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# The Washington Report
## for the week ended March 27, 2015

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# Safety & Soundness

## Federal Reserve and FDIC Require Three Banking Organizations to Address Shortcomings in Resolution Plans

On March 23, 2015, the Federal Reserve Board (Federal Reserve) and the Federal Deposit Insurance Corporation (FDIC), (collectively, the Agencies) announced that they had issued feedback letters to each of three large, foreign banking organizations detailing the specific shortcomings of each firm's 2014 resolution plan and the Agencies' expectations for the firm's 2015 submission. The Agencies also noted some improvements from the banks' original plans.

The Agencies stated that the shortcomings of the plans varied across the firms, but they identified several common features, including:

- Unrealistic or inadequately supported assumptions about the likely behavior of customers, counterparties, investors, central clearing facilities and regulators; and
- Inadequate analysis regarding interconnections within the firms.

The Agencies will require the annual plans submitted by these three institutions on or before December 31, 2015, to demonstrate that the firms are making significant progress toward addressing all the shortcomings identified in the letters, and are taking actions to improve their resolvability under the U.S. bankruptcy code.

*The Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) requires that certain banking organizations with total consolidated assets of $50 billion or more and nonbank financial companies designated by the Financial Stability Oversight Council for supervision by the Federal Reserve periodically submit resolution plans to the Federal Reserve and the FDIC. Each plan, commonly known as a living will, must describe the firm's strategy for rapid and orderly resolution under the U.S. bankruptcy code in the event of material financial distress or failure of the company.

## Agencies Adjust Resolution Plan Filing Deadline for Nonbank Financial Institutions

On March 26, 2015, the Federal Reserve Board (Federal Reserve) and the Federal Deposit Insurance Corporation (FDIC) permanently adjusted the annual resolution plan filing deadline for three nonbank financial institutions designated by the Financial Stability Oversight Council for supervision by the Federal Reserve. Beginning in 2016, the filing deadline for those institutions will shift from July 1 to December 31. Previously, the Agencies had extended the 2015 resolution plan deadlines to December 31. A fourth nonbank financial institution will submit its first resolution plan by December 31, 2016.

## FDIC Reminds Institutions of Regulatory Capital Rules Regarding Accumulated Other Comprehensive Income Opt-Out Election

On March 23, 2015, the Federal Deposit Insurance Corporation (FDIC) issued Financial Institution Letter 12-2015 (FIL12-2015) to remind FDIC-supervised institutions not subject to the advanced approaches risk-based capital rules that they may elect to calculate regulatory capital using the treatment for accumulated other comprehensive income (AOCI) permitted in the FDIC's general regulatory capital rules in effect prior to January 1, 2015. The FIL also states that the capital rules permit an FDIC-supervised institution that is not an advanced approaches institution to make a one-time, permanent election to opt out of the requirement to include most components of AOCI in regulatory capital.

The FDIC provided resources for community banks on the revised regulatory capital rules, including an interagency guide and an expanded guide for FDIC-supervised institutions.

## Comptroller Curry Discusses OCC Efforts to Assist Community Banks and Mutual Savings Associations

In an address at the American Bankers Associations' Mutual Community Bank Conference on March 23, 2015, Comptroller of the Currency Thomas Curry discussed efforts by the Office of the Comptroller of the Currency (OCC) to assist mutual savings associations and community banks. These efforts include:

- Continuing to meet with the OCC Mutual Savings Association Advisory Committee;
- Supporting collaboration among community banks;
- Reducing unnecessary burdensome regulation; and
- Recommending actions Congress can take to reduce "needless burden."

Comptroller Curry said Congressional action is necessary to reduce some regulatory burden on small institutions, and he discussed a set of legislative proposals that the OCC developed in 2014, including:

- Raising the asset threshold for the 18-month examination cycle from $500 million to $750 million;
- Exempting community banks from the Volcker Rule; and
- Making it easier for thrifts to expand their business model without changing their governance structure.

## Office of Financial Research Director Discusses Data Transparency Transformation

In an address at the Financial Regulation Summit on March 24, 2015, Office of Financial Research (OFR) Director Richard Berner discussed data transparency transformation. He described the global legal entity identifier (LEI) as "a critical and foundational data standard," but said it is "only the start and there is much more to be done." Director Berner described the LEI "like a bar code for precisely identifying parties to financial transactions." He suggested a second standard for hierarchies or corporate structures, a "who owns whom," can help make progress in tracing interconnections in the financial system. He added that the creation of data standards involves an international collaborative effort among U.S. and overseas regulators and noted the need to improve ways to securely share sensitive data, both among authorities within the same jurisdiction and across borders.

Director Berner explained that the OFR is "working on a spectrum of other identifiers to help us answer the question, 'Who owns what?'" and has also begun to develop plans for a reference database for financial instruments.

## FDIC Chair Testifies at U.S. House Subcommittee Hearing Regarding Operation Choke Point

On March 24, 2015, Martin J. Gruenberg, Chairman of the Federal Deposit Insurance Corporation (FDIC) testified at a hearing of the U.S. House Financial Services Subcommittee on Oversight and Investigations entitled "The Federal Deposit Insurance Corporation's Role in Operation Choke Point." He addressed lawmakers' concerns that FDIC bank examiners were discouraging banks from lending to certain merchant categories as a result of Operation Choke Point, a U.S. Department of Justice (DOJ) initiative begun in 2013 that looks at banks' business relationships with certain companies, such as payment processors and payday lenders, believed to be at higher risk for fraud and money laundering.

In his testimony, Chairman Gruenberg referenced an August 2013 letter he received from members of Congress expressing concern that DOJ and the FDIC were pressuring banks and third-party payment processors to terminate business relationships with lawful lenders. He said that the FDIC did not intend to discourage lawful businesses that offered those services, and he said the FDIC addressed confusion about its intent with examiners by issuing a number of Financial Institution Letters, including:

- Financial Institution Letter 43-2013 (FIL-43-2013) in September of 2013 to clarify that financial institutions that properly manage relationships and effectively mitigate risks are neither prohibited nor discouraged from providing payment processing services to customers, regardless of the customers' business, provided the customers are operating in compliance with applicable state and federal law.
- Financial Institution Letter 21-2014 (FIL-21-2014) in July 2014 restating its policy that insured institutions that properly manage customer relationships are neither prohibited nor discouraged from providing services to customers operating in compliance with applicable federal and state law. The FDIC removed the list of examples of merchant categories from outstanding guidance.
- Financial Institution Letter 5-2015 (FIL 5-2015) in January 2015 to encourage institutions to take a risk-based approach in assessing customer relationships, and establishing procedures to ensure the FDIC's policies and expectations are effectively implemented.

Some congressmen told Chairman Gruenberg that not enough had been done to address their concerns regarding the FDIC's role in Operation Choke Point. One Subcommittee member suggested that top employees of the agency be terminated and that Chairman Gruenberg step down. Other congressmen defended the FDIC, saying it was attempting to properly implement policy and protect the banking sector.

## U.S. Senate Committee on Banking, Housing, and Urban Affairs Conducts Hearing Regarding FSOC Nonbank Designations

On March 24, 2015, the U.S. Senate Committee on Banking, Housing, and Urban Affairs conducted a hearing entitled, "FSOC Accountability: Nonbank Designations" at which Jacob J. Lew, Secretary of the U. S. Department of the Treasury was one of five witnesses to present testimony. Secretary Lew said that the Financial Stability Oversight Council (FSOC) "has enhanced its transparency policy, strengthened its internal governance, solicited public comment on potential risks from asset management products and activities, and adopted refinements to its nonbank financial company designations process."

Opposed to a rollback of financial reform, Secretary Lew said, "No law is perfect. But let me be clear: we will vigilantly defend Wall Street Reform against any change that increases risk within the financial system, weakens consumer, investor or taxpayer protections, or impedes the ability of regulators to carry out their mission."

During questioning, Secretary Lew told the Committee that procedures adopted by the FSOC in February will provide companies early in the process with information regarding where they stand and enable them to provide input. In addition, the FSOC will provide companies with a "clearer and more robust" annual review process.

Senators questioned Secretary Lew about whether a process existed for de-designating large nonbanks if their business structure changed and if FSOC would be willing to reverse the designation. Secretary Lew said that such a process does exist but the annual checkup for these institutions is still in its early stages.

## Senate Banking Committee Holds Second Hearing, "Examining the Regulatory Regime for Regional Banks"

On March 24, 2015, the U.S. Senate Committee on Banking, Housing, and Urban Affairs (the Committee) held the second of two hearings entitled, "Examining the Regulatory Regime for Regional Banks." Testifying at the hearing were the executive vice president of a regional bank and representatives of a university, a law firm and a policy center. Most favored raising or eliminating the $50 billion asset size threshold as a determinant of systemic importance and enhanced regulation by the Federal Reserve Board. All agreed that "one-size-fits-all" regulation is not appropriate.

The regional bank representative testified that more data is now available about the scope of the *Dodd Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank) regulatory regime and the nature of systemic risk, so he believed it appropriate to question whether there is a commensurate benefit to having regional banks automatically subjected to this oversight regime.  He referred to a recent study by the Office of Financial Research that uses systemic indicators that the Federal Reserve Board has gathered from banks.  "Altering the threshold in a common sense manner will not remove regulators' discretion to stop risky behavior or weaken their supervisory powers," he said.  "Even absent systemic designation, protective regulatory guardrails that have evolved since the financial crisis would remain in place for regional banks, including the capital planning and stress testing processes started before Dodd-Frank.  Regional banks also would remain subject to new Basel III standards as well as Consumer Protection Financial Bureau (CFPB) oversight."

Some senators on the Committee expressed a willingness to reconsider the $50 billion threshold.  However they also expressed concern about maintaining regulatory standards.  There was concern about regional impacts resulting from geographic concentrations and systemic risk that the simultaneous failures of several large regional banks would represent.

At the March 17 hearing on this topic, prudential regulators testified that they would consider adjusting parts of the prudential standards regime.

### U.S. House Committee on Financial Services Votes in Favor of 11 Bills and One Resolution

On March 25, 2015, the U.S. House of Representatives Committee on Financial Services voted in favor of the following bills and measures:

- H.R. 299, the *Capital Access for Small Community Financial Institutions Act of 2015*, 56 ayes and 1 nay.
- H.R. 601, the *Eliminate Privacy Notice Confusion Act*, 57 ayes and 0 nay.
- H.R. 650, the *Preserving Access to Manufactured Housing Act of 2015*, 43 ayes and 15 nays.
- H.R. 685, the *Mortgage Choice Act of 2015*, 43 ayes and 12 nays.
- H.R. 1195, the *Bureau of Consumer Financial Protection Advisory Boards Act*, 53 ayes and 5 nays.
- H.R. 1259, the *Helping Expand Lending Practices in Rural Communities Act,* 56 ayes and 2 nays.
- H.R. 1265, *the Bureau Advisory Commission Transparency Act*, 56 ayes and 2 nays.
- H.R. 1367, to amend the *Expedited Funds Availability Act* to clarify the application of that Act to American Samoa and the Northern Mariana Islands, 58 ayes and 0 nays.
- H.R. 1408, the *Mortgage Servicing Asset Capital Requirements Act* of 2015, 49 ayes and 9 nays.
- H.R. 1480, the *SAFE Act Confidentiality and Privilege Enhancement Act*, 58 ayes and 0 nays.
- H.R. 1529, the *Community Institution Mortgage Relief Act* of 2015, 48 ayes and 10 nays.

The Resolution to establish the *Task Force to Investigate Terrorism Financing* was agreed to by a voice vote.

# Enterprise & Consumer Compliance

### CFPB Considering Rules to Require Lenders to Determine Whether Borrowers Have Capacity to Repay Loans

The Consumer Financial Protection Bureau (CFPB or Bureau) announced on March 26, 2015, that it is considering rules to require lenders, in certain circumstances, to determine whether borrowers have the capacity to repay their loans.  As proposed, the rules being considered would apply to payday loans, vehicle title loans, deposit advance products, and certain high-cost installment loans and open-end loans.  The proposed rules would also restrict lenders from attempting to collect payment from consumers' bank accounts in ways that generate "excessive" fees.  The Bureau stated that it had published the outline of the proposals in preparation for convening a Small Business Review Panel to gather feedback from small lenders.

The proposals under consideration provide two different approaches to ensuring that a borrower is able to meet the payment obligations of the debt, to end what the CFPB terms "debt traps."  For both short-term and longer-term credits covered by the proposals, lenders would be required to determine at the outset that the consumer is not taking on unaffordable debt, or alternatively, they would have to comply with various restrictions intended to ensure that the consumers can affordably repay their debt such as limitations on the credit amount, duration, and eligible number of rollovers.  Lenders would be permitted to choose which set of requirements to follow.  A fact sheet on the proposals is available on the Bureau Web pages.

## FTC Announces Six Enforcement Actions Against Auto Lenders

On March 26, 2015, the Federal Trade Commission (FTC) announced that it had entered into separate enforcement actions with six auto dealers.  In particular:

- Actions were taken against two auto dealers to address add-on products.  This is the first time since receiving expanded authority over auto dealers under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd Frank Act), the FTC has taken actions involving these products.  A California-based nonbank company was charged for allegedly violating the *Federal Trade Commission Act* (FTC Act) for deceptive practices related to sales of an auto payment program.  The FTC found the company failed to disclose that the fees it charged for the service often cancelled out any savings.  In a related case, the FTC alleged that a New Jersey-based dealership violated the FTC Act by failing to disclose, or to adequately disclose, the fees associated with the first company's add-on service and fees.  The dealership received a commission for each of the consumers it enrolled.  Each of the companies agreed to settle the FTC charges, and under the proposed consent order, the company will refund more than $1.5 million to consumers, and waive another $949,000 in fees to current customers during the fee waiver period.  The dealership will pay $184,000 to the FTC.
- Three auto dealers were charged with deceptive advertising in violation of the FTC Act, the *Truth in Lending Act* (TILA) and/or the *Consumer Leasing Act* (CLA) for failing to disclose relevant terms and making claims that were negated by fine print disclaimers.  The proposed settlements in these actions prohibit the defendants from misrepresenting the purchase cost or any other material fact about the price, sale, financing or leasing of a vehicle.  The proposed orders also address the TILA and CLA violations by requiring the dealerships to clearly and conspicuously disclose terms required by these rules.
- At the request of the FTC, a U.S. District Court temporarily halted the practices of a nonbank financial company that allegedly charged consumers upfront fees to negotiate an auto loan modification on their behalf, but then often provided nothing in return.  The court froze the defendants' assets.  In its ongoing lawsuit, the FTC is seeking a permanent injunction and disgorgement.

## CFPB Associate Director Says Subprime Auto Loan Market is an Emerging Risk

In an address to the Consumer Bankers Association on March 25, 2015, Consumer Financial Protection Bureau (CFPB or Bureau) Deputy Director Steven Antonakes, described the subprime auto loan market as an "emerging risk."  He said, the average term of a subprime auto loan for a new vehicle has increased every year since the financial crisis and is "now at a length never seen before."  He also said credit losses for recent loan vintages over the past two years is "rising from historically low levels, and some preliminary analysis suggests high levels of early delinquencies.  Combined, these trends cause us to worry that subprime borrowers are being extended credit that they are unable to pay back.  Given the potential for harm to consumers, we will be keeping a close eye on these trends to address, as necessary, potentially unfair, deceptive and abusive practices in this space."

## Federal Reserve Releases Report on Consumers Use of Mobile Financial Services

On March 27, 2015, the Federal Reserve Board (Federal Reserve) released its fourth annual report regarding consumers' use of mobile phones to access bank accounts, credit cards and other financial accounts. The report, *Consumers and Mobile Financial Services 2015,* indicates an increase in adults' usage of mobile phones to access their financial accounts. The report discusses how consumers access banking services using mobile phones, their payments for goods and services using mobile phones, and their use of mobile phones to inform shopping decisions.

## OCC Mortgage Performance Report Indicates Improvement in Performance of First Lien Mortgages

On March 27, 2015, the Office of the Comptroller of the Currency (OCC) published its quarterly report on mortgage performance, indicating that the performance of first-lien mortgages serviced by eight national banks improved in the fourth quarter of 2014. It also indicated that foreclosure activity among the reporting servicers continued to decline.

The OCC *Mortgage Metrics Report, Fourth Quarter 2014*, showed 93.2 percent of mortgages included in the report were current and performing at the end of the quarter, compared with 93.0 percent at the end of the previous quarter and 91.8 percent a year earlier. The percentage of mortgages that were 30 to 59 days past due was 2.4 percent of the portfolio, a 9.4 percent decrease from a year earlier. Seriously delinquent mortgages—60 or more days past due or held by bankrupt borrowers whose payments are 30 days or more past due—made up 3.1 percent of the portfolio, a 12.2 percent decrease from a year earlier.

The first-lien mortgages included in this report comprise 45 percent of all residential mortgages outstanding in the United States—23.1 million loans totaling $3.9 trillion in principal balances. This report provides information on their performance through December 31, 2014

# Capital Markets and Investment Management

## CFTC Staff Issues Advisory Regarding Reporting Obligations Under the Ownership and Control Final Rule

On March 23, 2015, the U.S. Commodity Futures Trading Commission's (CFTC) Division of Market Oversight and Division of Swap Dealer and Intermediary Oversight issued CFTC Staff Advisory No. 15-14 to remind futures commission merchants, clearing members, foreign brokers, swap dealers and certain reporting markets (collectively, "reporting parties") of their obligation to obtain information on a timely basis from their customers or counterparties in order to comply with the ownership and control reports final rule (OCR Final Rule).

The staff advisory states:

- Reporting parties must obtain from their customers or counterparties the information necessary for reporting parties to submit certain OCR reporting forms by the deadlines specified in the OCR Final Rule.
- It may be advisable for reporting parties to take steps to ensure that their customers and counterparties:
  - Respond promptly to requests from reporting parties for OCR information;
  - Promptly notify reporting parties of any subsequent updates to the information; and
  - Assist reporting parties in fulfilling their reporting obligations under the OCR Final Rule.

The OCR Final Rule requires the electronic submission of trader identification and market participant data on new and updated reporting forms. The OCR Final Rule is currently subject to staff no-action letter 15-03, issued on February 10, 2015. Pursuant to the no-action letter, reporting obligations under the OCR Final Rule follow a staggered implementation schedule with obligations beginning on October 1, 2015. The CFTC stated that reporting parties should take preparatory steps, as described in staff no-action letter 15-03, so that they may successfully comply with their reporting obligations on October 1, 2015.

## SEC Proposes Rule to Require Broker-Dealers Active in Off-Exchange Market to Become Members of National Securities Association

On March 25, 2015, the Securities and Exchange Commission (SEC) proposed rule amendments to Rule 15b9-1 that would require broker-dealers that trade in off-exchange venues to become members of a national securities association. The amendments are intended to enhance regulatory oversight of active proprietary trading firms, such as high frequency traders. The SEC will accept public comment on the proposed rule amendments for 60 days following its publication in the *Federal Register*.

As proposed, the amendments to Rule 15b9-1 under the *Exchange Act* would:

- Narrow an exemption that currently exempts certain broker-dealers from membership in a national securities association if they are a member of a national securities exchange, carry no customer accounts, and have annual gross income of no more than $1,000 that is derived from securities transactions effected otherwise than on a national securities exchange of which they are a member. Income derived from proprietary trading conducted with or through another broker-dealer does not count against the $1,000 limit.
- Amend the exemption to target the broker-dealers with a business focused on an exchange floor and over which that exchange is positioned to oversee the entirety of their trading activity.
- Eliminate the current proprietary trading exemption and replace it with a more focused one that would accommodate off-exchange transactions by a floor-based dealer that are solely for the purpose of hedging the risks of its floor-based activities.
- Update the exemption that permits off-exchange transactions necessary to comply with regulatory requirements restricting trade-throughs, under Rule 611 of Regulation NMS.

## SEC Adopts Final Rules to Facilitate Smaller Companies Access to Capital

On March 25, 2015, the Securities and Exchange Commission (SEC) adopted final rules to facilitate smaller companies' access to capital. The new rules are intended to provide investors with more investment choices.

The new rules update and expand Regulation A, an existing exemption from registration for smaller issuers of securities. The rules are mandated by Title IV of the *Jumpstart Our Business Startups* (JOBS) *Act*. The updated exemption will enable smaller companies to offer and sell up to $50 million of securities in a 12-month period, subject to eligibility, disclosure and reporting requirements. The rules will be effective 60 days after publication in the *Federal Register.*

## Enforcement Actions

The Securities and Exchange Commission and the Commodity Futures Trading Commission (CFTC) recently announced the following enforcement action:

- The SEC charged nearly two dozen companies and individuals who regularly bought and sold securities on behalf of an Illinois-based trading firm without registering with the SEC as a broker-dealer. An SEC investigation found that the trading firm entered into agreements with third parties that acted as unregistered broker-dealers on its behalf and bought billions of dollars' worth of newly issued bonds, causing the company's allocation in the bond offerings to increase. The trading company was generally able to sell the bonds within a few days for a small profit, and it split profits with the third-party participants. The trading company and its owner agreed to settle the SEC's charges along with 21 third-party participants. They must collectively pay nearly $5 million in disgorgement plus about $1 million in penalties.

- The SEC charged a New York-based brokerage firm for underwriting a public offering despite obtaining a due diligence report indicating that the foreign-based company's offering materials contained false information. The firm agreed to settle the SEC's charges by paying $15 million and separately to compensate investors who suffered losses. The SEC also charged the firm's former managing director and former investment banker for failing to exercise appropriate care in their due diligence review. Both agreed to settle the charges and accept permanent injunctions and five-year industry bars without admitting or denying the allegations. The managing director agreed to pay $212,711 and investment banker agreed to pay $35,000.
- The CFTC charged a New York-based subsidiary of an overseas general trading company for failing to comply with its legal obligation to submit accurate monthly CFTC Form 204 Reports, regarding the composition of the company's fixed price cash purchases and sales. Without admitting or denying the charges, the company settled the charges and agreed to pay an $800,000 civil monetary penalty and to cease and desist from committing further violations of CFTC Regulation 19.01.
- The CFTC revoked the registrations of Florida-based commodity pool operator and its owner after they failed to respond to the CFTC's Notice of Intent to revoke their registrations. They had been charged with fraud for misappropriating commodity pool funds and by delivering false quarterly account statements to pool participants. The owner was convicted in federal court for conspiracy to commit mail fraud and wire fraud in connection with these same activities.
- The CFTC announced that a U.S. District Court entered an additional Order of permanent injunction against an individual charged with commodity pool fraud, permanently banning him from engaging in commodity-related activity. The individual had earlier agreed to a Consent Order that required him to pay a $275,000 civil monetary penalty but did not resolve the imposition of permanent trading and registration bans. Separately the individual pleaded guilty to criminal charges arising from the same fraudulent conduct and was sentenced to 1 year and 1 day in prison and ordered to pay restitution.

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This is a publication of KPMG's Financial Services Regulatory Risk Practice and KPMG's Americas FS Regulatory Center of Excellence


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