection programs intended to support a bank's longer-term competitive position, consumer satisfaction levels, and customer retention activities; and (2) a bank's evaluation of the effect of any implemented modifications.

- **Periodic account analysis:** Processes to periodically review accounts of customers who use overdraft protection programs on a regular basis. The objectives of this review are primarily to confirm that customers

  - are provided with readily accessible and understandable tools and information to assist in managing their finances.

  - are not routinely relying on overdraft protection programs.

  - receive fair treatment.

  - are not incurring disproportionate costs relative to the face value of the item being presented, the amount of their regular deposits, and their average account balances.

- **Account monitoring:** Periodic account analyses that result in appropriate changes to overdraft limits, eligibility for continued use, or recommendations to consumers for other appropriate deposit account services when overreliance, excessive costs, or options for more cost-effective credit usage are detected. Overdraft limits and any changes to overdraft limits are clearly and timely communicated to consumers.

- **Grace amounts:** Grace amounts, or de minimis exclusions from fees that are based on transaction size or the magnitude of the overdrawn balance, are meaningful and periodically reviewed.

- **Grace periods:** Grace periods that provide additional time before the assessment of fees sufficient for customers to address a potential or actual negative account balance through an additional deposit or transfer of funds.

- **Online access and timely automated alerts:** Processes to send consumers accurate information in real or near real time through online account access or electronic alerts, such as text messages, online or web-based applications, or emails. In certain circumstances, these technologies may provide opportunities for customers to react to and address negative balances or items being presented for settlement to avoid fees.
- **Single daily fee:** Single daily fee assessments that are reasonably related to the costs of providing either overdraft protection or returned item for NSF services, offer effective transparency to customers, and eliminate confusion caused by item-posting order protocols or the use of available account balances.
- **Timing of fee collection:** A practice of collecting fees related to overdraft protection or NSF services from the next deposit only after all other appropriately presented items have posted or cleared to ensure that a greater amount of the consumers' deposited funds is available for consumer use.
- **Complaints management:** Incorporating overdraft protection-related complaints into a bank's complaint management and resolution processes, which should be commensurate with the bank's size, complexity, and risk profile. Processes should include steps to analyze complaint data and to detect and remediate concerns or problem areas, including potential unfair or deceptive acts or practices or unfair, deceptive, or abusive acts or practices.

Corrective Action

The OCC encourages banks to have processes in place to identify and correct risk management weaknesses and violations of laws and regulations. OCC violation findings at specific banks related to overdraft protection programs have typically led to corrective action, including remediation to harmed consumers. The OCC encourages banks to review their overdraft protection programs and related practices to ensure that banks comply with Section 5 and other applicable laws and regulations and take corrective action as appropriate.

Further Information

Please contact Candace B. Matzenauer, Director for Consumer Compliance Policy, at (202) 649-5470, or Terence W. Culler, Director for Retail Credit Risk Policy, at (202) 649-6670.

What You Need to Do:

This bulletin describes practices that may assist banks with managing overdraft protection program risks. The OCC encourages banks to explore offering low-cost accounts, as well as other lower-cost alternatives for covering overdrafts, such as overdraft lines of credit and linked accounts. If you are an OCC supervised institution, please review and share with appropriate team members.

CFPB: Consumer Financial Protection Circular 2023-02; Reopening Deposit Accounts that Consumers Previously Closed (May 10, 2023)

Link

https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2023-02-reopening-deposit-accounts-that-consumers-previously-closed/

Text

Question Presented

After consumers have closed deposit accounts, if a financial institution unilaterally reopens those accounts to process a debit (*i.e.*, withdrawal, ACH transaction, check) or deposit, can it constitute an unfair act or practice under the Consumer Financial Protection Act (CFPA)?

Response

Yes. After consumers have closed deposit accounts, if a financial institution unilaterally reopens those accounts to process debits or deposits, it can constitute an unfair practice under the CFPA. This practice may impose substantial injury on consumers that that they cannot reasonably avoid and that is not outweighed by countervailing benefits to consumers or competition.

Background

Consumers may elect to close a deposit account for a variety of reasons. For example, after moving to a new area, a consumer may elect to use a new account that they opened with a different financial institution that has a branch close to their new home. A consumer also might close an account because they are not satisfied with the account for another reason, such as the imposition of fees or the adequacy of customer service.

The process of closing a deposit account often takes time and effort. For example, closing an account typically involves taking steps to bring the account balance to zero at closure. The financial institution typically returns any funds remaining in the account to the consumer at closure and the consumer typically must pay any negative balance at closure. Some institutions require customers to provide a certain period of notice (*e.g.*, a week) prior to closing the account to provide time for the financial institution to process any pending debits or deposits. Deposit account agreements typically indicate that the financial institution may return any debits or deposits to the account that the financial institution receives after closure and faces no liability for failing to honor any debits or deposits received after closure.

Sometimes after a consumer completes all of the steps that the financial institution requires to initiate the process of closing a deposit account and the financial institution completes the request, the financial institution unilaterally reopens the closed account if the institution receives a debit or deposit to the closed account. Financial institutions sometimes reopen an account even if doing so would overdraw the account, causing the financial institution to impose overdraft and non-sufficient funds (NSF) fees. Financial institutions may also charge consumers account maintenance fees upon reopening, even if the consumers were not required to pay such fees prior to account closure (*e.g.*, because the account previously qualified to have the fees waived).

In addition to subjecting consumers to fees, when a financial institution processes a credit through an account that has reopened, the consumer's funds may become available to third parties, including third parties that do not have permission to access their funds.

The Consumer Financial Protection Bureau (CFPB) has brought an enforcement action regarding the practice of account reopening under the CFPA's prohibition against unfair, deceptive, or abusive practices. The CFPB found that a financial institution engaged in an unfair practice by reopening deposit accounts consumers had previously closed without seeking prior authorization or providing timely notice. This practice of reopening closed deposit accounts caused some account balances to become negative and potentially subjected consumers to various fees, including overdraft and NSF fees. In addition, when the financial institution reopened an account to process a deposit, creditors had the opportunity to initiate debits to the account and draw down the funds, possibly resulting in a negative balance and the accumulation of fees. These practices resulted in hundreds of thousands of dollars in fees charged to consumers. The CFPB concluded that the institution's practice of reopening consumer accounts without obtaining consumers' prior authorization and providing timely notice caused substantial injury to consumers that was not reasonably avoidable or outweighed by any countervailing benefit to consumers or to competition.

Analysis

A financial institution's unilateral reopening of deposit accounts that consumers previously closed can constitute a violation of the CFPA's probation on unfair acts or practices.

Under the CFPA, an act or practice is unfair when it causes or is likely to cause consumers substantial injury that is not reasonably avoidable by consumers and the injury is not outweighed by countervailing benefits to consumers or to competition.

<u>Unilaterally reopening a closed deposit account to process a debit or deposit may cause substantial injury to consumers.</u>

Substantial injury includes monetary harm, such as fees paid by consumers due to the unfair practice. Actual injury is not required; significant risk of concrete harm is sufficient. Substantial injury can occur when a small amount of harm is imposed on a significant number of consumers.

After a consumer has closed a deposit account, a financial institution's act of unilaterally reopening that account upon receiving a debit or deposit may cause monetary harm to the consumer. Financial institutions frequently charge fees after they reopen an account. For example, consumers may incur penalty fees when an account that they closed is reopened by the financial institution after receiving a debit or deposit. Since financial institutions typically require a zero balance to close an account, reopening a closed account to process a debit is likely to result in consumers incurring penalty fees.

In addition to fees, reopening a consumer's account to accept a deposit increases the risk that an unauthorized third party may gain access to the consumer's funds (*e.g.*, a person with the consumer's account information who pulls funds from the account without the consumer's authorization).

And if reopening the account overdraws the account and the consumer does not repay the amount owed quickly, the financial institution may furnish negative information to consumer reporting companies, which may make it harder for the consumer to obtain a deposit account in the future. Because reopening accounts that the consumer closed gives rise to these risks of monetary harm, this practice may cause substantial injury.

***Consumers likely cannot reasonably avoid this injury*.**

An injury is not reasonably avoidable by consumers when consumers cannot make informed decisions or take action to avoid that injury. Injury that occurs without a consumer's knowledge or consent, when consumers cannot reasonably anticipate the injury, or when there is no way to avoid the injury even if anticipated, is not reasonably avoidable.

Consumers often cannot reasonably avoid the risk of substantial injury caused by financial institutions' practice of unilaterally reopening accounts that consumers previously closed because they cannot control one or more of the following circumstances: a third party's attempt to debit or deposit money, the process and timing of account closure, or the terms of the deposit account agreements.

First, without the consumer's consent or knowledge, a third party may attempt to debit from or deposit to the closed account, prompting their previous financial institution to reopen the account. For example, a payroll provider may inadvertently send a consumer's paycheck to the closed account, even if the consumer informed the payroll provider about the account closure and directed them to deposit their paycheck in a new account. Similarly, a merchant may take an extended amount of time to process a refund to a customer's account for a returned item or may use the wrong account information to process a recurring monthly payment. Consumers cannot reasonably avoid these types of injuries resulting from these types of actions by a third party.

Second, financial institutions may require consumers to complete a multi-step process before closing a deposit account, which can involve completing paperwork in person, returning or destroying any access devices, bringing the balance to zero, and fulfilling waiting periods. When consumers begin this process, they likely will not know exactly when the financial institution will fulfill their request to close the account. Consumers, for example, do not control waiting periods or the length of time it takes a financial institution to settle transactions to bring a balance to zero. Consumers' lack of control over the financial institution's account closure process and timeline may make it more difficult for them to prevent debits and credits that will reopen the account, since the account may close earlier than they expect.

Finally, consumers may not have a reasonable alternative to financial institutions that permit this practice because most deposit contracts either permit or are silent on this practice. Further, to the extent that deposit account agreements allow or disclose such practices, these agreements typically are standard-form contracts prepared by financial institutions that specify a fixed set of terms. Consumers have no ability to negotiate the terms of these agreements. Instead, financial institutions present these contracts to consumers on a take-or-leave-it basis. Thus, even if deposit account agreements reference this practice, consumers also have limited ability to negotiate the terms of such contracts, and consumers can incur injuries in circumstances beyond their control. Moreover, even if the financial institution informs the consumer at the time that the account is closed that the institution may reopen the account, pursuant to the account agreement, the consumer will still generally lack the practical ability to control whether the account will be reopened and to avoid fees and other monetary harms.

<u>This injury is likely not outweighed by countervailing benefits to consumers or competition.</u>

Reopening a closed account does not appear to provide any meaningful benefits to consumers or competition. To the extent financial institutions are concerned about controlling their own costs to remain competitive, they have alternatives to reopening a closed account upon receiving a debit or deposit that could minimize their expenses and liability. For example, the financial institution could decline any transactions that they receive for accounts consumers previously closed. In addition to minimizing the institution's costs, not reopening these accounts may protect the financial institution against the use of closed accounts to commit fraud.

Moreover, consumers do not generally benefit when a financial institution unilaterally reopens an account that consumers previously closed. Since financial institutions typically require consumers to bring the account balance to zero before closing an account, reopening an account in response to a debit will likely result in penalty fees rather than payment of an amount owed by the consumer. While consumers might potentially benefit in some instances where their accounts are reopened to receive deposits, which then become available to them, that benefit does not outweigh the injuries that can be caused by unilateral account reopening. Such benefits are unlikely to be significant because consumers can generally receive the same deposits in another way that they would prefer (such as through a new account that they opened to replace the closed account). And those uncertain benefits are outweighed by the risk that deposited funds will be depleted before the consumer can access (or is even aware of) the funds (*e.g.*, through maintenance or other fees assessed by the financial institution as a result of the reopening or debits from the reopened account by third parties).

Further, not reopening accounts may benefit consumers in certain circumstances. For example, declining a deposit submitted to a closed account alerts the fund's sender that they have incorrect account information and may encourage the sender to contact the consumer to obtain updated account information. Declining a debit also provides an opportunity for the sender of the debit to inform the consumer of any erroneous account information, providing the consumer with the opportunity to make the payment with a current account or through another process.

For these reasons, government enforcers should consider whether a financial institution has violated the prohibition against unfair acts or practices in the CFPA if they discover that a financial institution has unilaterally reopened accounts that consumers previously closed.

What You Need to Do:

This is generally informational; however, review and share with appropriate team members.

CFPB: NSF Revenue Down Nearly 50% Versus Pre-pandemic Levels (May 24, 2023)

Link

https://www.consumerfinance.gov/data-research/research-reports/data-spotlight-overdraft-nsf-revenue-in-q4-2022-down-nearly-50-versus-pre-pandemic-levels/full-report/

Text

For the past year-and-a-half, CFPB has been closely monitoring trends in overdraft/non-sufficient fund (NSF) fee revenue and practices. With data now available for all four quarters of 2022, we have a fuller picture of reductions in these revenues compared to pre-pandemic levels. Our most recent analysis finds the following:

- Overdraft/NSF revenue for the fourth quarter of 2022 alone was approximately $1.5 billion lower than in the fourth quarter of 2019 – a decrease of 48% compared to before the pandemic, suggesting an annual reduction of over $5.5 billion going forward. This decrease suggests average annual savings of more than $150 per household that incurs overdraft or NSF fees; many households that have typically paid a high number of overdraft or NSF fees annually have saved much more.
- Even with this substantial reduction, consumers paid over $7.7 billion in 2022 in overdraft/NSF fees.
- Evidence continues to suggest that financial institutions are not increasing other checking account fees to compensate for reduced overdraft/NSF revenue. Across all reporting banks, combined account maintenance and ATM fees remained flat from 2019 to 2022.

This analysis of bank call report data follows our previous analyses of trends in checking account fee revenue published in December 2021, July 2022, and February 2023.

Editor's Note: Balance of this article is omitted.

What You Need to Do:

This is generally informational; you may wish to review the entire article and share with appropriate team members.

FDIC: Clarifying Supervisory Approach Regarding Supervisory Guidance on Multiple Re-Presentment NSF Fees (June 16, 2023)

Link

https://www.fdic.gov/news/financial-institution-letters/2023/fil23032a.pdf

Text

The Federal Deposit Insurance Corporation (FDIC) is issuing guidance to ensure that supervised institutions are aware of the consumer compliance risks associated with assessing multiple nonsufficient funds (NSF) fees arising from the re-presentment of the same unpaid transaction. Additionally, the FDIC is sharing its supervisory approach where a violation of law is identified and full corrective action is expected.

Background

Many financial institutions charge NSF fees when checks or Automated Clearinghouse (ACH) transactions are presented for payment, but cannot be covered by the balance in a customer's transaction account. After receiving notice of declination, merchants may subsequently resubmit the transaction for payment. Some financial institutions charge additional NSF fees for the same transaction when a merchant re-presents a check or ACH transaction on more than one occasion after the initial unpaid transaction was declined. In these situations, there is an elevated risk of violations of law and harm to consumers.

During consumer compliance examinations, the FDIC has identified violations of law when financial institutions charged multiple NSF fees for the re-presentment of unpaid transactions. The FDIC found that some disclosures provided to customers did not fully or clearly describe the institution's re-presentment practice, including not explaining that the same unpaid transaction might result in multiple NSF fees if an item was presented more than once.

Potential Risks Arising from Multiple Re-Presentment NSF Fees

<u>Consumer Compliance Risk:</u> Practices involving the charging of multiple NSF fees arising from the same unpaid transaction results in heightened risks of violations of Section 5 of the Federal Trade Commission (FTC) Act, which prohibits unfair or deceptive acts or practices (UDAP). While specific facts and circumstances ultimately determine whether a practice violates a law or regulation, the failure to disclose material information to customers about re-presentment and fee practices has the potential to mislead reasonable customers, and there are situations that may also present risk of unfairness if the customer is unable to avoid fees related to re-presented transactions.

<u>Deceptive Practices:</u> In a number of consumer compliance examinations, the FDIC determined that if a financial institution assesses multiple NSF fees arising from the same transaction, but disclosures do not adequately advise customers of this practice, the misrepresentation and omission of this information from the institution's disclosures is material. The FDIC found that if this information is not disclosed clearly and conspicuously to customers, the material omission of this information is considered to be deceptive pursuant to Section 5 of the FTC Act.

Unfair Practices: In certain circumstances, a failure to adequately advise customers of fee practices for re-presentments raises unfairness concerns because the practices may result in substantial injuries to customers; the injury may not be reasonably avoidable; and there may be no countervailing benefits to either customers or competition. In particular, a risk of unfairness may be present if multiple NSF fees are assessed for the same transaction in a short period of time without sufficient notice or opportunity for customers to bring their account to a positive balance in order to avoid the assessment of additional NSF fees. While revising disclosures may address the risk of deception, doing so may not fully address the unfairness risks.

Third-Party Risk: Third parties, including core processors, often play significant roles in processing payments, identifying and tracking re-presented items, and providing systems that determine when NSF fees are assessed. Such third-party arrangements may present risks if not properly managed. Institutions are expected to maintain adequate oversight of third-party activities and appropriate quality control over products and services provided through third-party arrangements. In addition, institutions are responsible for identifying and controlling risks arising from third-party relationships to the same extent as if the third-party activity was handled within the institution. Institutions are encouraged to review and understand the risks presented from their core processing system settings related to multiple NSF fees, as well as understand the capabilities of their core processing system(s), such as identifying and tracking re-presented items and maintaining data on such transactions.

Litigation Risk: Multiple NSF fee practices may result in heightened litigation risk. Numerous financial institutions, including some FDIC-supervised institutions, have faced class action lawsuits alleging breach of contract and other claims because of the failure to adequately disclose re-presentment NSF fee practices in their account disclosures. Some of these cases have resulted in substantial settlements, including customer restitution and legal fees.

Risk Mitigation Practices

Institutions are encouraged to review their practices and disclosures regarding the charging of NSF fees for re-presented transactions. The FDIC has observed various risk-mitigating activities that financial institutions have taken to reduce the potential risk of consumer harm and avoid potential violations of law regarding multiple re-presentment NSF fee practices. These include:

- Eliminating NSF fees.
- Declining to charge more than one NSF fee for the same transaction, regardless of whether the item is re-presented.
- Conducting a comprehensive review of policies, practices, and monitoring activities related to re-presentments and making appropriate changes and clarifications, including providing revised disclosures to all existing and new customers.
- Clearly and conspicuously disclosing the amount of NSF fees to customers and when and how such fees will be imposed, including:
  - Information on whether multiple fees may be assessed in connection with a single transaction when a merchant submits the same transaction multiple times for payment;
  - The frequency with which such fees can be assessed; and
  - The maximum number of fees that can be assessed in connection with a single transaction.

- Reviewing customer notification or alert practices related to NSF transactions and the timing of fees to ensure customers are provided with an ability to effectively avoid multiple fees for re-presented items, including restoring their account balance to a sufficient amount before subsequent NSF fees are assessed.

If institutions self-identify re-presentment NSF fee issues, the FDIC expects supervised financial institutions to:

- Take full corrective action, including providing restitution to harmed customers, consistent with the restitution approach described in this guidance;
- Promptly correct NSF fee disclosures and account agreements for both existing and new customers, including providing revised disclosures and agreements to all customers;
- Consider whether additional risk mitigation practices are needed to reduce potential unfairness risks; and
- Monitor ongoing activities and customer feedback to ensure full and lasting corrective action.

FDIC's Supervisory Approach

When exercising supervisory and enforcement responsibilities regarding multiple re-presentment NSF fee practices, the FDIC will take appropriate action to address consumer harm and violations of law. The FDIC's supervisory response will focus on identifying re-presentment related issues and ensuring correction of deficiencies and remediation to harmed customers, when appropriate.

In reviewing compliance management systems, the FDIC recognizes an institution's proactive efforts to self-identify and correct violations. Examiners will generally not cite UDAP violations that have been self-identified and fully corrected prior to the start of a consumer compliance examination. In addition, in determining the scope of any restitution requested, the FDIC will consider the likelihood of substantial consumer harm from the practice as well as an institution's record keeping practices and any challenges an institution may have with retrieving, reviewing, and analyzing transaction data or other information about the frequency and timing of representment fees.

If examiners identify violations of law due to re-presentment NSF fee practices that have not been self-identified and fully corrected prior to a consumer compliance examination, the FDIC will evaluate appropriate supervisory or enforcement actions, including civil money penalties and restitution, where appropriate.

What You Need to Do:

If you are FDIC-supervised, please review and share with appropriate team members.

Joint Agencies: List of Distressed or Underserved Nonmetropolitan Middle-Income Geographies (June 23, 2023)

Link

https://www.ffiec.gov/cra/PDF/2023DistressedorUnderservedTracts.pdf

Text

Federal bank regulatory agencies today made available the 2023 list of distressed or underserved nonmetropolitan middle-income geographies.

The Community Reinvestment Act (CRA) encourages banks to help meet the credit needs of their local communities, including low- and moderate- income communities, in a safe and sound manner. Distressed or underserved nonmetropolitan middle-income geographies are census tracts where revitalization or stabilization activities are eligible to receive CRA consideration. The designations reflect local economic conditions, including unemployment, poverty, and population changes. Previous years' lists and criteria for designating these areas are available here. (https://www.ffiec.gov/cra/distressed.htm)

Revitalization or stabilization activities in these geographies are eligible to receive CRA consideration under the community development definition for 12 months after publication of the current list. As with past lists, the agencies apply a one-year lag period for geographies that were included in 2022 but are no longer designated as distressed or underserved in the current list.

What You Need to Do:

Distressed or underserved nonmetropolitan middle-income geographies are census tracts where revitalization or stabilization activities are eligible to receive CRA consideration. See the appendix for your State's 2022 – 2023 List of Distressed or Underserved Nonmetropolitan Middle-Income Geographies. Please review and share with CRA Officer and other appropriate team members.

Joint Agencies: Statement on Completing the LIBOR Transition (April 26, 2023)

Link

https://www.fdic.gov/news/financial-institution-letters/2023/fil23020.html

Text

Summary

The Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the National Credit Union Administration (NCUA), and the Consumer Financial Protection Bureau (CFPB) in conjunction with the state bank and state credit union regulators (collectively, agencies) are jointly issuing this statement to remind supervised institutions that U.S. dollar (USD) London Inter-Bank Offered Rate (LIBOR) panels will end on June 30, 2023. The agencies also reiterate their expectations that institutions with USD LIBOR exposure should complete their transition of remaining LIBOR contracts as soon as practicable. As noted in prior interagency statements, failure to adequately prepare for LIBOR's discontinuance could undermine financial stability and institutions' safety and soundness and create litigation, operational, and consumer protection risks.

Joint Statement on Completing the LIBOR Transition

Purpose

Five federal financial institution regulatory agencies in conjunction with the state bank and state credit union regulators (collectively, agencies) are jointly issuing this statement to remind supervised institutions that U.S. dollar (USD) LIBOR panels will end on June 30, 2023. The agencies also reiterate their expectations that institutions with USD LIBOR exposure should complete their transition of remaining LIBOR contracts as soon as practicable. As noted in prior interagency statements, failure to adequately prepare for LIBOR's discontinuance could undermine financial stability and institutions' safety and soundness and create litigation, operational, and consumer protection risks.

Supervisory Considerations

The agencies expect institutions to have taken all necessary steps to prepare for an orderly transition away from LIBOR by June 30, 2023.

Expeditious transition of remaining legacy contracts

Institutions have reported significant progress in their LIBOR transition efforts; however, work remains for institutions to prepare for the end of the USD LIBOR panels. Institutions are encouraged to ensure that replacement alternative rates are negotiated where needed and in place in advance of June 30, 2023, for all LIBOR–referencing financial contracts including investments, derivatives, and loans. Institutions are also encouraged to work expeditiously with their customers and coordinate with other institutions as needed in these efforts.

In order to facilitate the transition, Congress enacted the Adjustable Interest Rate (LIBOR) Act (LIBOR Act) to provide a targeted solution for so–called "tough legacy contracts," which are contracts that reference USD LIBOR and will not mature by June 30, 2023, but which lack adequate fallback provisions providing for a clearly defined or practicable replacement benchmark following the cessation of USD LIBOR. In January 2023, the Federal Reserve Board published a regulation that implements the LIBOR Act.

Examiners will continue monitoring efforts through 2023 to ensure that institutions have moved their contracts away from LIBOR in a safe and sound manner and in compliance with applicable legal requirements.

Appropriate alternative rate selection

The agencies remind institutions that safe–and–sound practices include conducting the due diligence necessary to ensure that alternative rate selections are appropriate for the institution's products, risk profile, risk management capabilities, customer and funding needs, and operational capabilities. As part of their due diligence, institutions should understand how their chosen reference rate is constructed and be aware of any fragilities associated with that rate and the markets that underlie it.

What You Need to Do:

This is generally informational; please review and share with appropriate team members, if you use LIBOR in your bank.

CFPB: Interim Final Rule with Request for Comment; Facilitating the LIBOR Transition Consistent with the LIBOR Act (Regulation Z) (April 28, 2023)

Link

https://files.consumerfinance.gov/f/documents/cfpb_facilitating-libor-transition-libor-act-regulation-z_2023-04.pdf

Text

Summary

The Consumer Financial Protection Bureau (CFPB or Bureau) issued an interim final rule amending Regulation Z, which implements the Truth in Lending Act (TILA), to reflect the enactment of the Adjustable Interest Rate (LIBOR) Act (the LIBOR Act or Act) and its implementing regulation promulgated by the Board of Governors of the Federal Reserve System (Board). This interim final rule further addresses the planned cessation of most U.S. Dollar (USD) LIBOR tenors after June 30, 2023, by incorporating the Board-selected benchmark replacement for consumer loans into Regulation Z. This interim final rule conforms the terminology from the LIBOR Act and the Board's implementing regulation into relevant Regulation Z open-end and closed-end credit provisions and also addresses treatment of the 12- month USD LIBOR index and its replacement index, including permitting creditors to use alternative language in change-in-terms notice content requirements for situations where the 12- month tenor of the LIBOR index is being replaced consistent with the LIBOR Act. The CFPB requests public comment on this interim final rule.

DATES: This interim final rule is effective May 15, 2023. Comments must be received on or before June 12, 2023.

Editor's Note: We have only included the regulatory text for your review. The changes to the commentary are omitted as well. The balance of the information provided by the CFPB has been omitted.

Regulatory Text

PART 1026—TRUTH IN LENDING (REGULATION Z)

Subpart A—General

§ 1026.2 Definitions and rules of construction

(a) **Definitions.** * * *

(28) **The Board-selected benchmark replacement for consumer loans** means the SOFR-based index selected by the Board of Governors of the Federal Reserve System

to replace, as applicable, the 1-month, 3-month, 6-month, or 12-month tenor of U.S. Dollar LIBOR, as set forth in the Board of Governors of the Federal Reserve System's regulation at 12 CFR part 253, which implements the Adjustable Interest Rate (LIBOR) Act, Pub. L. 117-103, division U.

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Subpart E—Special Rules for Certain Home Mortgage Transactions

§ 1026.40 Requirements for home equity plans.

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(f) * * *

(3) * * *

(ii) * * *

(B) If a variable rate on the plan is calculated using a LIBOR index, change the LIBOR index and the margin for calculating the variable rate on or after April 1, 2022, to a replacement index and a replacement margin, as long as historical fluctuations in the LIBOR index and replacement index were substantially similar, and as long as the replacement index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on October 18, 2021, and the replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the creditor generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12- month U.S. Dollar LIBOR index, the creditor must use the index value on June 30, 2023, for the LIBOR index and, for the Board-selected benchmark replacement for consumer loans, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index.

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Subpart G—Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

§ 1026.55 Limitations on increasing annual percentage rates, fees, and charges.

* * * * *

(b) * * *

(7) * * *

(ii) If a variable rate on the plan is calculated using a LIBOR index, the card issuer changes the LIBOR index and the margin for calculating the variable rate on or after April 1, 2022, to a replacement index and a replacement margin, as long as historical fluctuations in the LIBOR index and replacement index were substantially similar, and as long as the replacement index value in effect on October 18, 2021, and replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is newly established and therefore does not have any rate history, it may be used if the replacement index value in effect on October 18, 2021, and the replacement margin will produce an annual percentage rate substantially similar to the rate calculated using the LIBOR index value in effect on October 18, 2021, and the margin that applied to the variable rate immediately prior to the replacement of the LIBOR index used under the plan. If the replacement index is not published on October 18, 2021, the card issuer generally must use the next calendar day for which both the LIBOR index and the replacement index are published as the date for selecting indices values in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index. The one exception is that if the replacement index is the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3- month, 6-month, or 12-month U.S. Dollar LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the Board-selected benchmark replacement for consumer loans, must use the index value on the first date that index is published, in determining whether the annual percentage rate based on the replacement index is substantially similar to the rate based on the LIBOR index.

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§ 1026.59 Reevaluation of rate increases.

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(f) * * *

(3) Effective April 1, 2022, in the case where the rate applicable immediately prior to the increase was a variable rate with a formula based on a LIBOR index, the card issuer reduces the annual percentage rate to a rate determined by a replacement formula that is derived from a replacement index value on October 18, 2021, plus replacement margin that is equal to the LIBOR index value on October 18, 2021, plus the margin used to calculate the rate immediately prior to the increase

(previous formula). A card issuer must satisfy the conditions set forth in § 1026.55(b)(7)(ii) for selecting a replacement index. If the replacement index is not published on October 18, 2021, the card issuer generally must use the values of the indices on the next calendar day for which both the LIBOR index and the replacement index are published as the index values to use to determine the replacement formula. The one exception is that if the replacement index is the Board-selected benchmark replacement for consumer loans to replace the 1-month, 3-month, 6-month, or 12-month U.S. Dollar LIBOR index, the card issuer must use the index value on June 30, 2023, for the LIBOR index and, for the Board-selected benchmark replacement for consumer loans, must use the index value on the first date that index is published, as the index values to use to determine the replacement formula.

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What You Need to Do:

This is generally informational; please review and share with appropriate team members, if your bank uses LIBOR.

Section 4: Third-Party Risk Management

Joint Agencies: Final Guidance on Third-Party Risk Management (June 6, 2023)

Editor's Note: This is not necessarily a compliance related topic. But we have included this topic due to its importance.

Link

https://www.govinfo.gov/content/pkg/FR-2023-06-09/pdf/2023-12340.pdf

Text

Federal bank regulatory agencies issued final joint guidance designed to help banking organizations manage risks associated with third-party relationships, including relationships with financial technology companies.

The final guidance describes principles and considerations for banking organizations' risk management of third-party relationships. The final guidance covers risk management practices for the stages in the life cycle of third-party relationships: planning, due diligence and third-party selection, contract negotiation, ongoing monitoring, and termination.

The final guidance includes illustrative examples to help banking organizations, particularly community banks, align their risk management practices with the nature and risk profile of their third-party relationships. The agencies plan to engage with community banks immediately and develop additional resources in the near future to assist them in managing relevant third-party risks.

The final guidance replaces each agency's existing general third-party guidance and promotes consistency in the agencies' supervisory approaches toward third-party risk management. The final guidance reflects streamlined language and improved clarity based on the agencies' consideration of public comments on the proposed guidance released in July 2021.

The guidance is final as of June 6, 2023.

Introduction

Banking organizations routinely rely on third parties for a range of products, services, and other activities (collectively, activities). The use of third parties can offer banking organizations significant benefits, such as quicker and more efficient access to technologies, human capital, delivery channels, products, services, and markets. Banking organizations' use of third parties does not remove the need for sound risk management. On the contrary, the use of third parties, especially those using new technologies, may present elevated risks to banking organizations and their customers, including operational, compliance, and strategic risks. Importantly, the use of third parties does not diminish or remove banking organizations' responsibilities to ensure that activities are performed in a safe and sound manner and in compliance with applicable laws and regulations, including but not limited to those designed to protect consumers (such as fair lending laws and prohibitions against unfair, deceptive or abusive acts or practices) and those addressing financial crimes.

The agencies have each previously issued general guidance for their respective supervised banking organizations to address appropriate risk management practices for third-party relationships, each of which is rescinded and replaced by this final guidance: the Board's 2013 guidance, the FDIC's 2008 guidance, and the OCC's 2013 guidance and its 2020 frequently asked questions (herein, OCC FAQs). By issuing this interagency guidance, the agencies aim to promote consistency in their third-party risk management guidance and to clearly articulate risk-based principles for third-party risk management. Further, the agencies have observed an increase in the number and type of banking organizations' third-party relationships. Accordingly, the final guidance is intended to assist banking organizations in identifying and managing risks associated with third-party relationships and in complying with applicable laws and regulations.

Text of Final Interagency Guidance on Third-Party Relationships

Overview

The Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) (collectively, the agencies) have issued this guidance to provide sound risk management principles supervised banking organizations can leverage when developing and implementing risk management practices to assess and manage risks associated with third-party relationships.

Whether activities are performed internally or via a third party, banking organizations are required to operate in a safe and sound manner and in compliance with applicable laws and regulations. A banking organization's use of third parties does not diminish its responsibility to meet these requirements to the same extent as if its activities were performed by the banking organization in-house. To operate in a safe and sound manner, a banking organization establishes risk management practices to effectively manage the risks arising from its activities, including from third-party relationships.

This guidance addresses any business arrangement between a banking organization and another entity, by contract or otherwise. A third-party relationship may exist despite a lack of a contract or remuneration. Third-party relationships can include, but are not limited to, outsourced services, use of independent consultants, referral arrangements, merchant payment processing services, services provided by affiliates and subsidiaries, and joint ventures. Some banking organizations may form third-party relationships with new or novel structures and features – such as those observed in relationships with some financial technology (fintech) companies. The respective roles and responsibilities of a banking organization and a third party may differ, based on the specific circumstances of the relationship. Where the third-party relationship involves the provision of products or services to, or other interaction with, customers, the banking organization and the third party may have varying degrees of interaction with those customers.

The use of third parties can offer banking organizations significant benefits, such as access to new technologies, human capital, delivery channels, products, services, and markets. However, the use of third parties can reduce a banking organization's direct control over activities and may introduce new risks or increase existing risks, such as operational, compliance, and strategic risks. Increased risk often arises from greater operational or technological complexity, newer or different types of relationships, or potential inferior performance by the third party. A banking organization can be exposed to adverse impacts, including substantial financial loss and operational disruption, if it fails to appropriately manage the risks associated with third-party relationships. Therefore, it is important for a banking organization to identify, assess, monitor, and control risks related to third-party relationships.

The principles set forth in this guidance can support effective third-party risk management for all types of third-party relationships, regardless of how they may be structured. It is important for a banking organization to understand how the arrangement with a particular third party is structured so that the banking organization may assess the types and levels of risks posed and determine how to manage the third-party relationship accordingly.

Risk Management

Not all relationships present the same level of risk, and therefore not all relationships require the same level or type of oversight or risk management. As part of sound risk management, a banking organization analyzes the risks associated with each third-party relationship and tailors risk management practices, commensurate with the banking organization's size, complexity, and risk profile and with the nature of the third-party relationship. Maintaining a complete inventory of its third-party relationships and periodically conducting risk assessments for each third-party relationship supports a banking organization's determination of whether risks have changed over time and to update risk management practices accordingly.

As part of sound risk management, banking organizations engage in more comprehensive and rigorous oversight and management of third-party relationships that support higher-risk activities, including critical activities. Characteristics of critical activities may include those activities that could:

- Cause a banking organization to face significant risk if the third party fails to meet expectations;
- Have significant customer impacts; or
- Have a significant impact on a banking organization's financial condition or operations.

It is up to each banking organization to identify its critical activities and third-party relationships that support these critical activities. Notably, an activity that is critical for one banking organization may not be critical for another. Some banking organizations may assign a criticality or risk level to each third-party relationship, whereas others identify critical activities and those third parties that support such activities. Regardless of a banking organization's approach, a key element of effective risk management is applying a sound methodology to designate which activities and third-party relationships receive more comprehensive oversight.

Third-party Relationship Life Cycle

Effective third-party risk management generally follows a continuous life cycle for third-party relationships. The stages of the risk management life cycle of third-party relationships are shown in Figure 1 and detailed below. The degree to which the examples of considerations discussed in this guidance are relevant to each banking organization is based on specific facts and circumstances and these examples may not apply to all of a banking organization's third-party relationships.

It is important to involve staff with the requisite knowledge and skills in each stage of the risk management life cycle. A banking organization may involve experts across disciplines, such as compliance, risk, or technology, as well as legal counsel, and may engage external support when helpful to supplement the qualifications and technical expertise of in-house staff.

Figure 1: Stages of the Risk Management Life Cycle

Omitted

Planning

As part of sound risk management, effective planning allows a banking organization to evaluate and consider how to manage risks before entering into a third-party relationship. Certain third parties, such as those that support a banking organization's higher-risk activities, including critical activities, typically warrant a greater degree of planning and consideration. For example, when critical activities are involved, plans may be presented to and approved by a banking organization's board of directors (or a designated board committee).

Depending on the degree of risk and complexity of the third-party relationship, a banking organization typically considers the following factors, among others, in planning:

- Understanding the strategic purpose of the business arrangement and how the arrangement aligns with a banking organization's overall strategic goals, objectives, risk appetite, risk profile, and broader corporate policies;
- Identifying and assessing the benefits and the risks associated with the business arrangement and determining how to appropriately manage the identified risks;
- Considering the nature of the business arrangement, such as volume of activity, use of subcontractor(s), technology needed, interaction with customers, and use of foreign-based third parties;
- Evaluating the estimated costs, including estimated direct contractual costs and indirect costs expended to augment or alter banking organization staffing, systems, processes, and technology;
- Evaluating how the third-party relationship could affect banking organization employees, including dual employees, and what transition steps are needed for the banking organization to manage the impacts when activities currently conducted internally are outsourced;
- Assessing a potential third party's impact on customers, including access to or use of those customers' information, third-party interaction with customers, potential for consumer harm, and handling of customer complaints and inquiries;
- Understanding potential information security implications, including access to the banking organization's systems and to its confidential information;
- Understanding potential physical security implications, including access to the banking organization's facilities;
- Determining how the banking organization will select, assess, and oversee the third party, including monitoring the third party's compliance with applicable laws, regulations, and contractual provisions, and requiring remediation of compliance issues that may arise;
- Determining the banking organization's ability to provide adequate oversight and management of the proposed third-party relationship on an ongoing basis (including whether staffing levels and expertise, risk management and compliance management

systems, organizational structure, policies and procedures, or internal control systems need to be adapted over time for the banking organization to effectively address the business arrangement); and

- Outlining the banking organization's contingency plans in the event the banking organization needs to transition the activity to another third party or bring it in-house.

Due Diligence and Third-Party Selection

Conducting due diligence on third parties before selecting and entering into third-party relationships is an important part of sound risk management. It provides management with the information needed about potential third parties to determine if a relationship would help achieve a banking organization's strategic and financial goals. The due diligence process also provides the banking organization with the information needed to evaluate whether it can appropriately identify, monitor, and control risks associated with the particular third-party relationship. Due diligence includes assessing the third party's ability to: perform the activity as expected, adhere to a banking organization's policies related to the activity, comply with all applicable laws and regulations, and conduct the activity in a safe and sound manner. Relying solely on experience with or prior knowledge of a third party is not an adequate proxy for performing appropriate due diligence, as due diligence should be tailored to the specific activity to be performed by the third party.

The scope and degree of due diligence should be commensurate with the level of risk and complexity of the third-party relationship. More comprehensive due diligence is particularly important when a third party supports higher-risk activities, including critical activities. If a banking organization uncovers information that warrants additional scrutiny, the banking organization should consider broadening the scope or assessment methods of the due diligence.

In some instances, a banking organization may not be able to obtain the desired due diligence information from a third party. For example, the third party may not have a long operational history, may not allow on-site visits, or may not share (or be permitted to share) information that a banking organization requests. While the methods and scope of due diligence may differ, it is important for the banking organization to identify and document any limitations of its due diligence, understand the risks from such limitations, and consider alternatives as to how to mitigate the risks. In such situations, a banking organization may, for example, obtain alternative information to assess the third party, implement additional controls on or monitoring of the third party to address the information limitation, or consider using a different third party.

A banking organization may use the services of industry utilities or consortiums, consult with other organizations, or engage in joint efforts to supplement its due diligence. As the activity to be performed by the third party may present a different level of risk to each banking organization, it is important to evaluate the conclusions from such supplemental efforts based on the banking organization's own specific circumstances and performance criteria for the activity. Effective risk management processes include evaluating the capabilities of any external party conducting the supplemental efforts, understanding how such supplemental efforts relate to the banking organization's planned use of the third party, and assessing the risks of relying on the supplemental efforts. Use of such external parties to conduct supplemental due diligence does not abrogate the responsibility of the banking organization to manage third-party relationships in a safe and sound manner and consistent with applicable laws and regulations.

Depending on the degree of risk and complexity of the third-party relationship, a banking organization typically considers the following factors, among others, as part of due diligence:

a. Strategies and Goals

A review of the third party's overall business strategy and goals helps the banking organization to understand: (1) how the third party's current and proposed strategic business arrangements (such as mergers, acquisitions, and partnerships) may affect the activity; and (2) the third party's service philosophies, quality initiatives, and employment policies and practices (including its diversity policies and practices). Such information may assist a banking organization to determine whether the third party can perform the activity in a manner that is consistent with the banking organization's broader corporate policies and practices.

b. Legal and Regulatory Compliance

A review of any legal and regulatory compliance considerations associated with engaging a third party allows a banking organization to evaluate whether it can appropriately mitigate risks associated with the third-party relationship. This may include (1) evaluating the third party's ownership structure (including identifying any beneficial ownership, whether public or private, foreign, or domestic ownership) and whether the third party has the necessary legal authority to perform the activity, such as any necessary licenses or corporate powers; (2) determining whether the third party itself or any owners are subject to sanctions by the Office of Foreign Assets Control; (3) determining whether the third party has the expertise, processes, and controls to enable the banking organization to remain in compliance with applicable domestic and international laws and regulations; (4) considering the third party's responsiveness to any compliance issues (including violations of law or regulatory actions) with applicable supervisory agencies and self-regulatory organizations, as appropriate; and (5) considering whether the third party has identified, and articulated a process to mitigate, areas of potential consumer harm.

c. Financial Condition

An assessment of a third party's financial condition through review of available financial information, including audited financial statements, annual reports, and filings with the U.S. Securities and Exchange Commission (SEC), among others, helps a banking organization evaluate whether the third party has the financial capability and stability to perform the activity. Where relevant and available, a banking organization may consider other types of information such as access to funds, expected growth, earnings, pending litigation, unfunded liabilities, reports from debt rating agencies, and other factors that may affect the third party's overall financial condition.

d. Business Experience

An evaluation of a third party's: (1) depth of resources (including staffing); (2) previous experience in performing the activity; and (3) history of addressing customer complaints or litigation and subsequent outcomes, helps to inform a banking organization's assessment of the third party's ability to perform the activity effectively. Another consideration may include whether there have been significant changes in the activities offered or in its business model. Likewise, a review of the third party's websites, marketing materials, and other information related to banking products or services may help determine if statements and assertions accurately represent the activities and capabilities of the third party.

e. Qualifications and Backgrounds of Key Personnel and Other Human Resources Considerations

An evaluation of the qualifications and experience of a third party's principals and other key personnel related to the activity to be performed provides insight into the capabilities of the third party to successfully perform the activities. An important consideration is whether the third party and the banking organization, as appropriate, periodically conduct background checks on the third party's key personnel and contractors who may have access to information technology systems or confidential information. Another important consideration is whether there are procedures in place for identifying and removing the third party's employees who do not meet minimum suitability requirements or are otherwise barred from working in the financial services sector. Another consideration is whether the third party has training to ensure that its employees understand their duties and responsibilities and are knowledgeable about applicable laws and regulations as well as other factors that could affect performance or pose risk to the banking organization. Finally, an evaluation of the third party's succession and redundancy planning for key personnel, and of the third party's processes for holding employees accountable for compliance with policies and procedures, provides valuable information to the banking organization.

f. Risk Management

Appropriate due diligence includes an evaluation of the effectiveness of a third party's overall risk management, including policies, processes, and internal controls, and alignment with applicable policies and expectations of the banking organization surrounding the activity. This would include an assessment of the third party's governance processes, such as the establishment of clear roles, responsibilities, and segregation of duties pertaining to the activity. It is also important to consider whether the third party's controls and operations are subject to effective audit assessments, including independent testing and objective reporting of results and findings. Banking organizations also gain important insight by evaluating processes for escalating, remediating, and holding management accountable for concerns identified during audits, internal compliance reviews, or other independent tests, if available. When relevant and available, a banking organization may consider reviewing System and Organization Control (SOC) reports and any conformity assessment or certification by independent third parties related to relevant domestic or international standards. In such cases, the banking organization may also consider whether the scope and the results of the SOC reports, certifications, or assessments are relevant to the activity to be performed or suggest that additional scrutiny of the third party or any of its contractors may be appropriate.

g. Information Security

Understanding potential information security implications, including access to a banking organization's systems and information, can help a banking organization decide whether or not to engage with a third party. Due diligence in this area typically involves assessing the third party's information security program, including its consistency with the banking organization's information security program, such as its approach to protecting the confidentiality, integrity, and availability of the banking organization's data. It may also involve determining whether there are any gaps that present risk to the banking organization or its customers and considering the extent to which the third party applies controls to limit access to the banking organization's data and transactions, such as multifactor authentication, end-to-end encryption, and secure source code management. It also aids a banking organization when determining whether the third party keeps informed of, and has sufficient experience in identifying, assessing, and mitigating, known and emerging threats and vulnerabilities. As applicable, assessing the third party's data, infrastructure, and application security programs, including the software development life cycle and results of vulnerability and penetration tests, can provide valuable information regarding information technology system vulnerabilities. Finally, due diligence can help a banking organization evaluate the third party's implementation of effective and sustainable corrective actions to address any deficiencies discovered during testing.

h. Management of Information Systems

It is important to review and understand the third party's business processes and information systems that will be used to support the activity. When technology is a major component of the third-party relationship, an effective practice is to review both the banking organization's and the third party's information systems to identify gaps in service-level expectations, business process and management, and interoperability issues. It is also important to review the third party's processes for maintaining timely and accurate inventories of its technology and its contractor(s). A banking organization also benefits from understanding the third party's measures for assessing the performance of its information systems.

i. Operational Resilience

An assessment of a third party's operational resilience practices supports a banking organization's evaluation of a third party's ability to effectively operate through and recover from any disruption or incidents, both internal and external. Such an assessment is particularly important where the impact of such disruption could have an adverse effect on the banking organization or its customers, including when the third party interacts with customers. It is important to assess options to employ if the third party's ability to perform the activity is impaired and to determine whether the third party maintains appropriate operational resilience and cybersecurity practices, including disaster recovery and business continuity plans that specify the time frame to resume activities and recover data. To gain additional insight into a third party's resilience capabilities, a banking organization may review (1) the results of operational resilience and business continuity testing and performance during actual disruptions; (2) the third party's telecommunications redundancy and resilience plans; and (3) preparations for known and emerging threats and vulnerabilities, such as wide-scale natural disasters, pandemics, distributed denial of service attacks, or other intentional or unintentional events. Other considerations related to operational resilience include (1) dependency on a single provider for multiple activities; and (2) interoperability or potential end of life issues with the software programming language, computer platform, or data storage technologies used by the third party.

j. Incident Reporting and Management Processes

Review and consideration of a third party's incident reporting and management processes is helpful to determine whether there are clearly documented processes, timelines, and accountability for identifying, reporting, investigating, and escalating incidents. Such review assists in confirming that the third party's escalation and notification processes meet the banking organization's expectations and regulatory requirements.

k. Physical Security

It is important to evaluate whether the third party has sufficient physical and environmental controls to protect the safety and security of people (such as employees and customers), its facilities, technology systems, and data, as applicable. This would typically include a review of the third party's employee on- and off-boarding procedures to ensure that physical access rights are managed appropriately

l. Reliance on Subcontractors

An evaluation of the volume and types of subcontracted activities and the degree to which the third party relies on subcontractors helps inform whether such subcontracting arrangements pose additional or heightened risk to a banking organization. This typically includes an assessment of the third party's ability to identify, manage, and mitigate risks associated with subcontracting, including how the third party selects and oversees its subcontractors and ensures that its subcontractors implement effective controls. Other important considerations include whether additional risk is presented by the geographic location of a subcontractor or dependency on a single provider for multiple activities.

m. Insurance Coverage

An evaluation of whether the third party has existing insurance coverage helps a banking organization determine the extent to which potential losses are mitigated, including losses posed by the third party to the banking organization or that might prevent the third party from fulfilling its obligations to the banking organization. Such losses may be attributable to dishonest or negligent acts; fire, floods, or other natural disasters; loss of data; and other matters. Examples of insurance coverage may include fidelity bond; liability; property hazard and casualty; and areas that may not be covered under a general commercial policy, such as cybersecurity or intellectual property

n. Contractual Arrangements with Other Parties

A third party's commitments to other parties may introduce potential legal, financial, or operational implications to the banking organization. Therefore, it is important to obtain and evaluate information regarding the third party's legally binding arrangements with subcontractors or other parties to determine whether such arrangements may create or transfer risks to the banking organization or its customers.

Contract Negotiation

When evaluating whether to enter into a relationship with a third party, a banking organization typically determines whether a written contract is needed, and if the proposed contract can meet the banking organization's business goals and risk management needs. After such determination, a banking organization typically negotiates contract provisions that will facilitate effective risk management and oversight and that specify the expectations and obligations of both the banking organization and the third party. A banking organization may tailor the level of detail and comprehensiveness of such contract provisions based on the risk and complexity posed by the particular third-party relationship.

While third parties may initially offer a standard contract, a banking organization may seek to request modifications, additional contract provisions, or addendums to satisfy its needs. In difficult contract negotiations, including when a banking organization has limited negotiating power, it is important for the banking organization to understand any resulting limitations and consequent risks. Possible actions that a banking organization might take in such circumstances include determining whether the contract can still meet the banking organization's needs, whether the contract would result in increased risk to the banking organization, and whether residual risks are acceptable. If the contract is unacceptable for the banking organization, it may consider other approaches, such as employing other third parties or conducting the activity in-house. In certain circumstances, banking organizations may gain an advantage by negotiating contracts as a group with other organizations.

It is important that a banking organization understand the benefits and risks associated with engaging third parties and particularly before executing contracts involving higher-risk activities, including critical activities. As part of its oversight responsibilities, the board of directors should be aware of and, as appropriate, may approve or delegate approval of contracts involving higher-risk activities. Legal counsel review may also be warranted prior to finalization.

Periodic reviews of executed contracts allow a banking organization to confirm that existing provisions continue to address pertinent risk controls and legal protections. If new risks are identified, a banking organization may consider renegotiating a contract.

Depending on the degree of risk and complexity of the third-party relationship, a banking organization typically considers the following factors, among others, during contract negotiations:

a. Nature and Scope of Arrangement

In negotiating a contract, it is helpful for a banking organization to clearly identify the rights and responsibilities of each party. This typically includes specifying the nature and scope of the business arrangement. Additional considerations may also include, as applicable, a description of (1) ancillary services such as software or other technology support, maintenance, and customer service; (2) the activities the third party will perform; and (3) the terms governing the use of the banking organization's information, facilities, personnel, systems, intellectual property, and equipment, as well as access to and use of the banking organization's or customers' information. If dual employees will be used, it may also be helpful to specify their responsibilities and reporting lines. It is also important for a banking organization to understand how changes in business and other circumstances may give rise to the third party's rights to terminate or renegotiate the contract.

b. Performance Measures or Benchmarks

For certain relationships, clearly defined performance measures can assist a banking organization in evaluating the performance of a third party. In particular, a service-level agreement between the banking organization and the third party can help specify the measures surrounding the expectations and responsibilities for both parties, including conformance with policies and procedures and compliance with applicable laws and regulations. Such measures can be used to monitor performance, penalize poor performance, or reward outstanding performance. It is important to negotiate performance measures that do not incentivize imprudent performance or behavior, such as encouraging processing volume or speed without regard for accuracy, compliance requirements, or adverse effects on the banking organization or customers.

c. Responsibilities for Providing, Receiving, and Retaining Information

It is important to consider contract provisions that specify the third party's obligation for retention and provision of timely, accurate, and comprehensive information to allow the banking organization to monitor risks and performance and to comply with applicable laws and regulations. Such provisions typically address:

- The banking organization's ability to access its data in an appropriate and timely manner;
- The banking organization's access to, or use of, the third-party's data and any supporting documentation, in connection with the business arrangement;

- The banking organization's access to, or use of, its own or the third-party's data and how such data and supporting documentation may be shared with regulators in a timely manner as part of the supervisory process;
- Whether the third party is permitted to resell, assign, or permit access to customer data, or the banking organization's data, metadata, and systems, to other entities;
- Notification to the banking organization whenever compliance lapses, enforcement actions, regulatory proceedings, or other events pose a significant risk to the banking organization or customers;
- Notification to the banking organization of significant strategic or operational changes, such as mergers, acquisitions, divestitures, use of subcontractors, key personnel changes, or other business initiatives that could affect the activities involved; and
- Specification of the type and frequency of reports to be received from the third party, as appropriate. This may include performance reports, financial reports, security reports, and control assessments

d. The Right to Audit and Require Remediation

To help ensure that a banking organization has the ability to monitor the performance of a third party, a contract often establishes the banking organization's right to audit and provides for remediation when issues are identified. Generally, a contract includes provisions for periodic, independent audits of the third party and its relevant subcontractors, consistent with the risk and complexity of the third-party relationship. Therefore, it would be appropriate to consider whether contract provisions describe the types and frequency of audit reports the banking organization is entitled to receive from the third party (for example, SOC reports, Payment Card Industry (PCI) compliance reports, or other financial and operational reviews). Such contract provisions may also reserve the banking organization's right to conduct its own audits of the third party's activities or to engage an independent party to perform such audits.

e. Responsibility for Compliance with Applicable Laws and Regulations

A banking organization is responsible for conducting its activities in compliance with applicable laws and regulations, including those activities involving third parties. The use of third parties does not abrogate these responsibilities. Therefore, it is important for a contract to specify the obligations of the third party and the banking organization to comply with applicable laws and regulations. It is also important for the contract to provide the banking organization with the right to monitor and be informed about the third party's compliance with applicable laws and regulations, and to require timely remediation if issues arise. Contracts may also reflect considerations of relevant guidance and self-regulatory standards, where applicable.

f. Costs and Compensation

Contracts that clearly describe all costs and compensation arrangements help reduce misunderstandings and disputes over billing and help ensure that all compensation arrangements are consistent with sound banking practices and applicable laws and regulations. Contracts commonly describe compensation and fees, including cost schedules, calculations for base services, and any fees based on volume of activity and for special requests. Contracts also may specify the conditions under which the cost structure may be changed, including limits on any cost increases. During negotiations, a banking organization should confirm that a contract does not include incentives that promote inappropriate risk taking by the banking organization or the third party. A banking organization should also consider whether the contract includes burdensome upfront or termination fees, or provisions that may require the banking organization to reimburse the third party. Appropriate provisions indicate which party is responsible for payment of legal, audit, and examination fees associated with the activities involved. Another consideration is outlining cost and responsibility for purchasing and maintaining hardware and software, where applicable.

g. Ownership and License

In order to prevent disputes between the parties regarding the ownership and licensing of a banking organization's property, it is common for a contract to state the extent to which the third party has the right to use the banking organization's information, technology, and intellectual property, such as the banking organization's name, logo, trademark, and copyrighted material. Provisions that indicate whether any data generated by the third party become the banking organization's property help avert misunderstandings. It is also important to include appropriate warranties on the part of the third party related to its acquisition of licenses or subscriptions for use of any intellectual property developed by other third parties. When the banking organization purchases software, it is important to consider a provision to establish escrow agreements to provide for the banking organization's access to source code and programs under certain conditions (for example, insolvency of the third party).

h. Confidentiality and Integrity

With respect to contracts with third parties, there may be increased risks related to the sensitivity of non-public information or access to infrastructure. Effective contracts typically prohibit the use and disclosure of banking organization and customer information by a third party and its subcontractors, except as necessary to provide the contracted activities or comply with legal requirements. If the third party receives personally identifiable information, contract provisions are important to ensure that the third party implements and maintains appropriate security measures to comply with applicable laws and regulations.

Another important provision is one that specifies when and how the third party will disclose, in a timely manner, information security breaches or unauthorized intrusions. Considerations may include the types of data stored by the third party, legal obligations for the banking organization to disclose the breach to its regulators or customers, the potential for consumer harm, or other factors. Such provisions typically stipulate that the data intrusion notification to the banking organization include estimates of the effects on the banking organization and its customers and specify corrective action to be taken by the third party. They also address the powers of each party to change security and risk management procedures and requirements and resolve any confidentiality and integrity issues arising out of shared use of facilities owned by the third party. Typically, such provisions stipulate whether and how often the banking organization and the third party will jointly practice incident management exercises involving unauthorized intrusions or other breaches of confidentiality and integrity.

i. Operational Resilience and Business Continuity

Both internal and external factors or incidents (for example, natural disasters or cyber incidents) may affect a banking organization or a third party and thereby disrupt the third party's performance of the activity. Consequently, an effective contract provides for continuation of the activity in the event of problems affecting the third party's operations, including degradations or interruptions in delivery. As such, it is important for the contract to address the third party's responsibility for appropriate controls to support operational resilience of the services, such as protecting and storing programs, backing up datasets, addressing cybersecurity issues, and maintaining current and sound business resumption and business continuity plans.

To help ensure maintenance of operations, contracts often require the third party to provide the banking organization with operating procedures to be carried out in the event business continuity plans are implemented, including specific recovery time and recovery point objectives. Contracts may also stipulate whether and how often the banking organization and the third party will jointly test business continuity plans. Another consideration is whether the contract provides for the transfer of the banking organization's accounts, data, or activities to another third party without penalty in the event of the third party's bankruptcy, business failure, or business interruption.

j. Indemnification and Limits on Liability

Incorporating indemnification provisions into a contract may reduce the potential for a banking organization to be held liable for claims and be reimbursed for damages arising from a third party's misconduct, including negligence and violations of laws and regulations. As such, it is important to consider whether indemnification clauses specify the extent to which the banking organization will be held liable for claims or be reimbursed for damages based on the failure of the third party or its subcontractor to perform, including failure of the third party to obtain any necessary intellectual property licenses. Such consideration typically includes an assessment of whether any limits on liability are in proportion to the amount of loss the banking organization might experience as a result of third-party failures, or whether indemnification clauses require the banking organization to hold the third party harmless from liability.

k. Insurance

One way in which a banking organization can protect itself against losses caused by or related to a third party and the products and services provided through third-party relationships is by including insurance requirements in a contract. These provisions typically require the third party to (1) maintain specified types and amounts of insurance (including, if appropriate, naming the banking organization as insured or additional insured); (2) notify the banking organization of material changes to coverage; and (3) provide evidence of coverage, as appropriate. The type and amount of insurance coverage should be commensurate with the risk of possible losses, including those caused by the third party to the banking organization or that might prevent the third party from fulfilling its obligations to the banking organization, and the activities performed

l. Dispute Resolution

Disputes regarding a contract can delay or otherwise have an adverse impact upon the activities performed by a third party, which may negatively affect the banking organization. Therefore, a banking organization may want to consider whether the contract should establish a dispute resolution process to resolve problems between the banking organization and the third party in an expeditious manner, and whether the third party should continue to provide activities to the banking organization during the dispute resolution period. It is important to also understand whether the contract contains provisions that may impact the banking organization's ability to resolve disputes in a satisfactory manner, such as provisions addressing arbitration or forum selection.

m. Customer Complaints

Where customer interaction is an important aspect of the third-party relationship, a banking organization may find it useful to include a contract provision to ensure that customer complaints and inquiries are handled properly. Effective contracts typically specify whether the banking organization or the third party is responsible for responding to customer complaints or inquiries. If it is the third party's responsibility, it is important to include provisions for the third party to receive and respond to customer complaints and inquiries in a timely manner and to provide the banking organization with sufficient, timely, and usable information to analyze customer complaint and inquiry activity and associated trends. If it is the banking organization's responsibility, it is important to include provisions for the banking organization to receive prompt notification from the third party of any complaints or inquiries received by the third party.

n. Subcontracting

Third-party relationships may involve subcontracting arrangements, which can result in risk due to the absence of a direct relationship between the banking organization and the subcontractor, further lessening the banking organization's direct control of activities. The impact on a banking organization's ability to assess and control risks may be especially important if the banking organization uses third parties for higher-risk activities, including critical activities. For this reason, a banking organization may want to address when and how the third party should notify the banking organization of its use or intent to use a subcontractor and whether specific subcontractors are prohibited by the banking organization. Another important consideration is whether the contract should prohibit assignment, transfer, or subcontracting of the third party's obligations to another entity without the banking organization's consent. Where subcontracting is integral to the activity being performed for the banking organization, it is important to consider more detailed contractual obligations, such as reporting on the subcontractor's conformance with performance measures, periodic audit results, and compliance with laws and regulations. Where appropriate, a banking organization may consider including a provision that states the third party's liability for activities or actions by its subcontractors and which party is responsible for the costs and resources required for any additional monitoring and management of the subcontractors. It may also be appropriate to reserve the right to terminate the contract without penalty if the third party's subcontracting arrangements do not comply with contractual obligations.

o. Foreign-Based Third Parties

In contracts with foreign-based third parties, it is important to consider choice-of-law and jurisdictional provisions that provide dispute adjudication under the laws of a single jurisdiction, whether in the United States or elsewhere. When engaging with foreign-based third parties, or where contracts include a choice-of-law provision that includes a jurisdiction other than the United States, it is important to understand that such contracts and covenants may be subject to the interpretation of foreign courts relying on laws in those jurisdictions. It may be warranted to seek legal advice on the enforceability of the proposed contract with a foreign-based third party and other legal ramifications, including privacy laws and cross-border flow of information.

p. Default and Termination

Contracts can protect the ability of the banking organization to change third parties when appropriate without undue restrictions, limitations, or cost. An effective contract stipulates what constitutes default, identifies remedies, allows opportunities to cure defaults, and establishes the circumstances and responsibilities for termination. Therefore, it is important to consider including contractual provisions that:

- Provide termination and notification requirements with reasonable time frames to allow for the orderly transition of the activity, when desired or necessary, without prohibitive expense;
- Provide for the timely return or destruction of the banking organization's data, information, and other resources;
- Assign all costs and obligations associated with transition and termination; and
- Enable the banking organization to terminate the relationship with reasonable notice and without penalty, if formally directed by the banking organization's primary federal banking regulator.

q. Regulatory Supervision

For relevant third-party relationships, it is important for contracts to stipulate that the performance of activities by third parties for the banking organization is subject to regulatory examination and oversight, including appropriate retention of, and access to, all relevant documentation and other materials. This can help ensure that a third party is aware of its role and potential liability in its relationship with a banking organization.

Ongoing Monitoring

Ongoing monitoring enables a banking organization to: (1) confirm the quality and sustainability of a third party's controls and ability to meet contractual obligations; (2) escalate significant issues or concerns, such as material or repeat audit findings, deterioration in financial condition, security breaches, data loss, service interruptions, compliance lapses, or other indicators of increased risk; and (3) respond to such significant issues or concerns when identified.

Effective third-party risk management includes ongoing monitoring throughout the duration of a third-party relationship, commensurate with the level of risk and complexity of the relationship and the activity performed by the third party. Ongoing monitoring may be conducted on a periodic or continuous basis, and more comprehensive or frequent monitoring is appropriate when a third-party relationship supports higher-risk activities, including critical activities. Because both the level and types of risks may change over the lifetime of third-party relationships, banking organizations may adapt their ongoing monitoring practices accordingly, including changes to the frequency or type of information used in monitoring.

Typical monitoring activities include: (1) review of reports regarding the third party's performance and the effectiveness of its controls; (2) periodic visits and meetings with third-party representatives to discuss performance and operational issues; and (3) regular testing of the banking organization's controls that manage risks from its third-party relationships, particularly when supporting higher-risk activities, including critical activities. In certain circumstances, based on risk, a banking organization may also perform direct testing of the third party's own controls. To gain efficiencies or leverage specialized expertise, banking organizations may engage external resources, refer to conformity assessments or certifications, or collaborate when performing ongoing monitoring. To support effective monitoring, a banking organization dedicates sufficient staffing with the necessary expertise, authority, and accountability to perform a range of ongoing monitoring activities, such as those described above.

Depending on the degree of risk and complexity of the third-party relationship, a banking organization typically considers the following factors, among others, as part of ongoing monitoring:

- The overall effectiveness of the third-party relationship, including its consistency with the banking organization's strategic goals, business objectives, risk appetite, risk profile, and broader corporate policies;
- Changes to the third party's business strategy and its agreements with other entities that may pose new or increased risks or impact the third party's ability to meet contractual obligations;
- Changes in the third party's financial condition, including its financial obligations to others;
- Changes to, or lapses in, the third party's insurance coverage;
- Relevant audits, testing results, and other reports that address whether the third party remains capable of managing risks and meeting contractual obligations and regulatory requirements;
- The third party's ongoing compliance with applicable laws and regulations and its performance as measured against contractual obligations;
- Changes in the third party's key personnel involved in the activity;
- The third party's reliance on, exposure to, and use of subcontractors, the location of subcontractors (and any related data), and the third party's own risk management processes for monitoring subcontractors;
- Training provided to employees of the banking organization and the third party;
- The third party's response to changing threats, new vulnerabilities, and incidents impacting the activity, including any resulting adjustments to the third party's operations or controls;
- The third party's ability to maintain the confidentiality, availability, and integrity of the banking organization's systems, information, and data, as well as customer data, where applicable;
- The third party's response to incidents, business continuity and resumption plans, and testing results to evaluate the third party's ability to respond to and recover from service disruptions or degradations;
- Factors and conditions external to the third party that could affect its performance and financial and operational standing, such as changing laws, regulations, and economic conditions; and
- The volume, nature, and trends of customer inquiries and complaints, the adequacy of the third party's responses (if responsible for handling customer inquiries or complaints), and any resulting remediation.

Termination

A banking organization may terminate a relationship for various reasons, such as expiration or breach of the contract, the third party's failure to comply with applicable laws or regulations, or a desire to seek an alternate third party, bring the activity in-house, or discontinue the activity. When this occurs, it is important for management to terminate relationships in an efficient manner, whether the activities are transitioned to another third party, brought in-house, or discontinued. Depending on the degree of risk and complexity of the third-party relationship, a banking organization typically considers the following factors, among others, to facilitate termination:

- Options for an effective transition of services, such as potential alternate third parties to perform the activity;
- Relevant capabilities, resources, and the time frame required to transition the activity to another third party or bring in-house while still managing legal, regulatory, customer, and other impacts that might arise;
- Costs and fees associated with termination;
- Managing risks associated with data retention and destruction, information system connections and access control, or other control concerns that require additional risk management and monitoring after the end of the third-party relationship;
- Handling of joint intellectual property; and
- Managing risks to the banking organization, including any impact on customers, if the termination happens as a result of the third party's inability to meet expectations.

Governance

There are a variety of ways for banking organizations to structure their third-party risk management processes. Some banking organizations disperse accountability for their third-party risk management processes among their business lines. Other banking organizations may centralize the processes under their compliance, information security, procurement, or risk management functions. Regardless of how a banking organization structures its process, the following practices are typically considered throughout the third-party risk management life cycle, commensurate with risk and complexity.

<u>Oversight and Accountability</u>

Proper oversight and accountability are important aspects of third-party risk management because they help enable a banking organization to minimize adverse financial, operational, or other consequences. A banking organization's board of directors has ultimate responsibility for providing oversight for third-party risk management and holding management accountable. The board also provides clear guidance regarding acceptable risk appetite, approves appropriate policies, and ensures that appropriate procedures and practices have been established. A banking organization's management is responsible for developing and implementing third-party risk management policies, procedures, and practices, commensurate with the banking organization's risk appetite and the level of risk and complexity of its third-party relationships.

In carrying out its responsibilities, the board of directors (or a designated board committee) typically considers the following factors, among others:

- Whether third-party relationships are managed in a manner consistent with the banking organization's strategic goals and risk appetite and in compliance with applicable laws and regulations;
- Whether there is appropriate periodic reporting on the banking organization's third-party relationships, such as the results of management's planning, due diligence, contract negotiation, and ongoing monitoring activities; and
- Whether management has taken appropriate actions to remedy significant deterioration in performance or address changing risks or material issues identified, including through ongoing monitoring and independent reviews.

When carrying out its responsibilities, management typically performs the following activities, among others:

- Integrating third-party risk management with the banking organization's overall risk management processes;
- Directing planning, due diligence, and ongoing monitoring activities;
- Reporting periodically to the board (or designated committee), as appropriate, on third-party risk management activities;
- Providing that contracts with third parties are appropriately reviewed, approved, and executed;
- Establishing appropriate organizational structures and staffing (level and expertise) to support the banking organization's third-party risk management processes;
- Implementing and maintaining an appropriate system of internal controls to manage risks associated with third-party relationships;
- Assessing whether the banking organization's compliance management system is appropriate to the nature, size, complexity, and scope of its third-party relationships;
- Determining whether the banking organization has appropriate access to data and information from its third parties;
- Escalating significant issues to the board and monitoring any resulting remediation, including actions taken by the third party; and
- Terminating business arrangements with third parties when they do not meet expectations or no longer align with the banking organization's strategic goals, objectives, or risk appetite.

Independent Reviews

It is important for a banking organization to conduct periodic independent reviews to assess the adequacy of its third-party risk management processes. Such reviews typically consider the following factors, among others:

- Whether the third-party relationships align with the banking organization's business strategy, and with internal policies, procedures, and standards;
- Whether risks of third-party relationships are identified, measured, monitored, and controlled;
- Whether the banking organization's processes and controls are designed and operating adequately;
- Whether appropriate staffing and expertise are engaged to perform risk management activities throughout the third-party risk management life cycle, including involving multiple disciplines across the banking organization, as appropriate; and
- Whether conflicts of interest or appearances of conflicts of interest are avoided or eliminated when selecting or overseeing third parties.

A banking organization may use the results of independent reviews to determine whether and how to adjust its third-party risk management process, including its policies, reporting, resources, expertise, and controls. It is important that management respond promptly and thoroughly to issues or concerns identified and escalate them to the board, as appropriate.

Documentation and Reporting

It is important that a banking organization properly document and report on its third-party risk management process and specific third-party relationships throughout their life cycle. Documentation and reporting, key elements that assist those within or outside the banking organization who conduct control activities, will vary among banking organizations depending on the risk and complexity of their third-party relationships. Examples of processes that support effective documentation and internal reporting that the agencies have observed include, but are not limited to:

- A current inventory of all third-party relationships (and, as appropriate to the risk presented, related subcontractors) that clearly identifies those relationships associated with higher-risk activities, including critical activities;
- Planning and risk assessments related to the use of third parties;
- Due diligence results and recommendations;
- Executed contracts;
- Remediation plans and related reports addressing the quality and sustainability of the third party's controls;
- Risk and performance reports required and received from the third party as part of ongoing monitoring;
- If applicable, reports related to customer complaint and inquiry monitoring, and any subsequent remediation reports;
- Reports from third parties of service disruptions, security breaches, or other events that pose, or may pose, a material risk to the banking organization;
- Results of independent reviews; and
- Periodic reporting to the board (including, as applicable, dependency on a single provider for multiple activities).

Supervisory Reviews of Third-Party Relationships

The concepts discussed in this guidance are relevant for all third-party relationships and are provided to banking organizations to assist in the tailoring and implementation of risk management practices commensurate to each banking organization's size, complexity, risk profile, and the nature of its third-party relationships. Each agency will review its supervised banking organizations' risk management of third-party relationships as part of its standard supervisory processes. Supervisory reviews will evaluate risks and the effectiveness of risk management to determine whether activities are conducted in a safe and sound manner and in compliance with applicable laws and regulations.

In their evaluations of a banking organization's third-party risk management, examiners consider that banking organizations engage in a diverse set of third-party relationships, that not all third-party risk relationships present the same risks, and that banking organizations accordingly tailor their practices to the risks presented. Thus, the scope of the supervisory review depends on the degree of risk and the complexity associated with the banking organization's activities and third-party relationships. When reviewing third-party risk management processes, examiners typically conduct the following activities, among others:

- Assess the ability of the banking organization's management to oversee and manage the banking organization's third-party relationships;

- Assess the impact of third-party relationships on the banking organization's risk profile and key aspects of financial and operational performance, including compliance with applicable laws and regulations;
- Perform transaction testing or review results of testing to evaluate the activities performed by the third party and assess compliance with applicable laws and regulations;
- Highlight and discuss any material risks and deficiencies in the banking organization's risk management process with senior management and the board of directors as appropriate;
- Review the banking organization's plans for appropriate and sustainable remediation of any deficiencies, particularly those associated with the oversight of third parties that involve critical activities; and
- Consider supervisory findings when assigning the components of the applicable rating system and highlight any material risks and deficiencies in the Report of Examination.

When circumstances warrant, an agency may use its legal authority to examine functions or operations that a third party performs on a banking organization's behalf. Such examinations may evaluate the third party's ability to fulfill its obligations in a safe and sound manner and comply with applicable laws and regulations, including those designed to protect customers and to provide fair access to financial services. The agencies may pursue corrective measures, including enforcement actions, when necessary to address violations of laws and regulations or unsafe or unsound banking practices by the banking organization or its third party.

What You Need to Do:

Share with appropriate management for future use.

Bank Secrecy Act

FinCEN: Renews and Expands Real Estate Geographic Targeting Orders (April 21, 2023)

Link

https://www.fincen.gov/news/news-releases/fincen-renews-and-expands-real-estate-geographic-targeting-orders-1

Text

The Financial Crimes Enforcement Network (FinCEN) announced the renewal and expansion of its Geographic Targeting Orders (GTOs) that require U.S. title insurance companies to identify the natural persons behind shell companies used in non-financed purchases of residential real estate.

The terms of the GTOs are effective beginning April 25, 2023, and ending on October 21, 2023. The GTOs continue to provide valuable data on the purchase of residential real estate by persons possibly involved in various illicit enterprises. Renewing the GTOs will further assist in tracking illicit funds and other criminal or illicit activity, as well as continuing to inform FinCEN's regulatory efforts in this sector.

FinCEN renewed the GTOs that cover certain counties within the following major U.S. metropolitan areas:

Boston; Chicago; Dallas-Fort Worth; Houston; Laredo; Las Vegas; Los Angeles; Miami; New York City; San Antonio; San Diego; San Francisco; Seattle, the District of Columbia, Northern Virginia, and Maryland (DMV) area; as well as the City and County of Baltimore, the County of Fairfield, Connecticut, and the Hawaiian islands of Honolulu, Maui, Hawaii, and Kauai.

FinCEN, working in conjunction with our law enforcement partners, identified additional regions that present greater risks for illicit finance activity through non-financed purchases of residential real estate. Accordingly, FinCEN expanded the geographic coverage of the GTOs to Litchfield County in Connecticut and Adams, Arapahoe, Clear Creek, Denver, Douglas, Eagle, Elbert, El Paso, Fremont, Jefferson, Mesa, Pitkin, Pueblo, and Summit counties in Colorado. The effective period of the GTOs for purchases in these newly added areas begins on May 24, 2023.

The purchase amount threshold remains $300,000 for each covered metropolitan area, with the exception of the City and County of Baltimore, where the purchase threshold is $50,000.

FinCEN appreciates the continued assistance and cooperation of title insurance companies and the American Land Title Association in protecting real estate markets from abuse by illicit actors.

Any questions about the Orders should be directed to FinCEN's Regulatory Support Section at FRC@FinCEN.gov.

A copy of the GTO is available here:

https://www.fincen.gov/sites/default/files/shared/508_Order_April2023REGTO.pdf

Frequently asked questions regarding these GTOs are available here:

https://www.fincen.gov/sites/default/files/shared/508_FAQ_April2023REGTO.pdf

What You Need to Do:
This does not impact banks, and is informational only.

FinCEN: Supplemental Alert – Continued Vigilance for Potential Russian Export Control Evasion Attempts (May 18, 2023)

Link

https://www.fincen.gov/sites/default/files/shared/FinCEN%20and%20BIS%20Joint%20Alert%20_FINAL_508C.pdf

Text

The Financial Crimes Enforcement Network (FinCEN) and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) are issuing a supplemental joint alert urging continued vigilance on the part of U.S. financial institutions for potential attempts by Russia to evade U.S. export controls.

The alert reinforces ongoing U.S. Government engagements and initiatives designed to further constrain and prevent Russia from accessing needed technology and goods to supply and replenish its military and defense industrial base. The alert is one of several actions the U.S. Treasury as well as other U.S Government agencies are taking today to reaffirm the United States' commitment to strengthening the unprecedented and coordinated sanctions and other economic measures taken to date to counter Russia's capacity to wage its illegal aggression against Ukraine.

This alert supplements the first FinCEN-BIS joint alert issued in June 2022 and provides information on new export control restrictions implemented since June 2022. It details evasion typologies, introduces nine new high priority Harmonized System codes to inform U.S. financial institutions' customer due diligence, and identifies additional transactional and behavioral red flags to assist in identifying suspicious transactions relating to possible export control evasion. FinCEN urges U.S. financial institutions to consider these indicators and those set out in the 2022 alert, in determining whether an identified activity may be connected to Russia-related export control evasion.

Supplemental Alert: FinCEN and the U.S. Department of Commerce's Bureau of Industry and Security Urge Continued Vigilance for Potential Russian Export Control Evasion Attempts

The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) and the U.S. Department of Commerce's Bureau of Industry and Security (BIS) previously issued a joint alert (2022 Alert) urging financial institutions to be vigilant against efforts by individuals and entities to evade BIS export controls implemented in connection with the Russian Federation's (Russia) further invasion of Ukraine. This supplemental joint alert provides financial institutions additional information regarding new BIS export control restrictions related to Russia, as well as reinforces ongoing U.S. Government engagements and initiatives designed to further constrain and prevent Russia from accessing needed technology and goods to supply and replenish its military and defense industrial base. This alert further details evasion typologies, highlights for financial institutions nine high priority Harmonized System (HS) codes to inform their customer due diligence, and identifies additional transactional and behavioral red flags to assist financial institutions in identifying suspicious transactions relating to possible export control evasion. Finally, this alert requests that financial institutions continue to use the existing SAR code (FIN-2022-RUSSIABIS) when submitting SARs specific to Russian export control evasion and reminds them of their Bank Secrecy Act (BSA) reporting obligations.

Impact of U.S. Sanctions and Export Controls Against Russia

The United States, along with the Global Export Control Coalition (GECC) , an international coalition of 39 nations from North America, Europe, and the Indo-Pacific region, has imposed sweeping sanctions, export controls, and other economic restrictions since the start of Russia's unprovoked war against Ukraine in 2022. As a result, Russia's military-industrial complex and defense supply chains have been significantly degraded by sanctions and export controls over the past year. According to U.S. Government assessments, Russia has lost over 10,000 pieces of equipment on the battlefield and is struggling to replace them. This has resulted in Russia tasking its intelligence services with finding ways to circumvent sanctions and export controls to replace needed equipment.

The U.S. Government has also brought several enforcement cases against entities and individuals who violated U.S. export controls against Russia. Many of these actions were brought as part of Task Force KleptoCapture, an interagency law enforcement task force dedicated to enforcing the sanctions and export controls and economic countermeasures that the United States has imposed, along with allies and partners, in response to Russia's unprovoked military invasion of Ukraine.

In addition to Task Force KleptoCapture, on February 16, 2023, DOJ and Commerce announced the creation of the Disruptive Technology Strike Force, led by DOJ's National Security Division and BIS. The strike force brings together experts throughout government, including DOJ's National Security Division, the Federal Bureau of Investigation (FBI); the U.S. Department of Homeland Security, U.S. Immigration and Custom Enforcement's Homeland Security Investigations; and 14 U.S. Attorney's Offices in 12 metropolitan regions, to target illicit actors, strengthen supply chains and protect critical technological assets from being acquired or used by nation-state adversaries. For example, on May 16, 2023, DOJ and Commerce announced the first five strike force enforcement actions. One of those actions involved the arrest of a Greek national on May 9, 2023, involved in a procurement scheme to supply U.S.-origin military and dual-use technologies to Russia. The highly regulated and sensitive components included advanced electronics and sophisticated testing equipment used in military applications, including quantum cryptography and nuclear weapons testing, as well as tactical battlefield equipment. As described in the complaint, some of the Russian end users included nuclear and quantum research facilities, as well as the Russian Foreign Intelligence Service.

Case Study:

Two U.S. Citizens Arrested for Illegally Exporting Technology to Russia

On March 2, 2023, two Kansas men were arrested on charges related to a years-long scheme to circumvent U.S. export controls that included the illegal export of aviation-related technology to Russia after Russia's unprovoked invasion of Ukraine on February 24, 2022, and the imposition of stricter restrictions on exports to Russia. According to the indictment, the two men owned and operated KanRus Trading Company, which supplied Western avionics equipment (i.e., electronics installed in aircraft) to Russian companies and provided repair services for equipment used in Russian-manufactured aircraft. Since 2020, the defendants conspired to evade U.S. export controls by concealing and misstating the true end users, value, and end destinations of their exports and by transshipping items through third-party countries. For example, between November 2020 and February 2021, the defendants received avionics equipment, including a computer processor bearing a sticker identifying Russia's Federal Security Service (FSB), from a Russian company for repair in the United States. The defendants concealed the true end user and end destination by providing a fraudulent invoice to the shipment company identifying the end destination as Germany.

As further alleged, on Feb. 28, 2022, the defendants attempted to export avionics to Russia. U.S. authorities detained the shipment, and the U.S. Department of Commerce informed the defendants that a license was required to export the equipment to Russia. In an April 2022 communication, one of the defendants expressed to a Russia-based customer that "things are complicated in the USA" and that "[t]his is NOT the right time for [more paperwork and visibility]." Subsequently, in May, June and July 2022, the defendants illegally transshipped avionics through Armenia and Cyprus to Russia without obtaining the required licenses.

New Export Control Restrictions Implemented Since Publication of the June 2022 Alert

Since the publication of the 2022 Alert, BIS has imposed additional export control restrictions to further cut off Russia's defense industrial base and military from critical items it seeks to obtain to sustain Russia's ongoing, unprovoked war against Ukraine. Specifically, these restrictions, developed in concert with international allies and partners, aim to cut off Russia's access to critical components used for aircraft and tanks, semiconductors, other items needed for advanced military applications, and low-technology consumer goods needed for Russia to sustain its war effort.

BIS implemented these additional restrictions, which also target third countries such as Iran and China, that have served as supply nodes to the Russian war machine, on the one-year anniversary of Russia's invasion. BIS continues to build and sustain the GECC, whose members impose substantially similar export controls on Russia, targeting third countries and impeding Russia's ability globally to obtain commercially available items, such as semiconductors. These new restrictions, comprised of four rules, revise the Export Administration Regulations (EAR) to enhance the existing controls and add hundreds of low-level items to the United States' Russia export controls; bring the United States into further alignment with foreign partners; impose controls on specific items going to Iran, including semiconductors, that are components for Iranian Unmanned Aerial Vehicles (UAVs) used by Russia in Ukraine; and add a number of entities to the BIS Entity List. In addition, on April 12, 2023, and May 19, 2023, BIS added 30 entities under 34 entries to the Entity List as part of a wider third-country crackdown on Russian evasion. Each of the entities was found to be acting contrary to U.S. national security and foreign policy interests and in support of Russia's military or defense industrial base.

Use of Third-Party Intermediaries and Transshipment Points to Evade Controls

In addition, on March 2, 2023, DOJ, Commerce, and Treasury issued a joint compliance note on Russia-related sanctions and export control evasion to highlight to private industry a common tactic used by illicit actors to evade Russia-related sanctions and export controls: the use of third-party intermediaries and transshipment points. The joint compliance note highlights the use of this tactic to disguise the involvement of persons on Treasury's Office of Foreign Assets Control (OFAC) List of Specially Designated Nationals and Blocked Persons (SDN List), or parties on the BIS Entity List in transactions and to obscure the true identities of Russian end users.

Attempts to obfuscate the involvement of SDNs or parties on the BIS Entity List in transactions and obscure the true identities of Russian end users may involve the use of shell and front companies. For example, a Russian entity with ties to the defense sector may establish a front company in another country as well as various affiliates of the front company in third countries. Procurement agents, operating covertly on behalf of the Russian Government, will orchestrate purchases of goods by the front company from various suppliers, who in turn receive payment from the front company's non-Russian bank account, which may transmit funds through a U.S. correspondent bank account to route funds back to the supplier. The front company will then route the goods to Russia, often through permissive jurisdictions such as known transshipment points.

Such a procurement network may also involve additional layering to create complexity and further obfuscate the buyer and end user. For example, an SDN or Entity List party may create a shell company that legally owns a front company used by the SDN to procure defense or dual-use items from a supplier. Both the shell and front companies may have foreign bank accounts, which are used to transmit funds back to the supplier and which may also involve the transmittal of funds through a U.S. correspondent bank.

In other instances, an SDN or Entity List party may use a non-designated Russian supplier to procure goods through a subsidiary of an authorized reseller of defense and dual-use items. Some authorized reseller subsidiaries may be less likely to conduct as much customer due diligence as their parent entities. Another obfuscation tactic may involve procurement agents creating both shell companies with foreign bank accounts and transshipment companies that may order and receive dual-use goods from multiple, but similar, suppliers. As a result, the shell company's foreign bank account may send a smaller-volume of transactions to multiple firms, with the intent to attract less attention than would large-volume transactions.

High Priority Items List by Harmonized System Code

In addition to the commodities of concern first highlighted in the 2022 Alert, BIS, in partnership with the EU, the UK, and Japan, has identified nine HS codes covering critical U.S. components that Russia relies on for its weapons systems (the High Priority Items List). These HS codes are listed in Supplement No. 7 to Part 746 of the EAR, meaning a license is required for any items associated with these HS codes destined to Russia, Belarus, the Crimea region of Ukraine, or Iran, including certain foreign-produced items. This High Priority Items List is primarily based on the HS code classification of Russian weapons system components recovered on the battlefield in Ukraine. Items described by these HS codes have been found in multiple Russian weapons systems used against Ukraine, including the Kalibr cruise missile, the Kh-101 cruise missile, and the Orlan-10 UAV. Treasury and BIS assess that Russia is specifically using evasive methods to acquire these items. The High Priority Items List is not an exhaustive list of all items Russia is attempting to procure, but provides prioritized targets for customs and enforcement agencies around the world and has informed discussion in international engagements conducted by BIS and Treasury leadership as well EU and UK counterparts.

High Priority Items List

List omitted.

Applying a Risk-Based Approach to Trade Finance

As noted in the 2022 Alert, financial institutions, particularly banks, credit card operators, and foreign exchange dealers, may be involved in providing financing, processing payments, or performing other services associated with international trade. These services include processing payments for exported goods, issuing lines of credit for exporters, providing or handling the payments supported by letters of credit, processing payments associated with factoring of accounts receivables by an exporter, providing general credit or working capital loans, and issuing or paying insurance on the shipping and delivery of goods to protect the exporter from nonpayment by the buyer. Financial institutions with customers in maritime or export/import industries should rely on the financial institutions' internal risk assessments to employ appropriate risk-mitigation measures consistent with their underlying BSA obligations. This approach to compliance with the BSA includes appropriate due diligence policies and procedures as required by law and regulation, such as, where applicable, FinCEN's customer due diligence and beneficial ownership requirements.

Financial institutions are also strongly encouraged to conduct due diligence when encountering one of the nine listed HS codes to identify possible third-party intermediaries and attempts at evasion of U.S. export controls. HS codes can be found on trade documents including commercial invoices, packing slips, airway bills, sea bills, or other supporting trade documentation.

In reviewing U.S. export data related to these nine HS codes, BIS has identified three fact patterns associated with importers in non-GECC countries that raised diversion concerns:

- The company never received exports prior to February 24, 2022;
- The company received exports that did not include any of the nine HS Codes prior to February 24, 2022; or
- The company received exports involving the nine HS Codes prior to February 24, 2022, but also saw a significant spike in exports thereafter.

Accordingly, FinCEN and BIS are requesting that financial institutions conduct due diligence. Specifically, when opening accounts for new customers engaged in trade, especially those located in non-GECC countries, such as the transshipment countries identified in the 2022 Alert, financial institutions are urged to conduct due diligence, including:

- Evaluating the customer's date of incorporation (e.g., incorporation after February 24, 2022),
- Evaluating the end user and end use of the item (e.g., whether the customer's line of business is consistent with the ordered items), and
- Evaluating whether the customer's physical location and public-facing website raise any red flags (e.g., business address is a residence, no website is available).

For existing customers, financial institutions should pay particular attention to anomalous increases in the volume or value of orders, including by requesting additional information about end-use and end-user, or inconsistencies between the items ordered and customer's line of business. These flags are included in the following section.

Select Red Flag Indicators of Export Control Evasion

FinCEN and BIS are providing an additional select list of potential red flag indicators of export control evasion, including flags derived from recent BSA reporting, that may be relevant to financial institutions and other covered institutions or persons. These red flags should be read in conjunction with those set out in the 2022 Alert. Consideration of these indicators and those set out in the 2022 Alert, in conjunction with conducting appropriate risk-based customer and transactional due diligence, will assist in determining whether an identified activity may be connected to export control evasion. As no single red flag is necessarily indicative of illicit or suspicious activity, all the surrounding facts and circumstances should be considered before determining whether a specific transaction is suspicious or associated with potential export control evasion.

New Transactional and Behavioral Red Flags:

1. Transactions related to payments for defense or dual-use products from a company incorporated after February 24, 2022, and based in a non-GECC country.
2. A new customer whose line of business is in trade of products associated with the nine HS codes, is based in a non-GECC country, and was incorporated after February 24, 2022.
3. An existing customer who did not receive exports associated with the nine HS codes prior to February 24, 2022, but who is receiving such items now.
4. An existing customer, based outside the United States, received exports associated with one or more of the nine HS codes prior to February 24, 2022, and requested or received a significant increase in exports with those same codes thereafter.
5. A customer lacks or refuses to provide details to banks, shippers, or third parties, including about end users, intended end-use, or company ownership.
6. Transactions involving smaller-volume payments from the same end user's foreign bank account to multiple, similar suppliers of dual-use products.
7. Parties to transactions listed as ultimate consignees or listed in the "consign to" field do not typically engage in business consistent with consuming or otherwise using commodities (e.g., other financial institutions, mail centers, or logistics companies).
8. The customer is significantly overpaying for a commodity based on known market prices.
9. The customer or its address is similar to one of the parties on a proscribed parties list, such as the BIS Entity List, the SDN List, or the U.S. Department of State's Statutorily Debarred Parties List.

Reminder of Relevant BSA Obligations for U.S. Financial Institutions

Suspicious Activity and Other BSA Reporting

A financial institution is required to file a SAR if it knows, suspects, or has reason to suspect a transaction conducted or attempted by, at, or through the financial institution involves funds derived from illegal activity, or attempts to disguise funds derived from illegal activity; is designed to evade regulations promulgated under the BSA; lacks a business or apparent lawful purpose; or involves the use of the financial institution to facilitate criminal activity, including sanctions or export control evasion. All statutorily defined financial institutions may voluntarily report suspicious transactions under the existing suspicious activity reporting safe harbor.

When a financial institution files a SAR, it is required to maintain a copy of the SAR and the original or business record equivalent of any supporting documentation for a period of five years from the date of filing the SAR. Financial institutions must provide any requested SAR and all documentation supporting the filing of a SAR upon request by FinCEN or an appropriate law enforcement or supervisory agency. When requested to provide supporting documentation, financial institutions should take special care to verify that a requestor of information is, in fact, a representative of FinCEN or an appropriate law enforcement or supervisory agency. A financial institution should incorporate procedures for such verification into its BSA compliance or AML program. These procedures may include, for example, independent employment verification with the requestor's field office or face-to-face review of the requestor's credentials.

SAR Filing Instructions

FinCEN requests that financial institutions reference this alert by including the key term **"FIN 2022-RUSSIABIS"** in SAR field 2 (Filing Institution Note to FinCEN) and the narrative to indicate a connection between the suspicious activity being reported and the activities highlighted in this alert. Financial institutions may highlight additional advisory or alert keywords in the narrative, if applicable. FinCEN also requests that financial institutions check box 38(z) (Other Suspicious Activity) and note "Russia Export Restrictions Evasion". If known, please also indicate in field 45(z) (Other Product Types) the appropriate North American Industry Code(s) (NAICs) for the involved product, or the appropriate financial instrument or payment mechanism in field 46.

Financial institutions wanting to expedite their report of suspicious transactions that may relate to the activity noted in this alert should call the Financial Institutions Toll-Free Hotline at (866) 556-3974 (7 days a week, 24 hours a day).

Financial institutions should include any and all available information relating to the products or services involved in the suspicious activity, including all available transportation and trade financing documentation, accounts and locations involved, identifying information and descriptions of any legal entities or arrangements involved or associated with beneficial owners, and any information about related persons or entities (including transportation companies or services) involved in the activity. Financial institutions also should provide any and all available information regarding other domestic and foreign financial institutions and businesses or persons involved in the activity. Where appropriate, financial institutions should consider filing a SAR jointly on shared suspicious activity.

Other Relevant BSA Reporting Requirements

Financial institutions and other covered institutions or persons also may have other relevant BSA reporting requirements that provide information in connection with the subject of this alert. These include obligations related to the Currency Transaction Report (CTR), Report of Cash

Payments Over $10,000 Received in a Trade or Business (Form 8300), Report of Foreign Bank and Financial Accounts (FBAR), Report of International Transportation of Currency or Monetary Instruments (CMIR), Registration of Money Services Business (RMSB), and Designation of Exempt Person (DOEP). These standard reporting requirements may not have an obvious connection to Russia-related illicit finance, but may ultimately prove highly useful to law enforcement.

Form 8300 Filing Instructions

Covered institutions or persons may file a Form 8300 voluntarily for any suspicious transaction, even if the total amount does not exceed $10,000. When filing a Form 8300 involving a suspicious transaction relevant to this alert, FinCEN requests that the filer select Box 1b ("suspicious transaction") and include the key term "FIN-2022-RUSSIABIS" in the "Comments" section of the report.

Additional Reporting Options for Suspected Export Control Evasion

In addition to filing a SAR, financial institutions may wish to consider reporting suspected export control evasion activity directly to BIS through its web-based confidential Enforcement Lead/Tip form, located at the following webpage:

https://bis.doc.gov/index.php/component/rsform/form/14-reporting-violationsform?task=forms.edit.

Alternatively, suspected violations may be reported via email to EELEAD@bis.doc.gov or to the BIS Enforcement Hotline: 800-424-2980

For Further Information

Questions or comments regarding the contents of this alert should be sent to the FinCEN Regulatory Support Section at frc@fincen.gov.

What You Need to Do:

This probably will impact larger banks rather than smaller banks. Assure that your BSA officer has this information, and they can determine what additional steps to take.

FinCEN: FATF Identifies Jurisdictions with Anti-Money Laundering and Combating the Financing of Terrorism and Counter-Proliferation Deficiencies (June 29, 2023)

Link

https://www.fincen.gov/news/news-releases/financial-action-task-force-identifies-jurisdictions-anti-money-laundering-and-4

Text

The Financial Crimes Enforcement Network (FinCEN) is informing U.S financial institutions that the Financial Action Task Force (FATF), issued a public statement at the conclusion of its plenary meeting this month reiterating that all jurisdictions should be vigilant to current and emerging risks from the circumvention of measures taken against the Russian Federation in order to protect the international financial system. The FATF noted that the Russian Federation's war of aggression against Ukraine continues to run counter to FATF's principles and thus the suspension of the membership of the Russian Federation continues to stand.

The FATF also updated its lists of jurisdictions with strategic AML/CFT/CPF deficiencies. U.S. financial institutions should consider the FATF's stance toward these jurisdictions when reviewing their obligations and risk-based policies, procedures, and practices.

On June 23, 2023, the FATF added Cameroon, Croatia, and Vietnam to its list of Jurisdictions under Increased Monitoring and did not remove any jurisdictions from the list.

The FATF's list of High-Risk Jurisdictions Subject to a Call for Action remains the same, with Iran and the Democratic People's Republic of Korea (DPRK) still subject to FATF's countermeasures. Burma remains on the list of High-Risk Jurisdictions Subject to a Call for Action and is still subject to enhanced due diligence, not counter-measures.

As part of the FATF's listing and monitoring process to ensure compliance with its international standards, the FATF issued two statements:

(1) Jurisdictions under Increased Monitoring, which publicly identifies jurisdictions with strategic deficiencies in their AML/CFT/CPF regimes that have committed to, or are actively working with, the FATF to address those deficiencies in accordance with an agreed upon timeline and;

(2) High-Risk Jurisdictions Subject to a Call for Action, which publicly identifies jurisdictions with significant strategic deficiencies in their AML/CFT/CPF regimes and calls on all FATF members to apply enhanced due diligence, and, in the most serious cases, apply counter-measures to protect the international financial system from the money laundering, terrorist financing, and proliferation financing risks emanating from the identified countries.

Jurisdictions Under Increased Monitoring

With respect to the FATF-identified Jurisdictions under Increased Monitoring, U.S. covered financial institutions are reminded of their obligations to comply with the due diligence obligations for foreign financial institutions (FFI) under 31 CFR § 1010.610(a) in addition to their general obligations under 31 U.S.C. § 5318(h) and its implementing regulations. As required under 31 CFR § 1010.610(a), covered financial institutions should ensure that their due diligence programs, which address correspondent accounts maintained for FFIs, include appropriate, specific, risk-based, and, where necessary, enhanced policies, procedures, and controls that are reasonably designed to detect and report known or suspected money laundering activity conducted through or involving any correspondent account established, maintained, administered, or managed in the United States. Furthermore, money services businesses (MSBs) have parallel requirements with respect to foreign agents or foreign counterparties, as described in FinCEN Interpretive Release 2004-1, which clarifies that the AML program regulation requires MSBs to establish adequate and appropriate policies, procedures, and controls commensurate with the risk of money laundering and the financing of terrorism posed by their relationship with foreign agents or foreign counterparties. Additional information on these parallel requirements (covering both domestic and foreign agents and foreign counterparts) may be found in FinCEN's Guidance on Existing AML Program Rule Compliance Obligations for MSB Principals with Respect to Agent Monitoring. Such reasonable steps should not, however, put into question a financial institution's ability to maintain or otherwise continue appropriate relationships with customers or other financial institutions, and should not be used as the basis to engage in wholesale or indiscriminate de-risking of any class of customers or financial institutions. Financial institutions should also refer to previous interagency guidance on providing services to foreign embassies, consulates, and missions.

The United Nations (UN) adopted several resolutions implementing economic and financial sanctions. Member States are bound by the provisions of these UN Security Council Resolutions (UNSCRs), and certain provisions of these resolutions are especially relevant to financial institutions. Financial institutions should be familiar with the requirements and prohibitions contained in relevant UNSCRs. In addition to UN sanctions, the U.S. Government maintains a robust sanctions program. For a description of current Office of Foreign Assets Control (OFAC) sanctions programs, please consult OFAC's Sanctions Programs and Country Information.

High-Risk Jurisdictions Subject to a Call for Action

With respect to the FATF-identified High-Risk Jurisdictions Subject to a Call for Action, Burma remains in this category and FATF urges jurisdictions to apply enhanced due diligence proportionate to the risks. As a general matter, FinCEN advises U.S. financial institutions to apply enhanced due diligence when maintaining correspondent accounts for foreign banks operating under a banking license issued by a country designated by an intergovernmental group or organization of which the United States is a member, as noncooperative with respect to international anti-money laundering principles or procedures, and with which designation the U.S. representative to the group or organization concurs. U.S. financial institutions should continue to consult existing FinCEN and OFAC guidance on engaging in financial transactions with Burma.

In the case of DPRK and Iran, the FATF-identified High-Risk Jurisdictions Subject to a Call for Action, specifically, counter-measures, financial institutions must comply with the extensive U.S. restrictions and prohibitions against opening or maintaining any correspondent accounts, directly or indirectly, for North Korean or Iranian financial institutions. Existing U.S. sanctions and FinCEN regulations already prohibit any such correspondent account relationships.

The Government of Iran and Iranian financial institutions remain persons whose property and interests in property are blocked under E.O. 13599 and section 560.211 of the Iranian Transactions and Sanctions Regulations (ITSR). U.S. financial institutions and other U.S. persons continue to be broadly prohibited under the ITSR from engaging in transactions or dealings with Iran, the Government of Iran, and Iranian financial institutions, including opening or maintaining correspondent accounts for Iranian financial institutions. These sanctions impose obligations on U.S. persons that go beyond the relevant FATF recommendations. In addition to OFAC-administered sanctions, on October 25, 2019, FinCEN found Iran to be a Jurisdiction of Primary Money Laundering Concern and issued a final rule, pursuant to Section 311 of the USA PATRIOT Act, imposing the fifth special measure available under Section 311. This rule prohibits U.S. financial institutions from opening or maintaining correspondent accounts for, or on behalf of, an Iranian financial institution, and the use of foreign financial institutions' correspondent accounts at covered United States financial institutions to process transactions involving Iranian financial institutions (31 CFR § 1010.661).

For jurisdictions removed from the FATF listing and monitoring process, U.S. financial institutions should take the FATF's decisions and the reasons behind the delisting into consideration when assessing risk, consistent with financial institutions' obligations under 31 CFR § 1010.610(a) and 31 CFR § 1010.210.

If a financial institution knows, suspects, or has reason to suspect that a transaction involves funds derived from illegal activity or that a customer has otherwise engaged in activities indicative of money laundering, terrorist financing, or other violation of federal law or regulation, the financial institution must file a Suspicious Activity Report.

Questions or comments regarding the contents of this release should be addressed to the FinCEN Regulatory Support Section at frc@fincen.gov.

What You Need to Do:

Assure that your BSA officer has this information, and the BSA officer can take any appropriate actions.

Appendix

Appendix 1: 2022 – 2023 List of Distressed or Underserved Nonmetropolitan Middle-Income Geographies

ILLINOIS

		Distressed Middle-Income Nonmetropolitan Tracts			Underserved Middle-Income Nonmetropolitan Tracts	Previous Year Designation				
COUNTY NAME	STATE NAME	POVERTY	UNEMPLOYMENT	POPULATION LOSS	REMOTE RURAL	DISTRESSED	UNDER-SERVED	STATE CODE	COUNTY CODE	TRACT CODE
BROWN	IL				X		X	17	009	9705.00
EDWARDS	IL				X		X	17	047	9569.00
EDWARDS	IL				X		X	17	047	9570.00
EDWARDS	IL				X		X	17	047	9571.00
GALLATIN	IL			X	X	X	X	17	059	9727.00
HARDIN	IL			X	X	X	X	17	069	9709.00
HARDIN	IL			X	X	X	X	17	069	9710.00
HENDERSON	IL			X		X		17	071	9733.00
HENDERSON	IL			X		X		17	071	9734.00
HENDERSON	IL			X		X		17	071	9735.00
LAWRENCE	IL		X					17	101	8807.00
LAWRENCE	IL		X					17	101	8808.00
LAWRENCE	IL		X					17	101	8810.00
MASON	IL			X		X		17	125	9563.00
MASON	IL			X		X		17	125	9564.00
MASON	IL			X		X		17	125	9565.00
MASON	IL			X		X		17	125	9566.00
MASON	IL			X		X		17	125	9568.00
POPE	IL				X		X	17	151	9712.00
PULASKI	IL	X	X	X	X	X	X	17	153	9710.00
RICHLAND	IL				X		X	17	159	9779.00
RICHLAND	IL				X		X	17	159	9781.00
RICHLAND	IL				X		X	17	159	9782.00
RICHLAND	IL				X		X	17	159	9783.00
WABASH	IL				X		X	17	185	9572.00
WABASH	IL				X		X	17	185	9573.00
WABASH	IL				X		X	17	185	9574.00
WABASH	IL				X		X	17	185	9575.00

INDIANA

		Distressed Middle-Income Nonmetropolitan Tracts			Underserved Middle-Income Nonmetropolitan Tracts	Previous Year Designation				
COUNTY NAME	STATE NAME	POVERTY	UNEMPLOYMENT	POPULATION LOSS	REMOTE RURAL	DISTRESSED	UNDER-SERVED	STATE CODE	COUNTY CODE	TRACT CODE
SPENCER	IN				X		X	18	147	9528.00
SPENCER	IN				X		X	18	147	9529.00
SPENCER	IN				X		X	18	147	9530.00
SPENCER	IN				X		X	18	147	9531.00

KANSAS

		Distressed Middle-Income Nonmetropolitan Tracts			Underserved Middle-Income Nonmetropolitan Tracts	Previous Year Designation				
COUNTY NAME	**STATE NAME**	**POVERTY**	**UNEMPLOYMENT**	**POPULATION LOSS**	**REMOTE RURAL**	**DISTRESSED**	**UNDER-SERVED**	**STATE CODE**	**COUNTY CODE**	**TRACT CODE**
ALLEN	KS				X		X	20	001	9526.00
ALLEN	KS				X		X	20	001	9527.00
ALLEN	KS				X		X	20	001	9529.00
ALLEN	KS				X		X	20	001	9530.00
BARBER	KS				X		X	20	007	9681.00
BARBER	KS				X		X	20	007	9682.00
CHASE	KS			X	X	X	X	20	017	9606.00
CHEYENNE	KS			X	X	X	X	20	023	9502.00
CLARK	KS				X		X	20	025	9671.00
COMANCHE	KS				X		X	20	033	9676.00
CRAWFORD	KS	X						20	037	9566.00
CRAWFORD	KS	X						20	037	9567.00
CRAWFORD	KS	X						20	037	9569.00
CRAWFORD	KS	X						20	037	9570.00
CRAWFORD	KS	X						20	037	9573.00
CRAWFORD	KS	X						20	037	9574.00
CRAWFORD	KS	X						20	037	9576.01
DECATUR	KS			X	X	X	X	20	039	9513.00
EDWARDS	KS			X	X	X	X	20	047	9696.00
EDWARDS	KS			X	X	X	X	20	047	9697.00
ELK	KS			X	X	X	X	20	049	9651.00
GOVE	KS			X	X	X	X	20	063	9553.00
GRAHAM	KS			X	X	X	X	20	065	9523.00
GRAY	KS				X		X	20	069	9627.00
GREELEY	KS			X	X	X	X	20	071	9581.00
GREENWOOD	KS			X		X		20	073	9656.00
GREENWOOD	KS			X		X		20	073	9658.00
HAMILTON	KS				X		X	20	075	9586.00
HARPER	KS				X		X	20	077	9616.00
HARPER	KS				X		X	20	077	9618.00
HASKELL	KS				X		X	20	081	4631.00
HODGEMAN	KS			X	X	X	X	20	083	4611.00
KEARNY	KS			X		X		20	093	9591.00
KIOWA	KS			X	X	X	X	20	097	9691.00

KANSAS, continued

LANE	KS			X	X	X	X	20	101	9566.00
LINCOLN	KS			X	X	X	X	20	105	0861.00
LOGAN	KS				X		X	20	109	9546.00
LYON	KS			X		X		20	111	0002.01
LYON	KS			X		X		20	111	0002.03
LYON	KS			X		X		20	111	0003.00
LYON	KS			X		X		20	111	0004.00
LYON	KS			X		X		20	111	0005.00
MEADE	KS				X		X	20	119	9666.00
MEADE	KS				X		X	20	119	9667.00
MITCHELL	KS				X		X	20	123	1766.00
MITCHELL	KS				X		X	20	123	1767.00
MORTON	KS				X		X	20	129	9646.00
NESS	KS				X		X	20	135	9563.00
NORTON	KS				X		X	20	137	9517.00
OSBORNE	KS			X	X	X	X	20	141	4741.00
PHILLIPS	KS				X		X	20	147	4751.00
PHILLIPS	KS				X		X	20	147	4752.00
PHILLIPS	KS				X		X	20	147	4753.00
PRATT	KS				X		X	20	151	9687.00
RAWLINS	KS			X	X	X	X	20	153	9506.00
REPUBLIC	KS			X	X	X	X	20	157	9781.00
REPUBLIC	KS			X	X	X	X	20	157	9782.00
REPUBLIC	KS			X	X	X	X	20	157	9783.00
ROOKS	KS				X		X	20	163	9746.00
ROOKS	KS				X		X	20	163	9747.00
RUSH	KS				X		X	20	165	9723.00
SHERMAN	KS			X	X	X	X	20	181	4537.00
SMITH	KS			X	X	X	X	20	183	4759.00
STAFFORD	KS				X		X	20	185	4706.00
STAFFORD	KS				X		X	20	185	4707.00
STANTON	KS				X		X	20	187	9641.00
THOMAS	KS				X		X	20	193	9531.00
WALLACE	KS			X	X	X	X	20	199	9541.00
WASHINGTON	KS			X	X	X	X	20	201	9786.00
WASHINGTON	KS			X	X	X	X	20	201	9787.00
WILSON	KS				X		X	20	205	0971.00
WILSON	KS				X		X	20	205	0972.00
WILSON	KS				X		X	20	205	0973.00
WILSON	KS				X		X	20	205	0974.00
WOODSON	KS			X	X	X	X	20	207	0966.00
WOODSON	KS			X	X	X	X	20	207	0967.00

MICHIGAN

		Distressed Middle-Income Nonmetropolitan Tracts			Underserved Middle-Income Nonmetropolitan Tracts	Previous Year Designation				
COUNTY NAME	STATE NAME	POVERTY	UNEMPLOYMENT	POPULATION LOSS	REMOTE RURAL	DISTRESSED	UNDER-SERVED	STATE CODE	COUNTY CODE	TRACT CODE
ALCONA	MI		X		X		X	26	001	0001.00
ALCONA	MI		X		X		X	26	001	9701.00
ALCONA	MI		X		X		X	26	001	9704.00
ALCONA	MI		X		X		X	26	001	9706.00
ALGER	MI		X		X	X	X	26	003	0001.00
ALGER	MI		X		X	X	X	26	003	0002.00
ALGER	MI		X		X	X	X	26	003	0003.00
ANTRIM	MI		X		X		X	26	009	9601.00
ANTRIM	MI		X		X		X	26	009	9602.00
ANTRIM	MI		X		X		X	26	009	9603.00
ANTRIM	MI		X		X		X	26	009	9604.02
ANTRIM	MI		X		X		X	26	009	9605.01
ANTRIM	MI		X		X		X	26	009	9605.02
ANTRIM	MI		X		X		X	26	009	9607.01
ARENAC	MI		X	X	X	X	X	26	011	9702.00
ARENAC	MI		X	X	X	X	X	26	011	9703.00
ARENAC	MI		X	X	X	X	X	26	011	9704.00
ARENAC	MI		X	X	X	X	X	26	011	9705.00
BARAGA	MI		X		X		X	26	013	0001.00
BARAGA	MI		X		X		X	26	013	0002.00
CHARLEVOIX	MI				X		X	26	029	0001.00
CHARLEVOIX	MI				X		X	26	029	0002.00
CHARLEVOIX	MI				X		X	26	029	0005.00
CHARLEVOIX	MI				X		X	26	029	0008.00
CHARLEVOIX	MI				X		X	26	029	0010.00
CHARLEVOIX	MI				X		X	26	029	0011.00
CHARLEVOIX	MI				X		X	26	029	0013.00
CHARLEVOIX	MI				X		X	26	029	0014.00
CHARLEVOIX	MI				X		X	26	029	0015.00
CHEBOYGAN	MI		X		X	X	X	26	031	9601.00
CHEBOYGAN	MI		X		X	X	X	26	031	9602.00
CHEBOYGAN	MI		X		X	X	X	26	031	9604.01
CHEBOYGAN	MI		X		X	X	X	26	031	9604.02
CHEBOYGAN	MI		X		X	X	X	26	031	9605.00
CHEBOYGAN	MI		X		X	X	X	26	031	9606.00
CHEBOYGAN	MI		X		X	X	X	26	031	9607.00
CHIPPEWA	MI		X					26	033	9701.00
CHIPPEWA	MI		X					26	033	9702.00
CHIPPEWA	MI		X					26	033	9703.00
CHIPPEWA	MI		X					26	033	9704.00
CHIPPEWA	MI		X					26	033	9705.00
CHIPPEWA	MI		X					26	033	9706.02
CHIPPEWA	MI		X					26	033	9708.00
CHIPPEWA	MI		X					26	033	9710.00
CHIPPEWA	MI		X					26	033	9711.00
CLARE	MI		X			X		26	035	0001.00
CLARE	MI		X			X		26	035	0004.00
CLARE	MI		X			X		26	035	0006.00
CLARE	MI		X			X		26	035	0007.00
CLARE	MI		X			X		26	035	0008.00
CRAWFORD	MI		X		X		X	26	039	9601.00
CRAWFORD	MI		X		X		X	26	039	9602.00
CRAWFORD	MI		X		X		X	26	039	9603.00
CRAWFORD	MI		X		X		X	26	039	9604.00
CRAWFORD	MI		X		X		X	26	039	9605.00

MICHIGAN, continued

DELTA	MI		X					26	041	9701.00
DELTA	MI		X					26	041	9702.00
DELTA	MI		X					26	041	9703.00
DELTA	MI		X					26	041	9704.00
DELTA	MI		X					26	041	9705.00
DELTA	MI		X					26	041	9706.00
DELTA	MI		X					26	041	9707.00
DELTA	MI		X					26	041	9711.00
EMMET	MI		X		X		X	26	047	9701.00
EMMET	MI		X		X		X	26	047	9702.02
EMMET	MI		X		X		X	26	047	9704.00
EMMET	MI		X		X		X	26	047	9705.00
EMMET	MI		X		X		X	26	047	9708.00
GLADWIN	MI		X					26	051	0001.01
GLADWIN	MI		X					26	051	0002.00
GLADWIN	MI		X					26	051	0003.00
GLADWIN	MI		X					26	051	0005.00
GLADWIN	MI		X					26	051	0006.00
GLADWIN	MI		X					26	051	0007.00
GLADWIN	MI		X					26	051	0009.00
GOGEBIC	MI				X		X	26	053	9502.00
GOGEBIC	MI				X		X	26	053	9503.00
GOGEBIC	MI				X		X	26	053	9507.00
GOGEBIC	MI				X		X	26	053	9508.00
HURON	MI				X		X	26	063	9501.00
HURON	MI				X		X	26	063	9502.00
HURON	MI				X		X	26	063	9503.00
HURON	MI				X		X	26	063	9504.00
HURON	MI				X		X	26	063	9505.00
HURON	MI				X		X	26	063	9506.00
HURON	MI				X		X	26	063	9507.00
HURON	MI				X		X	26	063	9508.00
HURON	MI				X		X	26	063	9509.00
HURON	MI				X		X	26	063	9511.00
HURON	MI				X		X	26	063	9512.00
IOSCO	MI		X		X		X	26	069	0002.01
IOSCO	MI		X		X		X	26	069	0002.02
IOSCO	MI		X		X		X	26	069	0006.00
IOSCO	MI		X		X		X	26	069	0007.00
IOSCO	MI		X		X		X	26	069	0008.00
IRON	MI		X					26	071	0001.00
IRON	MI		X					26	071	0002.00
IRON	MI		X					26	071	0003.00
IRON	MI		X					26	071	0004.00
IRON	MI		X					26	071	0005.00
KALKASKA	MI		X					26	079	9502.01
KALKASKA	MI		X					26	079	9503.00
KALKASKA	MI		X					26	079	9504.00
KALKASKA	MI		X					26	079	9506.01
KALKASKA	MI		X					26	079	9506.02
KEWEENAW	MI		X					26	083	0001.00
LAKE	MI		X		X	X	X	26	085	9601.00
LUCE	MI		X		X		X	26	095	9601.00
LUCE	MI		X		X		X	26	095	9602.00

MICHIGAN, continued

MACKINAC	MI		X		X	X	X	26	097	9501.00
MACKINAC	MI		X		X	X	X	26	097	9503.00
MACKINAC	MI		X		X	X	X	26	097	9504.00
MANISTEE	MI		X					26	101	0001.00
MANISTEE	MI		X					26	101	0002.00
MANISTEE	MI		X					26	101	0004.00
MANISTEE	MI		X					26	101	0005.00
MANISTEE	MI		X					26	101	0006.00
MANISTEE	MI		X					26	101	0007.00
MANISTEE	MI		X					26	101	0008.00
MANISTEE	MI		X					26	101	0009.00
MECOSTA	MI		X					26	107	9601.00
MECOSTA	MI		X					26	107	9602.00
MECOSTA	MI		X					26	107	9603.00
MECOSTA	MI		X					26	107	9604.00
MECOSTA	MI		X					26	107	9606.00
MECOSTA	MI		X					26	107	9607.02
MECOSTA	MI		X					26	107	9608.00
MECOSTA	MI		X					26	107	9609.00
MECOSTA	MI		X					26	107	9610.01
MECOSTA	MI		X					26	107	9610.02
MONTMORENCY	MI		X		X	X	X	26	119	9102.00
OCEANA	MI		X		X		X	26	127	0103.00
OCEANA	MI		X		X		X	26	127	0104.00
OCEANA	MI		X		X		X	26	127	0105.00
OCEANA	MI		X		X		X	26	127	0106.00
OCEANA	MI		X		X		X	26	127	0108.00
OCEANA	MI		X		X		X	26	127	0109.00
OCEANA	MI		X		X		X	26	127	0110.00
OGEMAW	MI		X		X		X	26	129	9502.00
OGEMAW	MI		X		X		X	26	129	9503.00
OGEMAW	MI		X		X		X	26	129	9504.00
OGEMAW	MI		X		X		X	26	129	9505.00
ONTONAGON	MI		X	X	X	X	X	26	131	9701.00
ONTONAGON	MI		X	X	X	X	X	26	131	9702.00
OSCEOLA	MI				X		X	26	133	9701.00
OSCEOLA	MI				X		X	26	133	9702.00
OSCEOLA	MI				X		X	26	133	9703.00
OSCEOLA	MI				X		X	26	133	9705.02
OSCEOLA	MI				X		X	26	133	9706.00
OSCODA	MI		X	X	X	X	X	26	135	9702.01
OSCODA	MI		X	X	X	X	X	26	135	9702.02
OSCODA	MI		X	X	X	X	X	26	135	9703.00
OTSEGO	MI		X		X		X	26	137	9501.00
OTSEGO	MI		X		X		X	26	137	9502.00
OTSEGO	MI		X		X		X	26	137	9504.00
OTSEGO	MI		X		X		X	26	137	9505.00
OTSEGO	MI		X		X		X	26	137	9506.00
PRESQUE ISLE	MI		X	X		X		26	141	9501.00
PRESQUE ISLE	MI		X	X		X		26	141	9502.00
PRESQUE ISLE	MI		X	X		X		26	141	9503.00
PRESQUE ISLE	MI		X	X		X		26	141	9505.00
ROSCOMMON	MI		X		X	X	X	26	143	9703.00
ROSCOMMON	MI		X		X	X	X	26	143	9704.01
ROSCOMMON	MI		X		X	X	X	26	143	9705.00
ROSCOMMON	MI		X		X	X	X	26	143	9706.00
ROSCOMMON	MI		X		X	X	X	26	143	9707.00
ROSCOMMON	MI		X		X	X	X	26	143	9710.03
SCHOOLCRAFT	MI		X			X		26	153	0001.00
SCHOOLCRAFT	MI		X			X		26	153	0002.00
SCHOOLCRAFT	MI		X			X		26	153	0003.00
TUSCOLA	MI		X					26	157	0001.00
TUSCOLA	MI		X					26	157	0002.00
TUSCOLA	MI		X					26	157	0003.00
TUSCOLA	MI		X					26	157	0004.00
TUSCOLA	MI		X					26	157	0005.00
TUSCOLA	MI		X					26	157	0006.00
TUSCOLA	MI		X					26	157	0007.00
TUSCOLA	MI		X					26	157	0008.00
TUSCOLA	MI		X					26	157	0009.00
TUSCOLA	MI		X					26	157	0011.00
TUSCOLA	MI		X					26	157	0012.00
TUSCOLA	MI		X					26	157	0013.00

MISSOURI

		Distressed Middle-Income Nonmetropolitan Tracts			Underserved Middle-Income Nonmetropolitan Tracts	Previous Year Designation				
COUNTY NAME	**STATE NAME**	**POVERTY**	**UNEMPLOYMENT**	**POPULATION LOSS**	**REMOTE RURAL**	**DISTRESSED**	**UNDER-SERVED**	**STATE CODE**	**COUNTY CODE**	**TRACT CODE**
ADAIR	MO	X						29	001	9501.00
ADAIR	MO	X						29	001	9502.00
ADAIR	MO	X						29	001	9504.00
ADAIR	MO	X						29	001	9509.00
ATCHISON	MO			X	X	X	X	29	005	9501.00
ATCHISON	MO			X	X	X	X	29	005	9502.00
BENTON	MO				X		X	29	015	4601.00
BENTON	MO				X		X	29	015	4602.00
BENTON	MO				X		X	29	015	4603.00
BENTON	MO				X		X	29	015	4607.01
BENTON	MO				X		X	29	015	4608.01
BENTON	MO				X		X	29	015	4608.02
BUTLER	MO					X		29	023	9501.01
BUTLER	MO					X		29	023	9501.02
BUTLER	MO					X		29	023	9502.01
BUTLER	MO					X		29	023	9506.00
BUTLER	MO					X		29	023	9508.00
BUTLER	MO					X		29	023	9509.00
CARROLL	MO			X		X		29	033	9601.00
CARROLL	MO			X		X		29	033	9603.00
CARTER	MO	X			X	X	X	29	035	9601.00
CARTER	MO	X			X	X	X	29	035	9602.00
CHARITON	MO				X		X	29	041	4701.00
CHARITON	MO				X		X	29	041	4702.00
CHARITON	MO				X		X	29	041	4703.00
DADE	MO				X		X	29	057	4801.00
DADE	MO				X		X	29	057	4802.00
DOUGLAS	MO	X						29	067	9501.00
DOUGLAS	MO	X						29	067	9502.00
DOUGLAS	MO	X						29	067	9505.00
DUNKLIN	MO	X				X		29	069	3602.00
DUNKLIN	MO	X				X		29	069	3604.00
DUNKLIN	MO	X				X		29	069	3606.00
DUNKLIN	MO	X				X		29	069	3607.00
DUNKLIN	MO	X				X		29	069	3609.00
GENTRY	MO				X		X	29	075	9601.00
GRUNDY	MO				X		X	29	079	9602.00
GRUNDY	MO				X		X	29	079	9603.00
GRUNDY	MO				X		X	29	079	9604.00

MISSOURI, continued

HARRISON	MO				X		X	29	081	9501.00
HARRISON	MO				X		X	29	081	9502.00
HARRISON	MO				X		X	29	081	9503.00
HICKORY	MO				X		X	29	085	4701.00
HICKORY	MO				X		X	29	085	4703.00
HOLT	MO				X		X	29	087	9601.00
HOLT	MO				X		X	29	087	9602.00
HOLT	MO				X		X	29	087	9603.00
IRON	MO				X		X	29	093	9501.00
IRON	MO				X		X	29	093	9502.00
IRON	MO				X		X	29	093	9503.00
IRON	MO				X		X	29	093	9504.00
KNOX	MO				X		X	29	103	9601.00
KNOX	MO				X		X	29	103	9602.00
LINN	MO				X		X	29	115	4902.00
LINN	MO				X		X	29	115	4903.00
LINN	MO				X		X	29	115	4904.00
LINN	MO				X		X	29	115	4905.00
MISSISSIPPI	MO	X						29	133	9501.00
MISSISSIPPI	MO	X						29	133	9503.00
MORGAN	MO				X		X	29	141	4701.00
MORGAN	MO				X		X	29	141	4703.00
MORGAN	MO				X		X	29	141	4704.01
NEW MADRID	MO	X						29	143	9601.00
NEW MADRID	MO	X						29	143	9602.00
NEW MADRID	MO	X						29	143	9603.00
NEW MADRID	MO	X						29	143	9604.00
OREGON	MO	X			X	X	X	29	149	4802.00
OZARK	MO	X			X	X	X	29	153	4701.02
PEMISCOT	MO	X				X		29	155	4701.00
PEMISCOT	MO	X				X		29	155	4703.00
PEMISCOT	MO	X				X		29	155	4705.00
PUTNAM	MO				X		X	29	171	9602.00
REYNOLDS	MO				X		X	29	179	3801.00
REYNOLDS	MO				X		X	29	179	3802.00
RIPLEY	MO	X			X	X	X	29	181	8703.00
RIPLEY	MO	X			X	X	X	29	181	8704.00
SCOTLAND	MO				X		X	29	199	4801.00
SCOTLAND	MO				X		X	29	199	4802.00
SHANNON	MO	X			X	X	X	29	203	4701.00
SHANNON	MO	X			X	X	X	29	203	4702.00
SHELBY	MO				X		X	29	205	4502.00
SULLIVAN	MO				X		X	29	211	4801.00
SULLIVAN	MO				X		X	29	211	4802.00
SULLIVAN	MO				X		X	29	211	4803.00
TEXAS	MO	X				X		29	215	4801.01
TEXAS	MO	X				X		29	215	4802.02
TEXAS	MO	X				X		29	215	4803.01
TEXAS	MO	X				X		29	215	4804.01
TEXAS	MO	X				X		29	215	4804.02
VERNON	MO				X		X	29	217	9501.00
VERNON	MO				X		X	29	217	9503.00
VERNON	MO				X		X	29	217	9504.00
VERNON	MO				X		X	29	217	9506.00
WAYNE	MO	X			X	X	X	29	223	6901.00
WAYNE	MO	X			X	X	X	29	223	6902.00
WORTH	MO				X		X	29	227	9601.00

MONTANA

		Distressed Middle-Income Nonmetropolitan Tracts			Underserved Middle-Income Nonmetropolitan Tracts	Previous Year Designation				
COUNTY NAME	STATE NAME	POVERTY	UNEMPLOYMENT	POPULATION LOSS	REMOTE RURAL	DISTRESSED	UNDER-SERVED	STATE CODE	COUNTY CODE	TRACT CODE
BEAVERHEAD	MT				X		X	30	001	0001.00
BEAVERHEAD	MT				X		X	30	001	0002.00
BEAVERHEAD	MT				X		X	30	001	0003.00
BIG HORN	MT	X				X		30	003	0001.00
BIG HORN	MT	X				X		30	003	9405.00
BIG HORN	MT	X				X		30	003	9407.00
BLAINE	MT				X	X	X	30	005	0002.00
BROADWATER	MT				X		X	30	007	0001.00
BROADWATER	MT				X		X	30	007	0002.00
CHOUTEAU	MT				X		X	30	015	0102.00
CUSTER	MT				X		X	30	017	9616.00
CUSTER	MT				X		X	30	017	9620.00
DANIELS	MT			X	X	X	X	30	019	0203.00
DAWSON	MT				X		X	30	021	0001.00
DAWSON	MT				X		X	30	021	0002.00
DAWSON	MT				X		X	30	021	0003.00
FERGUS	MT				X		X	30	027	0301.00
FERGUS	MT				X		X	30	027	0302.01
GARFIELD	MT				X		X	30	033	0001.00
GLACIER	MT	X			X	X	X	30	035	9404.00
GLACIER	MT	X			X	X	X	30	035	9760.00
GRANITE	MT				X		X	30	039	9617.02
HILL	MT				X		X	30	041	0401.00
HILL	MT				X		X	30	041	0404.00
HILL	MT				X		X	30	041	0405.00
JUDITH BASIN	MT			X	X	X	X	30	045	0001.00
MCCONE	MT			X	X	X	X	30	055	9540.00
MADISON	MT				X		X	30	057	0001.01
MADISON	MT				X		X	30	057	0001.02
MADISON	MT				X		X	30	057	0002.00
MADISON	MT				X		X	30	057	0003.00
MEAGHER	MT				X		X	30	059	0001.00
MINERAL	MT				X		X	30	061	9645.00
PETROLEUM	MT				X		X	30	069	0001.00
PONDERA	MT				X		X	30	073	9770.00
PONDERA	MT				X		X	30	073	9772.00
POWDER RIVER	MT				X		X	30	075	0001.00
PRAIRIE	MT				X		X	30	079	0001.00
ROSEBUD	MT				X		X	30	087	0001.00
ROSEBUD	MT				X		X	30	087	0002.00
SHERIDAN	MT			X	X	X	X	30	091	0902.00
SHERIDAN	MT			X	X	X	X	30	091	0904.00
SWEET GRASS	MT				X		X	30	097	9670.00
TETON	MT				X		X	30	099	0001.00
TETON	MT				X		X	30	099	0002.00
TETON	MT				X		X	30	099	0003.00
TOOLE	MT				X		X	30	101	0001.00
TOOLE	MT				X		X	30	101	0002.00
VALLEY	MT				X		X	30	105	1001.00
VALLEY	MT				X		X	30	105	1005.00
VALLEY	MT				X		X	30	105	9406.00
WIBAUX	MT				X		X	30	109	0001.00

NORTH DAKOTA

		Distressed Middle-Income Nonmetropolitan Tracts			Underserved Middle-Income Nonmetropolitan Tracts	Previous Year Designation				
COUNTY NAME	STATE NAME	POVERTY	UNEMPLOYMENT	POPULATION LOSS	REMOTE RURAL	DISTRESSED	UNDER-SERVED	STATE CODE	COUNTY CODE	TRACT CODE
ADAMS	ND				X		X	38	001	9656.00
BENSON	ND	X			X	X	X	38	005	9567.00
BILLINGS	ND			X	X	X	X	38	007	9631.00
BOTTINEAU	ND			X	X	X	X	38	009	9523.00
BOTTINEAU	ND			X	X	X	X	38	009	9524.00
BOTTINEAU	ND			X	X	X	X	38	009	9525.00
BOWMAN	ND				X		X	38	011	9652.00
BOWMAN	ND				X		X	38	011	9653.00
BURKE	ND			X	X	X	X	38	013	9533.00
CAVALIER	ND			X	X	X	X	38	019	9509.00
CAVALIER	ND			X	X	X	X	38	019	9511.00
DICKEY	ND				X		X	38	021	9732.00
DICKEY	ND				X		X	38	021	9733.00
DICKEY	ND				X		X	38	021	9734.00
DIVIDE	ND				X		X	38	023	9545.00
EDDY	ND			X	X	X	X	38	027	9592.00
EMMONS	ND			X	X	X	X	38	029	9665.00
FOSTER	ND			X	X	X	X	38	031	9596.00
GOLDEN VALLEY	ND			X	X	X	X	38	033	9629.00
GRANT	ND			X	X	X	X	38	037	9659.00
GRIGGS	ND			X	X	X	X	38	039	9686.00
HETTINGER	ND				X		X	38	041	9647.00
HETTINGER	ND				X		X	38	041	9648.00
LAMOURE	ND			X	X	X	X	38	045	9721.00
LAMOURE	ND			X	X	X	X	38	045	9722.00
LOGAN	ND			X	X	X	X	38	047	9725.00
MCINTOSH	ND			X	X	X	X	38	051	9729.00
MCKENZIE	ND				X		X	38	053	9401.00
MCKENZIE	ND				X		X	38	053	9624.00
MCKENZIE	ND				X		X	38	053	9625.00
MCLEAN	ND				X		X	38	055	9608.00
MCLEAN	ND				X		X	38	055	9610.01
MERCER	ND				X		X	38	057	9616.00
MERCER	ND				X		X	38	057	9618.00
MOUNTRAIL	ND				X		X	38	061	9403.00
MOUNTRAIL	ND				X		X	38	061	9404.00
MOUNTRAIL	ND				X		X	38	061	9552.00
NELSON	ND			X	X	X	X	38	063	9590.00
PEMBINA	ND			X	X	X	X	38	067	9501.00
PEMBINA	ND			X	X	X	X	38	067	9502.00
PEMBINA	ND			X	X	X	X	38	067	9505.00
PEMBINA	ND			X	X	X	X	38	067	9506.00
RAMSEY	ND				X		X	38	071	9577.00
RAMSEY	ND				X		X	38	071	9578.00
RANSOM	ND			X	X	X	X	38	073	9689.00
RANSOM	ND			X	X	X	X	38	073	9690.00
RANSOM	ND			X	X	X	X	38	073	9691.00
RICHLAND	ND			X		X		38	077	9707.00
RICHLAND	ND			X		X		38	077	9709.00
RICHLAND	ND			X		X		38	077	9710.00
RICHLAND	ND			X		X		38	077	9711.00
RICHLAND	ND			X		X		38	077	9714.00

NORTH DAKOTA, continued

SARGENT	ND			X	X	X	X	38	081	9740.00
SARGENT	ND			X	X	X	X	38	081	9742.00
SHERIDAN	ND			X	X	X	X	38	083	9602.00
SLOPE	ND				X		X	38	087	9650.00
STEELE	ND			X	X	X	X	38	091	9687.00
TOWNER	ND			X	X	X	X	38	095	9515.00
TRAILL	ND				X		X	38	097	9701.00
TRAILL	ND				X		X	38	097	9702.00
TRAILL	ND				X		X	38	097	9703.00
TRAILL	ND				X		X	38	097	9704.00
WALSH	ND			X		X		38	099	9578.00
WALSH	ND			X		X		38	099	9581.00
WALSH	ND			X		X		38	099	9582.00
WALSH	ND			X		X		38	099	9583.00
WELLS	ND			X	X	X	X	38	103	9598.00
WELLS	ND			X	X	X	X	38	103	9600.00

OHIO

		Distressed Middle-Income Nonmetropolitan Tracts			Underserved Middle-Income Nonmetropolitan Tracts	Previous Year Designation				
COUNTY NAME	STATE NAME	POVERTY	UNEMPLOYMENT	POPULATION LOSS	REMOTE RURAL	DISTRESSED	UNDER-SERVED	STATE CODE	COUNTY CODE	TRACT CODE
ADAMS	OH		X			X		39	001	7702.00
ADAMS	OH		X			X		39	001	7703.02
ATHENS	OH	X				X		39	009	9729.00
ATHENS	OH	X				X		39	009	9734.00
ATHENS	OH	X				X		39	009	9735.00
ATHENS	OH	X				X		39	009	9736.00
ATHENS	OH	X				X		39	009	9737.00
ATHENS	OH	X				X		39	009	9738.00
MEIGS	OH	X	X					39	105	9641.00
MEIGS	OH	X	X					39	105	9642.00
MEIGS	OH	X	X					39	105	9643.00
MEIGS	OH	X	X					39	105	9645.00
MONROE	OH		X		X		X	39	111	9666.00
MONROE	OH		X		X		X	39	111	9668.00
MONROE	OH		X		X		X	39	111	9669.00
NOBLE	OH		X		X		X	39	121	9683.00
NOBLE	OH		X		X		X	39	121	9684.01
NOBLE	OH		X		X		X	39	121	9685.00
SCIOTO	OH	X				X		39	145	0021.00
SCIOTO	OH	X				X		39	145	0023.00
SCIOTO	OH	X				X		39	145	0025.00
SCIOTO	OH	X				X		39	145	0026.00
SCIOTO	OH	X				X		39	145	0027.00
SCIOTO	OH	X				X		39	145	0028.00
SCIOTO	OH	X				X		39	145	0029.01
SCIOTO	OH	X				X		39	145	0029.02
SCIOTO	OH	X				X		39	145	0033.00
SCIOTO	OH	X				X		39	145	0038.00
SCIOTO	OH	X				X		39	145	0040.00

WISCONSIN

		Distressed Middle-Income Nonmetropolitan Tracts			Underserved Middle-Income Nonmetropolitan Tracts	Previous Year Designation				
COUNTY NAME	STATE NAME	POVERTY	UNEMPLOYMENT	POPULATION LOSS	REMOTE RURAL	DISTRESSED	UNDER-SERVED	STATE CODE	COUNTY CODE	TRACT CODE
ASHLAND	WI				X		X	55	003	9400.00
ASHLAND	WI				X		X	55	003	9504.00
ASHLAND	WI				X		X	55	003	9505.00
ASHLAND	WI				X		X	55	003	9506.00
ASHLAND	WI				X		X	55	003	9507.00
FLORENCE	WI			X		X		55	037	1901.02
FLORENCE	WI			X		X		55	037	1902.00
IRON	WI			X	X	X	X	55	051	1802.00
IRON	WI			X	X	X	X	55	051	1803.00
LAFAYETTE	WI				X		X	55	065	9701.00
LAFAYETTE	WI				X		X	55	065	9702.00
LAFAYETTE	WI				X		X	55	065	9703.00
LAFAYETTE	WI				X		X	55	065	9704.00
LAFAYETTE	WI				X		X	55	065	9705.00
MARQUETTE	WI				X		X	55	077	9601.00
MARQUETTE	WI				X		X	55	077	9602.00
MARQUETTE	WI				X		X	55	077	9603.00
MARQUETTE	WI				X		X	55	077	9604.00
MARQUETTE	WI				X		X	55	077	9605.00
MENOMINEE	WI	X	X			X		55	078	9401.04
PRICE	WI			X	X	X	X	55	099	9701.00
PRICE	WI			X	X	X	X	55	099	9704.00
PRICE	WI			X	X	X	X	55	099	9705.00
PRICE	WI			X	X	X	X	55	099	9706.00
PRICE	WI			X	X	X	X	55	099	9707.00
SAWYER	WI				X		X	55	113	1003.00
SAWYER	WI				X		X	55	113	1004.00
SAWYER	WI				X		X	55	113	1005.01
SAWYER	WI				X		X	55	113	1005.02
SAWYER	WI				X		X	55	113	1008.00
SAWYER	WI				X		X	55	113	9400.01
SAWYER	WI				X		X	55	113	9400.02
VILAS	WI				X		X	55	125	9502.01
VILAS	WI				X		X	55	125	9502.02
VILAS	WI				X		X	55	125	9505.01
VILAS	WI				X		X	55	125	9505.02
VILAS	WI				X		X	55	125	9506.01
VILAS	WI				X		X	55	125	9506.02
VILAS	WI				X		X	55	125	9507.00
WASHBURN	WI				X		X	55	129	9501.00
WASHBURN	WI				X		X	55	129	9502.00
WASHBURN	WI				X		X	55	129	9503.00
WASHBURN	WI				X		X	55	129	9505.01
WASHBURN	WI				X		X	55	129	9505.02
WASHBURN	WI				X		X	55	129	9506.00