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Regulatory & Enforcement Insights on Recent Bank Industry Developments

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1 SCOTUS Ends Judicial Deference to Regulatory Agencies by Overruling *Chevron*

- Expect regulations to be threatened by litigation without built-in judicial deference to the issuing agencies.
- Interpretive swings due to administration changes are more likely to be challenged, and therefore, should be reduced. The ruling will not change any prior decisions that relied on *Chevron* in favoring an agency.

2 CFPB Utilizes a Variety of Tools to Set the Stage for Future Enforcement Actions

- In one month, the Bureau utilized a public report, litigation, an interpretive rule, and a circular to stake out its positions on disclosure, UDAAP, anti-discrimination, and fair lending issues, without a single regulation.
- Given the changes to SCOTUS precedent, reliance on these tools will invite an industry challenge.

3 OCC and Congress Flag Increase in State Encroachment on Federal Law and Powers

- Acting Comptroller Hsu provides agency cover for national banks' resistance to new, invasive state laws.
- Expect litigation to emerge from clashes between aggressive state regulators trying to rein in national banks.

4 Regulators Issue Joint Statement on Arrangements With 3rd Party Deposit Services

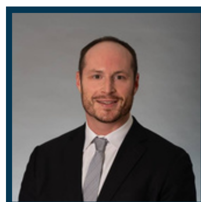
- The agencies compile expectations around TPRM, distilled and applied to BaaS deposit arrangements.
- The statement emphasizes how these arrangements are intertwined with liquidity risk, reiterating the supervisory expectation that banks ready themselves for unexpected deposit withdrawals by customers.

5 FRB Governor Bowman Comments on CU-Bank Deals & Regulatory Scrutiny

- Bowman rejected the idea that regulators have become a "rubber stamp" for bank M&A proposals.
- Her focus on the intersection of increased regulatory application scrutiny and CU purchases of banks could catalyze federal action. To date, states have been the lone actors addressing CU-bank deal activity.

About The Firm

Luse Gorman, PC is a Washington, D.C.-based law firm specializing in mergers, capital raising transactions, regulatory, enforcement, corporate, securities, employee benefits, executive compensation, and tax law for regional and community banks across the United States. Our attorneys have served with the major federal banking and securities agencies, and regularly engage with regulators on a range of novel and complex legal issues.



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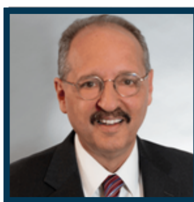

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SCOTUS Ends Judicial Deference to Regulatory Agencies by Overruling Chevron

Summary. On June 28, the Supreme Court issued a 6-3 decision in *Loper Bright Enterprises v. Raimondo*, overruling its longstanding *Chevron* precedent, which had required courts to defer to permissible regulatory agencies' interpretations of statutes they administer. The Court concluded that regulatory agencies have no "special competence" in resolving statutory ambiguities, but courts do.

Takeaways.

- Although the Supreme Court had not explicitly relied on *Chevron* in some time, lower courts had continued to defer to agency interpretations in regulatory challenges by private parties, as the legal bar that agencies had to clear to survive *Chevron*'s test and earn judicial deference was fairly low.
- The Court acknowledges judges can still use agencies' experience and judgment to reach decisions, but relying on agencies' guidance is a much lower standard than *Chevron's* mandatory deference.

Bottom Line. *Chevron*'s end will likely lead to 4 changes in the dynamics between the banking agencies/CFPB and institutions: (i) banks will be more likely to challenge agency rules; (ii) market certainty regarding existing and new rules will be weakened, as rules may be pared back, modified, or repealed; (iii) the regulators will rely more on means other than rulemaking to act and drive behavior, such as enforcement actions and issuing public interpretations; and (iv) Congress will need to be more explicit and prescriptive in drafting legislation, which could delay or kill bills in this climate.

CFPB Utilizes a Variety of Tools to Set the Stage for Future Enforcement Actions

Summary. In July, the CFPB continued to use a variety of tools to shape industry behavior on a range of compliance topics: it issued its Summer 2024 Supervisory Highlights on July 2; achieved a reversal of a district court dismissal of a redlining suit on July 11; proposed an interpretive rule on earned wage access (EWA) products on July 18; and published a circular on confidentiality agreements on July 24.

Takeaways.

- The Highlights cited "unfair" practices in how institutions handled customer communications regarding account freezes, detailing process changes made by entities in response to Bureau findings.
- The Seventh Circuit concluded that ECOA and Reg. B apply to *prospective* applicants, reversing a district court decision that held the requirements applied only to applicants in dismissing a CFPB suit.
- The EWA product interpretive rule reverses a recent Trump administration advisory opinion by opining the products are "credit," subjecting them to various substantive TILA and Reg. Z provisions.
- The circular states that broad confidentiality agreement provisions suggesting employers will take adverse action against whistleblowers may constitute discrimination in violation of federal statute.

Bottom Line. Each of the tools above represents an expansion of the CFPB's supervisory and regulatory umbrella under the guise of consumer disclosure, UDAAP, anti-discrimination, or fair lending laws. While avoiding the use of notice-and-comment rulemaking and comment from the public, the CFPB has laid the groundwork for future investigations and enforcement actions of the positions it stakes out via these tools.

OCC and Congress Flag Increase in State Encroachment on National Banks and Federal Law

Summary. On July 17, Acting Comptroller Hsu delivered remarks at the Exchequer Club on the development of politicized state laws affecting banks, following an earlier agency statement that it was monitoring the proliferation of "competing and potentially inconsistent requirements" at the state level purporting to apply to national banks, following passage of new legislation in Florida aimed at all banks.

Takeaways.

- Hsu noted the "worrisome trend of fragmentation" at the state level reflecting the influence of culture wars and identity politics on banking laws. He stated the OCC will continue to "vigorously" defend preemption, noting that it is "legally absolute" and "non-negotiable" in safety and soundness matters.
- After the Supreme Court's *Cantero* decision, the OCC will be revisiting its preemption guidance.
- On July 8, Rep. Gottheimer (D-NJ), Luetkemeyer (R-MO), and Sherman (D-CA) sent a letter to Hsu, Treasury Secretary Yellen, and FinCEN, warning of a developing trend of state laws that pose challenges to banks' ability to comply with BSA/AML regulations, as these laws purport to allow state regulators to investigate account closures, require filing of descriptive reports, or disclose filed SARs.

Bottom Line. With the OCC's support, national banks will likely continue to resist application of state laws that grant state agencies supervisory authority over them, or create conflicts with BSA/AML obligations. Expect litigation from aggressive state regulators, testing the boundaries of preemption assertions in court.

Regulators Issue Joint Statement on Arrangements With 3rd Party Deposit Services

Summary. On July 25, the FRB, OCC, and FDIC issued a joint statement on banks' arrangements with third parties to deliver deposit products and services. The statement is directly targeted at banking-as-a-service (BaaS) arrangements with fintechs through which banks offer deposit products to customers.

Takeaways.

- As explained in the statement, the agencies are "reemphasiz[ing]" existing guidance, but are not altering existing legal or regulatory requirements or establishing new supervisory expectations. This includes placing the ultimate compliance responsibility on the banks, rather than on their partners.
- While expressing support for "responsible" innovation with these arrangements, the statement strongly suggests that the agencies are going to deeply scrutinize every aspect of these partnerships.
- The statement highlights risks posed by the lack of access to records and the resulting delay in end-user access to their deposits, with downstream legal and reputational risks to the bank. It also details a series of effective risk management practices, including developing contingency plans to address operational disruption, bankruptcy, or business failure of a third party. These considerations have likely been elevated to the foreront by recent events involving third-party deposit relationships.

Bottom Line. Any bank jumping into a deposit arrangement should check each box from this statement.

FRB Governor Bowman Comments on CU-Bank Deals & Regulatory Scrutiny

Summary. On June 27, FRB Governor Bowman delivered remarks at the convention for western states' bankers' associations on regulatory approval processes, de novo bank formation, and bank M&A.

Takeaways.

- Governor Bowman's speech took aim at the "more restrictive" M&A regulatory approval process changes proposed by the FDIC and OCC, and the likelihood that they will make the application process slower and less efficient, after noting that extended review periods are already commonplace.
- She also called out the increasing trend of credit union acquisition of banks and the potential impacts of such transactions on product and service offerings in local communities. She observed that the ratcheting up of scrutiny of bank M&A may increase incentives for credit unions to acquire banks, as credit unions could face fewer delays and a more certain regulatory approval process.

Bottom Line. Although Governor Bowman has consistently highlighted the increasing regulatory regime applicable to banks, her focus on the intersection between recent agency M&A proposals, which would lengthen the bank merger review process, and the increase in CU purchases of community banks, could be a catalyst for the federal regulators to more closely examine this trend. While state legislatures have recently taken action in this space, there has been no sign at the federal level to date of a process change.

Other Developments That You May Have Missed . . .

- **SCOTUS Sets New Standard for Timeline to Challenge Agency Rules.** On July 1, SCOTUS issued its decision in *Corner Post, Inc. v. FRB*, extending the statute of limitations for lawsuits challenging agency actions to six years after the date a party gets injured, moving away from the prior standard, which started the six-year clock when an agency action became final. The decision opens the agencies to challenges on old rules by new market entrants or by institutions that have newly become impacted by a longstanding regulation.
- **CFPB Agenda Signals Potential Elimination of CC Late Fee Safe Harbor.** The Biden Administration's spring 2024 unified agenda of regulatory actions, released July 5, inconspicuously included a suggestion that the CFPB may move to eliminate Reg. Z's safe harbor for credit card late fees. This move would be a sudden change to its strategy to merely reduce the existing safe harbor down to $8 via regulation. The Bureau's fee cap rule has been mired in litigation with trade groups; a new approach may circumvent that impasse.
- **GAO Report Identifies Shortcomings in FRB Rules.** On July 18, the GAO published a report to Congress which found the FRB's capital and liquidity rules issued between 2012-2021 did not consistently identify alternative approaches, quantify benefits and costs, or document methodologies. With focus on Basel III endgame and other rules, the report may be used to push for more fulsome analysis.
- **CFPB Report Reveals Heightened Referral Activity.** The CFPB's Fair Lending Report to Congress, issued in June, highlighted a notable increase up to 18 fair lending referrals to the DoJ in 2023, from 2 in 2022, demonstrating the agency's continued focus on this area.
- **FDIC Issues Order With Growth Restriction.** On June 28, the FDIC publicized a consent order, entered concurrently with the MD OFI, against Forbright Bank, which includes a provision limiting the bank's total asset growth to less than 5% per quarter and 10% annually, and requiring (i) notification to the FDIC and OFI if it appears either limit could be exceeded and (ii) a plan to get under those limits.