LUSE GORMAN

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The Bankers' Bulletin

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

In This Issue:

Also covered in this month's edition:

INDUSTRY SNAPSHOT

month over month

- ↑ OCC Charter Applications Filed: **5**
- ↓ FDIC Insurance Applications Filed: **0**
- ↓ FDIC Insurance Applications Approved: **0**
- ↓ Bank Enforcement Actions Announced: **0**
- ↑ Bank Enforcement Actions Terminated: **6**

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

Proposed Merger ($89.8 M) || Subordinated Debt Issuance ($185.0 M)
Conversion and Stock Offering ($10.4) || Completion of Branch Sale

OCC and FDIC Propose Standards for Unsafe or Unsound Practices, MRAs

Summary

On Oct. 7, the OCC and FDIC issued a joint notice of proposed rulemaking to establish a uniform definition for the term "unsafe or unsound practice" and to revise the supervisory framework for issuing MRAs. The FRB did not join.

Highlights

1) The proposed unsafe or unsound practice definition would require showing that an act would *likely* "materially harm" the financial condition of the bank or present a material risk of loss to the deposit insurance fund.
2) Only in "limited circumstances" would a nonfinancial practice meet this standard: the rule cites severe critical infrastructure or cybersecurity deficiencies as examples. Non-material financial losses would be insufficient.
3) Going forward, issuance of MRAs would require a similar showing, and would generally need to be directly related to capital, asset quality, earnings, liquidity, or market risk sensitivity. Violations of laws and regulations would also support MRA issuance, but they must be banking-related. Tax laws, for example, wouldn't support issuing an MRA.

Practical Tips

- State banking regulators will retain independent authority to use supervisory or remedial tools for practices they find objectionable under their own governing statutes, so interagency conflicts could arise for state-chartered banks.
- Examiners would not be permitted under the proposal to criticize banks for declining to remediate, even over the course of several exam cycles, a concern identified in a supervisory communication that does not rise to an MRA.

Takeaway

Unsafe or unsound practices will be cited far more sparingly in exam correspondence once the proposal is finalized, which should have a corresponding effect on limiting potential enforcement actions, as the label has served as a common—and highly malleable—basis for such actions. The use of MRAs to drive process changes for nonfinancial areas of a bank will be markedly reduced. Expect examiners to proactively push to timely lift completed MRAs.

FinCEN and Bank Agencies Issue FAQs on SAR Filing and Documentation

Summary

On Oct. 8, FinCEN, along with the OCC, FDIC, and FRB, issued FAQs related to the filing and documentation of suspicious activity reports (SARs), intended to "clarify" existing requirements and allow banks to focus their resources.

Highlights

1) The FAQs state that banks are not required to conduct a separate review of a customer or account following a SAR filing to determine whether the suspicious activity has continued, reversing an acknowledged expectation to do so.
2) The FAQs also state that there is no requirement—and, importantly, no expectation—that banks document decisions not to file a SAR, acknowledging that FinCEN previously "encouraged" banks to do so. If banks do document the decision, a short, concise statement will likely suffice, but more documentation can be used in complex cases.
3) According to the FAQs, banks do not have to file a SAR just because a series of transactions occur at or near the CTR threshold (over $10K). The bank must *also* know or suspect the transactions are designed to evade that threshold.

Practical Tips

- The change in official agency policy in each of these areas should give banks some leverage to push back against proposed supervisory criticism—especially if it will lead to MRAs or other actions—even for practices before the FAQs.
- Because guidance can easily be retracted, future agency leadership may reverse course and resurrect previous expectations. Banks should continue to follow—and not use the FAQs to abandon—the practices that have worked.

Takeaway

Although the FAQs state they don't alter existing requirements or establish new expectations, the guidance—especially related to ongoing SAR filings and no-file decisions—will be a 180 for many examiners on the ground, who have routinely cited banks for deficient internal controls based on those areas. It will probably take months before these concepts trickle down to exam teams, and the FAQs likely won't impact an ongoing BSA/AML compliance assessment.

This month's big number:

$0

The value of the civil money penalty to be paid by a former Wells Fargo Risk Officer, in a negotiated settlement with the OCC. The agency had ordered the officer to pay a $10 million penalty and banned her from banking following the conclusion of its administrative hearings. The matter was on appeal to the federal Eighth Circuit.

FRB Issues Guidance on Mutual Banking Organization Capital Instruments

Summary

On Oct. 8, the FRB released FAQs confirming that Board-regulated mutual organizations can issue capital certificates and other capital instruments that are eligible to qualify as common equity tier 1 capital or additional tier 1 capital.

Highlights

1) The FAQs emphasize that mutual banking organizations' proposed capital instruments must still satisfy relevant requirements under Reg. Q and Reg. MM, as well as those found in the institutions' charters and bylaws.
2) The FAQs lay out the criteria that Reg. Q requires of capital instruments to qualify as either additional tier 1 capital or common equity tier 1 capital. While many of the criteria are the same, the parallel listing of the requirements will help mutual organizations identify the key differentiating factors, such as when the instrument can be senior to other instruments, and when the instruments can be called by the issuing organization.
3) On Oct. 9, the Comptroller issued a statement supporting the FRB's actions, noting that the OCC recently authorized a mutual FSA to issue an "innovative" mutual capital certificate that qualifies as regulatory capital.

Practical Tips

- The FAQs included template additional and common equity tier 1 term sheets that mutual organizations can use as references, but directed them to send questions regarding eligibility of specific instruments to their own regulators.
- FRB-regulated organizations are invited to pose questions to staff, and they should seize the chance to consult with the agency while designing the instruments. Be prepared to discuss how the proposed terms will comply with Reg. Q.

Takeaway

The publication of the FAQs and the Comptroller's contemporaneous statement together suggest that the two agencies are becoming more receptive to mutual organizations' use of innovative means to increase their capital levels. They also reinforce pledges to support the mutual banking sector, and to encourage innovation more broadly in the industry.

NYDFS Issues Guidance on Cybersecurity, Existing Enforcement Orders

Summary

As NYDFS transitions to a new Superintendent, the agency issued a Policy Statement on receiving notices of satisfaction for enforcement actions (Sept. 26), and cybersecurity guidance related to third-party service providers (TPSPs) (Oct. 21).

Highlights

1) Under the Statement, banks can submit a request that NYDFS evaluate compliance with an order's conditions to receive a "notice of satisfaction." But the notice does not alter or rescind the order itself. Criteria for a notice include receipt of an intervening exam report validating compliance, and demonstration of sustainable controls.
2) The guidance notes that appropriately managing TPSPs is a "crucial" element of state banks' cybersecurity programs, and the complexity of risks demands a proactive, risk-based, and adaptive approach to TPSP governance.
3) The guidance details areas where NY banks should strengthen TPSP programs, including more robust due diligence, contractual provisions, monitoring, and oversight—especially in situations where cyber compliance is outsourced.

Practical Tips

- NY-chartered banks should consult the "non-exhaustive" list of considerations to be assessed when performing TPSP due diligence, including reputation, history, financial stability, as well as access controls for their own systems.
- If banks need to transition away from a TPSP, the guidance indicates NY banks should document the risks related to replacement options, implement compensating controls, and monitor whether alternative vendors have emerged.

Takeaway

Even under new leadership, NYDFS will likely continue to implement policies inherited from Superintendent Harris, such as those on lifting enforcement actions, and emphasize prior departmental priorities, especially cybersecurity. The state's compliance examinations related to cybersecurity and third-party risk management will likely verify whether NY banks have incorporated guidance points—such as sample contractual provisions—into their programs.

> "[M]y general view is that our existing criteria is too restrictive when it comes to large failures. The downside risk of not finding an acquirer, or of the best bid coming at a substantial cost to the [deposit insurance fund], may outweigh the downside risk of potential future problems at certain potential bidders. . . . The FDIC has developed a seller-financing program for nonbank bidders, to increase competition by including private equity firms and other nonbank entities in the marketing process . . . ."
>
> **Acting FDIC Chairman Travis Hill,**
> in a speech at the Single Resolution Mechanism's 10th Anniversary Conference (Oct. 15).
> Hill was recently nominated by President Trump to be the permanent Chair of the FDIC.

OCC Eases Community Bank Exam Burden, Proposes Streamlined Licensing

Summary

On Oct. 6, the OCC announced several actions to reduce community bank's regulatory burdens, issuing guidance to tailor examination activities, and proposing a rule to streamline applications for corporate activities and transactions.

Highlights

1) As of Jan. 1, 2026, the OCC will eliminate examination activities for banks under $30B in assets not required by statute or regulation, but instead only by OCC policy. This includes examiners performing a fair lending risk assessment every supervisory cycle, and transaction testing for flood insurance coverage every three years.
2) The OCC's full scope, on-site exams for community banks will return to a "heightened focus" on "material financial risks," and feature streamlined testing methods, more limited sampling, and reliance on bank-provided reports.
3) The proposed licensing revisions would allow $30 billion and under banks, that have no $30B+ affiliates, are well capitalized, and not subject to an enforcement action, to access 13 streamlined or expedited application channels.

Practical Tips

- Focus on material financial risks during exams should reduce on-site disruption and pre-exam production burdens. Utilizing bank-prepared reports will reduce duplicative requests on bank personnel facing simultaneous reviews.
- Qualifying community banks will have expedited review of applications to exercise fiduciary powers, establish a branch, increase or change capital, conduct business reorganizations, and establish or acquire an operating subsidiary or perform a new activity in an existing operating subsidiary, among other relaxed procedures.

Takeaway

While the set of examination activities mandated only by OCC policy is fairly thin, elimination of those requirements demonstrate that the agency is seeking every chance to meaningfully reduce burdens on community banks. The OCC will now generally equate most community banks with "eligible banks," i.e., those with satisfactory ratings and capital.

Other Developments You May Have Missed Last Month . . .

Federal Circuit Court Rejects Post-Cantero Preemption Argument. On Sept. 22, the federal First Circuit Court of Appeals issued an opinion in *Conti v. Citizens Bank, N.A.*, vacating an earlier district court judgment that dismissed a class action complaint alleging the bank failed to pay interest on mortgage-escrow accounts as required by Rhode Island law. The appellate court held that the district court had failed to conduct the preemption test outlined by the Supreme Court's 2024 *Cantero* decision, which was issued while the appeal was pending.

Bottom Line: As one of the first major decisions implementing the *Cantero* comparison framework, the court's conclusion that Citizens Bank failed to meet the preemption standard will inevitably make the case a hurdle to overcome in future challenges. National banks should be prepared following this decision to demonstrate the practical effects of state laws on their powers if they are going to mount a preemption defense. They may also try to argue that state interest-on-escrow laws—which are impliedly permitted by federal law—are distinguishable.

SBA Issues Certification Form for Debanking Reviews. On Sept. 30, the SBA issued a letter "clarifying" how community banks under $30B could comply with its reporting requirements related to the debanking Executive Order, and providing a sample form to be used. The form requires certification of a reasonable review of policies and practices over the past 5 years and self-identification of instances of debanking.

Bottom Line: While nominally intended to serve as relief from the E.O. for community banks, the form still requires institutions to certify a review was conducted. Voluntary admissions of past debanking will conceivably prompt the penalties previously threatened by the SBA, including loss of good standing. Use of the form itself therefore could actually expose community banks to significant risks of SBA investigation.

SEC Announces Changes to Wells Process. On Oct. 7, SEC Chairman Atkins delivered a speech highlighting a number of planned initiatives for the agency's enforcement division designed to make the enforcement process more transparent and fair. Atkins highlighted the SEC's process for considering waivers from collateral consequences, publicizing termination and closing letters, and reforming the Wells process.

Bottom Line: Going forward, Atkins will expect staff to: provide sufficient information to understand the charges and the evidence, including transcripts and key documents, in the Wells notice; to make "every effort" to share information that has been gathered in the case; to be more "realistic" in providing time for a response, i.e., at least four weeks; and to encourage submission of whitepapers earlier on in the process.

Federal Bank Agencies Rescind Guidelines on Climate Risk, Recovery Planning. On Oct. 16, the OCC, FDIC, and FRB rescinded the interagency Principles for Climate-Related Financial Risk Management, intended for banks over $100B. On Oct. 27, the OCC issued a proposed rule to rescind guidelines establishing standards for recovery planning applicable to national banks and FSAs over the same asset threshold.

Bottom Line: The climate guidelines' rescission fulfills a larger Administration goal, removing climate-focused rules, as well as an Agency leadership goal, to remove overlapping layers of regulation. The OCC doubled down on these themes in rescinding the recovery planning standards, while observing that scenario-dependent or speculative planning is of little value when a specific stress situation arises. Meanwhile, on Oct. 24, the FRB requested comment on a proposal to enhance the transparency of its annual stress test for $100B+ banks. These actions suggest the Agencies are seeking to proactively incorporate industry feedback before establishing large bank guidelines and standards.

About Us

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

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

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