REGULATORY INTELLIGENCE BRIEFING — ISSUE 4, 2018

BALANCING COMMUNITY REINVESTMENT WITH MODERN BANKING

Capco Center of Regulatory Intelligence

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EDITORIAL NOTE FROM THE MANAGING PRINCIPAL, CENTER OF REGULATORY INTELLIGENCE

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The Community Reinvestment Act (CRA) has been in the spotlight since the Department of the Treasury (Treasury) announced its plans to review and modernize the Act. The CRA is a matter of great importance to those within the financial services industry, as CRA ratings (and the examination process itself) can have significant effects on a bank's business operations. And now, many believe that in order to return CRA efforts to the original goal of eschewing discriminatory redlining practices, the processes must be updated to reflect a changed and changing financial services landscape.

In our focus article this month, we outline the recommendations set forth in both the recent Government Accountability Office (GAO) and recent Treasury reports; and how to keep your institution proactive in its compliance efforts in order to ensure a competitive advantage through established lending inclusivity.

Our Congressional Activity Summary revisits the procedural question related to the Congressional Review Act, which Capco Center for Regulatory Intelligence (CRI) has been monitoring since the beginning of 2017. We finally have concrete activity to show how Congress was able to use the tool: the reversal of a rule the Consumer Financial Protection Bureau (CFPB) put forth on arbitration agreements shows that this utilization of the Congressional Review Act allows Congress to disapprove certain rules, even if they are already in effect.

And for our secondary article, we explore some of the shifting objectives at the Consumer Financial Protection Bureau (CFPB) and what this means for the way Unfair, Deceptive or Abusive Acts or Practices (UDAAP) are enforced. On the heels of the largest UDAAP fines the CFPB has ever imposed, we explore what the otherwise decreased activity from the agency may mean for UDAAP enforcement in the near future. We specifically discuss the "abusive" prong of CFPB's UDAAP regime; and provide tips on how to ensure your institution remains compliant. ❖

REGULATORY ROUNDUP

Regulatory and Compliance Alerts

Agencies Finalize Rule to Adjust Appraisal Threshold for Commercial Real Estate Transactions

On April 2, 2018, the Office of the Comptroller of the Currency (OCC), Federal Reserve Board (FRB) and Federal Deposit Insurance Corporation (FDIC) finalized a rule to raise to $500,000 the threshold for commercial real estate transactions requiring an appraisal. The new threshold would be an increase from $250,000, resulting in a larger number of transactions subject to less stringent requirements. As part of the proposal, an evaluation requirement would apply to those transactions under $500,000. The rule became effective on April 9, 2018.

FinCEN Releases FAQs on Customer Due Diligence Requirements

On April 3, 2018, the Financial Crimes Enforcement Network (FinCEN) issued a new set of frequently asked questions (FAQ) to assist covered financial institutions in understanding the scope of the Customer Due Diligence Requirements for Financial Institutions.

FFIEC Issues Statement on Cyber Insurance

On April 10, 2018, the Federal Financial Institutions Examination Council (FFIEC) members issued a joint statement to describe matters that financial institutions should consider if they are determining whether to use cyber insurance as a component of their risk management programs.

NCUA Issues Final Rule on Advertising Statement

On April 19, 2018, the National Credit Union Administration (NCUA) announced a final rule to expand and loosen requirements related to usage of the NCUA's official advertising statement. **The rule will become effective on May 25, 2018.**

FINRA Proposes Rule Change to Amend AML Compliance Program Rule

On April 20, 2018, the Financial Industry Regulatory Authority (FINRA) filed with the Securities and Exchange Commission (SEC) a proposed rule change to amend FINRA Rule 3310 (Anti-Money Laundering (AML) Compliance Program) to reflect the Financial Crimes Enforcement Network's (FinCEN) adoption of a final rule on Customer Due Diligence Requirements for Financial Institutions. The rule will be considered effective upon filing, though the SEC has 60 days to review and will accept comments for 21 days upon publication in the Federal Register.

BCBS Issues Progress Report on Basel Regulatory Framework Adoption

On April 23, 2018, the Basel Committee on Banking Supervision (BCBS) issued its progress report on the adoption of the Basel regulatory framework. The report sets out the adoption status of Basel III standards for each BCBS member jurisdiction as of the end of March 2018.

CONGRESSIONAL ACTIVITY SUMMARY: UTILIZING THE CONGRESSIONAL REVIEW ACT

The procedural question related to the Congressional Review Act may have finally been answered. Since the beginning of 2017, the Capco CRI has been monitoring whether Congress would use the procedural tool to disapprove rules already in effect. While it ostensibly seems implausible that Congress would be able do so, this may be exactly what this utilization of the Congressional Review Act permits.

Overview

First, it is important to understand that the Congressional Review Act established expedited procedures for Congress to disapprove regulatory rules that federal agencies issue. To do so, a joint resolution of disapproval must pass both houses of Congress by a simple majority and the president must sign off. Once a joint resolution of disapproval has successfully passed, the agency-issued rule shall not take effect. Further, an agency may not issue a rule in "substantially the same form" as the disapproved rule, unless subsequent law specifically authorizes it.

The Congressional Review Act has traditionally been used to overturn a rule during the statutorily mandated 60-legislative-day period following the submission of a rule. For example, the Consumer Financial Protection Bureau (CFPB) issued its final rule on arbitration agreements in July 2017, and by November 2017 a joint resolution of disapproval had passed both houses of Congress and was signed by President Donald Trump, prohibiting the arbitration agreements rule from taking effect.

Novel Approach

However, we have now seen a novel use of the Congressional Review Act take form over the past few months. The Act was reintroduced to the spotlight when Senator Patrick Toomey (R-PA) sent a request to the Government Accountability Office (GAO) to determine whether a joint guidance on leveraged lending that the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board (FRB) and the Federal Deposit Insurance Corporation (FDIC) issued in March 2013 constitutes a "rule" for the purposes of the Congressional

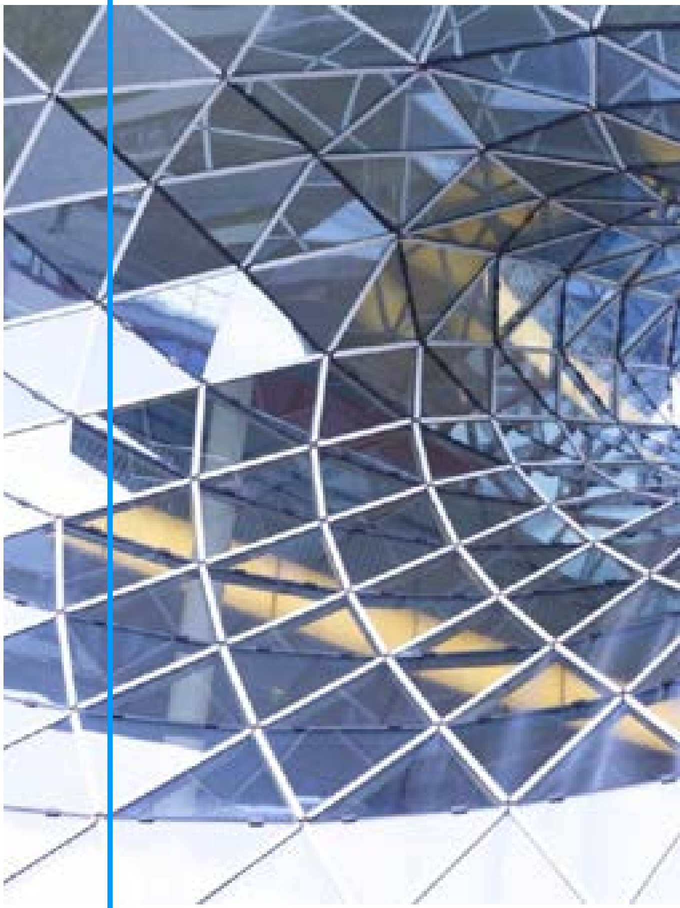
Review Act. On October 19, 2017, more than six months after Toomey's request, the GAO issued a report concluding "that the Interagency Guidance is a general statement of policy and is a rule under the Congressional Review Act."

Once it became clear that some guidance could be considered a "rule" under the Congressional Review Act, the next question came from the fact that the statute requires federal agencies promulgating rules to submit a report on the rule to Congress and the Comptroller General (head of the GAO). The report must specifically contain:

- a copy of the rule
- a concise general statement relating to the rule, including whether it is a "major rule"
- the proposed effective date of the rule

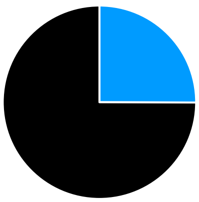
Therefore, if a guidance that is considered a "rule" under the Congressional Review Act was issued by a federal agency, but a report on the rule was never submitted to Congress and the Comptroller General, does Congress have the right to disapprove the guidance?

Until recently, the answer to this was unknown. But, on April 18, 2018, the Senate passed S.J. Res. 57. The resolution sought to disapprove a guidance document the CFPB issued in March 2013 titled "Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act." Since it was agency guidance, the CFPB most likely did not follow the procedures required under the Congressional Review Act in 2013.



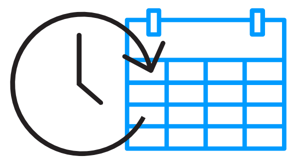
How Common of a Problem Is This?

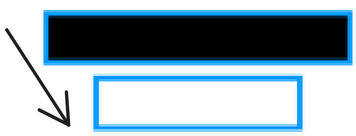
According to a GAO report on economically significant regulations during specified transition and non-transition periods by the Clinton, Bush and Obama administrations:



132 of the 527 economically significant regulations failed to meet at least one of the Congressional Review Act requirements.

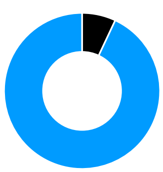
Failure to delay the effective date of regulations for 60 legislative days was the most prominent failure.





15 regulations were not properly submitted to the GAO (the number is now 10, as five regulations were submitted during the course of research for the GAO report after the agencies were notified of their failure to submit).

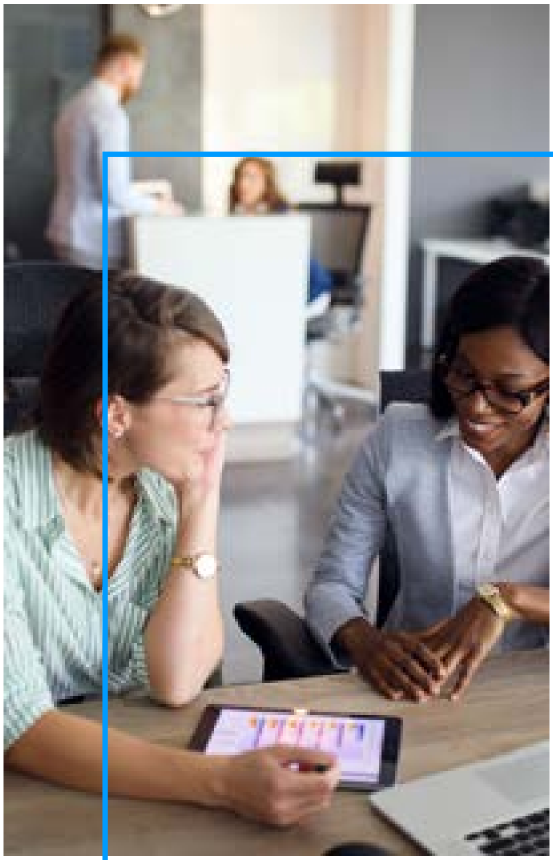
7 percent of significant regulations published during all periods reviewed had not been submitted to the GAO, as statutorily required.



The GAO also stated in this report that “not submitting a rule to Congress can potentially create legal uncertainty for agencies and regulated parties because courts have differed on the impact of noncompliance with [the Act] on the enforceability of the regulation.” According to a footnote in the GAO report, an opinion from the Southern District of Ohio held that the Congressional Review Act precludes judicial review of an agency’s failure to submit a rule; and an opinion from the Western District of Louisiana held that judicial review was available.

What Is the Impact Moving Forward?

For the CFPB's indirect auto lending guidance, it is unclear what happens next. While there have been institutions and companies that have been the subject of enforcement actions related to indirect auto lending, the CFPB's guidance was intended to help indirect auto lenders within the CFPB's jurisdiction minimize fair lending risk under Regulation B (Equal Credit Opportunity Act (ECOA)). There may be a chance that subjects of enforcement actions could potentially get back some or all of their monetary fines.



Regardless, Republicans have the opportunity to roll back a number of regulations as they currently control the House, the Senate and the presidency. Under the novel Congressional Review Act approach, the number of "rules" that could potentially be overturned by Congress is unknown, but certainly larger than with previous administrations.

Additionally, the GAO could have its hands full over the next few months determining:

- whether certain guidance is considered a "rule" under the Congressional Review Act; and
- whether "rules" under the Act were ever submitted to Congress and the Comptroller General.

The answers to these questions and the timelines in which they are answered could become increasingly important, and put even more pressure on the upcoming November mid-term elections, as Republicans maintaining control in the House could have substantial implications for rule disapproval. ❖

FOCUS BALANCING COMMUNITY REINVESTMENT WITH MODERN BANKING

DEVELOPMENTS IN THE CRA CONVERSATION

The CRA, in addition to its original goal of eschewing discriminatory redlining practices, is a matter of great importance to those within the financial services industry, as CRA ratings (and the examination process itself) can have significant effects on a bank's business operations. In this article, we outline the recommendations set forth in both the recent GAO and recent Treasury reports; and how an institution might maintain its competitive advantage while ensuring compliance with relevant requirements.

Recent CRA Activity

- February 2017 — Executive Order 13772, requires the Department of the Treasury (Treasury) to review Community Reinvestment Act (CRA) implementation as part of efforts to examine many existing laws and regulations affecting the financial services industry.
- June 2017 — Treasury announces plans to conduct CRA review, noting the criticality of regulatory system updates to reflect financial institutions' current business practices, while serving consumers' financial needs.
- February 2018 — The Government Accountability Office (GAO) publishes a report entitled "Community Reinvestment Act: Options for Treasury to Consider to Encourage Services and Small-Dollar Loans When Reviewing Framework," to provide guidance to Treasury's interest in the matter.
- April 2018 — Treasury releases its report on CRA findings and recommendations, which do not change current CRA processes, but do shed light on where regulators and legislators may be headed with the CRA.

The Importance of the Reports and Comments from the Regulators

The documents from the GAO and Treasury provide some of the only guidance stakeholders have for understanding what may be in store for the CRA, as the heads of the three regulating agencies responsible for CRA enforcement – the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board (FRB) and the Federal Deposit Insurance Corporation (FDIC) – have not made many public comments on the matter.

Of the three agencies, Comptroller of the Currency Joseph Otting has been the most vocal on CRA reform, and originally set sights for official reform proposals by spring 2018. But, it is uncertain when regulators will deliver these proposals, taking into consideration that leadership is in flux at the FRB and FDIC. Leaders from the FRB have commented that they plan to improve and amend the CRA, but have given no specifics. It is possible the OCC will move forward with its own agenda, but Otting has stated that he hopes the three regulators would work together to create a joint Advance Notice of Proposed Rulemaking.

FRB Governor Lael Brainard spoke about CRA modernization on April 17 in a speech at the Federal Reserve Bank of Richmond Baltimore Community Development Gathering, in which she outlined the CRA's importance and reiterated the agency's commitment to implementing revisions that will more accurately reflect the current financial services industry. She outlined five main FRB objectives for CRA updates and stated that the FRB is looking forward to working with the other agencies to create joint rulemaking, though she did not give a timeline.

The History of the CRA and How It Currently Operates

In 1977, Congress passed the CRA to encourage banks to serve their communities more inclusively, meeting the credit needs of all types of consumers, including those in low- and moderate-income (LMI) areas, while ensuring safe and sound business practices. Consistent with the CRA:

- Federal banking regulators conduct examinations and issue performance ratings for banks using census tracts to define LMI areas.
- Institutions can have multiple assessment areas for CRA purposes.
- Assessment areas include the locations of the institution's main office, branches and deposit-taking ATMs, as well as the surrounding geographies where the institution has originated or purchased a substantial portion of its loan portfolio.
- An institution's size determines it test subjectivity, with large institutions subject to a lending test, an investment test and a service test; intermediate small institutions subject to a lending test and a community development test; and small institutions subject to a lending test, with the option to have qualified investments and services reviewed to enhance a "Satisfactory" rating.
- Additionally, any institution may opt to apply for the "strategic plan" option, in lieu of size-based testing.

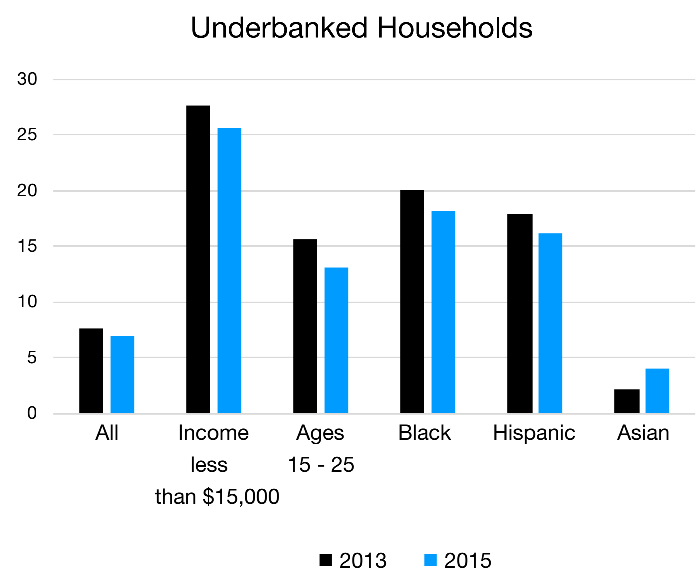
Types of CRA Tests

Lending	Investment	Community Development	Service
Evaluates the number, amount and distribution across income and geographic classifications of the institution's home mortgage, small business, small farm and consumer loans in the assessment area; and may also evaluate community development loans and any innovative or flexible loan products, depending on institution size. This test has the greatest effect on a large institution's overall rating.	Grades the dollar amount, complexity and responsiveness of qualified community development investments that benefit assessment areas or broader area that includes assessment areas. These are investments, grants or deposits that generally serve LMI individuals and areas.	Assesses the institution's community development loans, investments and services, as appropriate. Qualifying LMI community development activities may be related to: affordable housing; community services; economic development (financing small businesses or farms); and stabilization or revitalization efforts.	Examines retail service delivery, such as the availability and accessibility of branches, products and alternative delivery systems like ATMs and mobile banking in the assessment area and across income levels; and evaluates the extent, innovativeness and responsiveness of the institution's community development services.

The CRA tests determine an institution's overall CRA rating, and the results can have multiple effects. The test results can affect the institution's ability to grow, as they are considered when evaluating applications for deposit facilities, including mergers and acquisitions. Also, the results determine the frequency of testing, as maintaining a "Satisfactory" or better CRA rating means less frequent CRA examinations.

The Current Climate: A Need for Change

According to a 2015 FDIC survey, 7 percent of U.S. households were completely unbanked (nobody in the household has a checking or savings account at an insured institution) and 20 percent of households – about 51 million adults – were underbanked (at least one household member had such an account, but the household still utilized alternative financial services). While the findings of this survey showed slightly improved numbers since 2013 for households in the categories of younger, black, Hispanic and under $15,000 in yearly income, these types of households were still underbanked at a substantially higher rate than the overall rate. In the same timeframe, some household types became more likely to be underbanked, including Asian households and households with income volatility, with those households with greater volatility being more likely to be underbanked.



The GAO Report

Congress asked GAO to assess both basic banking services and small-dollar, nonmortgage consumer loans banks provide in LMI communities; and regulators' evaluation processes for these types of activities. GAO found that "many LMI consumers' need for basic banking services and small-dollar loans is not being met by traditional financial institutions." Even though most Americans have a checking or savings account and, generally, there are as many banks and credit unions near LMI communities as there are near middle-income communities, GAO found that lower-income households are more likely to use alternative financial services providers, which can be costly. The agency therefore advocated CRA changes to "motivate financial institutions to make greater efforts to provide more of the low-cost services and loans LMI consumers are currently seeking outside the banking system."

GAO Report's Recommendations:

1. Revising the lending and service tests to give more consideration to basic banking services

/ including applying the service test mandatorily to small financial institutions to better assess all banks that serve LMI communities; and evaluating the usage and effectiveness of products and services, with the idea that creating a more objective scorecard could increase banks' responsiveness to the needs of the underbanked, although it may impose additional costs for banks. The GAO also discussed some stakeholders' suggestions to penalize activities that undermine the provision of quality services or reward financial institutions for additional products and services, though opponents to these suggestions commented, among other reasons, that this may turn the CRA into a compliance exam.

2. Revising the CRA lending test to give more consideration for small-dollar, nonmortgage consumer loans

/ with a focus on evaluating loan quality, such as paying attention to which banks fund payday lenders; collecting data from banks that regularly provide this type of lending to better understand consumer lending that is reaching LMI communities and so banks may more easily compare themselves to their peers; and incentivizing these types of loans by crediting institutions that provide the loans (or utilize more innovative products), which are often only marginally profitable, in areas with high concentrations of high-cost lenders or in LMI areas.

3. Expanding CRA assessment areas to include services or loans provided outside of a financial institution's geographic area

/ reflecting major shifts from branch-focused banking when the CRA was enacted in 1977 to today's model in which many banks make loans through brokers and non-branch means. Additionally, financial holding companies, multinational financial enterprises and nonbank lenders, as well as internet, mobile and phone banking have impacted the definition of a lender's "community." GAO showed, however, that deciding how to expand assessment area definitions could prove tricky as there would be no simple "one-size-fits-all" approach.

4. Expanding CRA to include all affiliates of financial institutions and additional entities such as credit unions and nonbanks

/ because while many affiliates may not be subject to CRA requirements, including a bank's affiliates in that bank's CRA evaluation may incentivize lending behavior more in line with the CRA's objectives from both the bank and its affiliates. Participants in the GAO's study also indicated that including credit unions and nonbanks in CRA subjectivity may help LMI populations.

5. Issuing additional guidance

/ including more specific guidance on and examples of basic banking services and small-dollar, nonmortgage consumer loans that can receive CRA credit.

Treasury also Considers Affiliates and Nonbanks

Treasury included in its report (which is outlined later in this article) a short section on additional issues. Among these was the issue of including a bank's affiliates in its examination, which Treasury suggested would more accurately reflect a banks' overall CRA-eligible activities. Treasury also encouraged regulators to continue monitoring nonbanks' CRA impact, and specifically the extent to which nonbanks (especially loans that the Small Business Administration and Federal Housing Administration guarantee) meet LMI communities' credit needs.

The Treasury Report

Treasury's April CRA report proposes "regulatory and administrative changes that are consistent with the original intent of CRA, including common sense reforms that reduce the complexity and burden on banks, regulators, and community advocates." In creating the report, Treasury took the GAO report into consideration, and additionally conducted its own interviews with stakeholders and regulators. Many of the recommendations reflect GAO findings, but the Treasury report focuses on the following four key areas.

Treasury Report's Recommendations:

1. Assessment Areas

/ for the reasons also cited in the GAO report, Treasury suggested including a bank's physical location, the LMI communities outside this physical region and any areas in which the bank accepts deposits or conducts substantial business, to better capture a bank's interactions with its entire customer base; and applying these assessment areas to traditional banking organizations using alternative delivery channels, wholesale and limited purpose banks and emerging "branchless" banks.

2. Examination Clarity and Flexibility

/ adding onto the GAO's call for additional CRA guidance, the Treasury report addressed distinct areas of the overall CRA process and a need to clarify:

- eligibility prior to making an investment, by expanding the types of loans, investments and services eligible for CRA credit; establishing clearer standards for eligibility for CRA credit, with greater consistency and predictability across each of the regulators; and simplifying record-keeping procedures, designed to make eligibility updates more regular and timely;
- application of bank performance context, by having regulators develop the performance context in advance of CRA examinations, allowing research and policy experts to shed light on the economic and business environment of the communities where banks operate; and reducing the burden on CRA examiners, who are currently responsible for establishing a bank's performance context;
- examination criteria, so that CRA activity is clearly measurable and reportable, with a well-defined, consistent set of criteria for more accountable outcomes and understandable ratings, and possibly more frequent evaluations;
- examination staffing, practices and procedures, by dedicating specialized staff to CRA examinations and ensuring that all internal regulator guidance, or interpretations of official guidance, be made public;
- the Strategic Plan option, which fewer than 70 banks executed between 1996 (the option's inception) and 2016, by reducing community involvement requirements in the amendment stages, to allow more institutions to elect this alternative testing route; and
- service test definitions, by expanding the framework of CRA-eligible services (including services bank staff manages internally and those contracted externally).

3. Examination Process

/ identifying certain administrative aspects of the examination process for improvement, including fixing timing delays by standardizing examination schedules and reviewing the definition process for limited-scope assessment areas, especially in non-metropolitan areas.

4. Performance

/ outlining certain concerns regarding performance evaluation clarification and reform, including eliminating or reducing:

- downgrades for violations of consumer protection laws, by adopting uniform guidance for examiners to utilize the updates OCC published to its Policies and Procedures Manual on October 12, 2017, which outlined principles for assessing how evidence of illegal credit practices in a bank's CRA lending activities might affect its CRA rating
- performance evaluation delays due to consumer protection law investigations, by considering in the following examination cycle any evidence of a violation that emerges after an evaluation
- the impact of less than satisfactory ratings and remediation hindrances, by aligning the FDIC's and FRB's policies and procedures with the changes the OCC adopted on November 8, 2017, which clarified that banks with less than Satisfactory ratings would continue to receive enhanced scrutiny, but the OCC could approve an application for a deposit facility after considering certain factors
- the use of community benefits plans, by highlighting that the plan is not required, but is just one tool for showing how a bank might meet community needs; and that it may be useful for banks with less than Satisfactory ratings in remediation efforts
- the burden of maintaining a public file in the branch, by allowing banks to store their public files on their websites electronically; and ensuring that any party, upon request, can have access to a physical copy

How These Reports Change the CRA Conversation

Almost all stakeholders agree that reform to modernize the CRA is necessary, but there is some debate as to how to structure this change. OCC Director Joseph Otting has publicly stated that he believes the CRA is currently too focused on the details and his goal is to return the CRA to its original intent: “Are we getting money into those communities?”

Others believe that CRA provisions should be more stringent. Highlighting the fact that out of thousands of banks reviewed under CRA in 2017 only two received a rating of Substantial Noncompliance (and that these are the only two banks, therefore, not eligible for reduced mortgage data reporting), Senator Sherrod Brown (D-OH) remarked during a Congressional session on March 8, 2018, that without a stricter CRA process, we do not have sufficient data to analyze discriminatory lending practices.

The Treasury report — a result of an executive order from a presidential administration supporting deregulation — goes against some suggestions of Democratic legislators like Brown, by recommending changes such as eliminating or reducing implications of less than satisfactory CRA scores. This is probably our best insight into what forthcoming proposals might look like.

While the details are not yet concrete, those in the financial services industry can expect to soon see attempts to realize what regulators, legislators and banks alike have been demanding: a CRA modernization that captures the changing financial landscape while keeping intact the CRA’s original mission to better serve consumers in all types of communities. ❖

‘ABUSIVE’ BECOMES RECLUSIVE:

TRENDS IN UDAP AND UDAAP

Shifting objectives at the Consumer Financial Protection Bureau (CFPB) could mean changes in the way Unfair, Deceptive or Abusive Acts or Practices (UDAAP) are enforced, and specifically may mean fewer actions brought under the “abusive” prong of CFPB’s UDAAP regime.

Financial institutions have been subject to Unfair or Deceptive Acts or Practices (UDAP) legislation since the Federal Deposit Insurance Corporation’s (FDIC) Federal Trade Commission (FTC) Act passed in 1914. But in 2010, the Dodd-Frank Act added “abusive” to the list of disallowed behaviors and tasked the CFPB with managing UDAAP enforcement.

In the following years, the CFPB established a reputation as a stern regulator, and the financial services industry began to see increased punitive action under UDAAP. In 2017, the CFPB issued nine enforcement actions under UDAAP, while other banking regulators imposed only five penalties under the FTC Act’s UDAP.

UDAP Versus UDAAP:

CFPB’s UDAAP

“abusive”

The CFPB’s UDAAP defines “abusive” as an act or practice that:

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 its interests 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.

FTC’s UDAP

“deceptive”

Both the FTC’s UDAP and the CFPB’s UDAAP state that an act or practice is subject to a three-part test to determine whether it is “deceptive”:

1. The representation, omission or practice must mislead or be likely to mislead the consumer.
2. The consumer’s interpretation of the representation, omission or practice must be reasonable under the circumstances.
3. The misleading representation, omission or practice must be material.

“unfair”

Both the FTC’s UDAP and the CFPB’s UDAAP state that an act or practice is considered “unfair” if it:

1. causes or is likely to cause substantial injury (usually monetary) to consumers;
2. cannot be reasonably avoided by consumers; and
3. is not outweighed by countervailing benefits to consumers or to competition.

Democratic Legislators Question a Halt in the CFPB's Enforcement Activity

Since Mick Mulvaney became CFPB acting director in November 2017, the agency has not filed a single new lawsuit. In a hearing before the House Financial Services Committee on April 11, titled "The 2018 Semi-Annual Report of CFPB," Rep. Carolyn Maloney (D-NY) highlighted that under previous leadership, the agency brought approximately four enforcement actions per month to protect consumers and that since Mulvaney's appointment, it has initiated zero (i.e., it has filed no new lawsuits).

Maloney questioned whether this lack of action signaled a decline in enforcement activity and whether the CFPB is still doing its part to ensure financial institutions practice safely, soundly and honestly. Mulvaney explained that while the CFPB has not initiated any new lawsuits, there are approximately 100 ongoing cases that CFPB staff are investigating; and that the agency inherited from previous leadership 25 cases that had moved into the litigation phase, of which they have dismissed only one. Mulvaney explained this case "did not meet [his] standards."

CFPB Issues First Action under Mulvaney

On April 20, the CFPB and the OCC jointly announced a fine against a large bank for improper insurance charges on auto loans and improper fees on mortgage interest rate locks. The CFPB assessed a $1 billion fine, and the OCC assessed a $500 million fine. However, the CFPB is allowing the $500 million the bank will pay to the OCC to offset the CFPB's $1 billion fine, making the total fines the bank will pay $1 billion.

The $500 million fine the CFPB is requiring is still the largest fine the agency has ever assessed. However, Democrats are not convinced this action signals true enforcement from new CFPB leadership, as former Director Richard Cordray has claimed that much of the investigation for the action was done under his leadership. It is also important to note that the fines stem from findings that the bank engaged in "unfair" practices, and that the investigation did not find the bank's activities were "abusive."

Nonetheless, it is clear that Mulvaney expects the number of CFPB enforcement actions to decline, as he stated that before making any decisions or bringing any actions, he wants more data than his predecessor required and "better and more cost-benefit analysis before we make a final determination." He also stated, in response to a question about his tactics, that "regulation by enforcement is done."

The Tone from the Top

On the heels of this historically large enforcement action's announcement, some stakeholders are pointing out the shift in tone from CFPB leadership. In the agency's press release, Mulvaney said, "I am especially pleased that we were able to work closely and effectively with our colleagues at the OCC, and I appreciate the key role they played in the negotiations… As to the terms of the settlement: we have said all along that we will enforce the law. That is what we did here."

This matter-of-fact statement both places partial onus on the OCC for the enforcement action and declares the CFPB was doing no more than following the letter of the law, an important message for Mulvaney, who has claimed on many occasions that Cordray often overstepped his authority.

The shift in tone in press releases from the agency is evident when comparing Mulvaney's comments to Cordray's statements on CFPB actions when he was director. For example, on the last suit filed under Cordray's watch, he said the company "and its owners lied to financially vulnerable consumers to line their pockets with cash… Today's lawsuit seeks to stop these deceptive practices, impose civil money penalties, and return to cheated consumers the fees they paid to these companies."

Questioning What Is Considered 'Abusive'

In response to a request to elaborate on the CFPB's new enforcement-reduced supervision, Mulvaney said to the members of the Committee, "If I wanted to add to the list of things y'all can help me with, help me with the definition of 'abusive.' Give me some legislative guidance on that, because it is full of gray areas in the way the statute is written."

Mulvaney claimed that the language used in the definition of "abusive" — and specifically the words "materially" and "unreasonable"— is subjective and therefore provides too much discretion to the CFPB director. What he decides is "material" or "unreasonable," Mulvaney explained, could be very different from what another director might consider "material" or "unreasonable."

Representative Keith Rothfus (R-PA) emphasized that because institutions have long been subject to regulations disallowing deceptive and unfair practices, there is "precedent that can provide us with an interpretation of what is 'unfair' or deceptive,'" but "it is still unclear what 'abusive' means." Similarly, Representative Jeb Hensarling (R-TX) said that there is "long case history" for UDAP, but that this is not the case for defining "abusive."

This is not the first time these issues have been in the spotlight. In April 2016, Representative Blaine Luetkemeyer (R-MO) introduced the Unfair or Deceptive Acts or Practices Uniformity Act (H.R. 5112) to amend Dodd-Frank's Title X (Consumer Financial Protection Act) so that the CFPB's UDAAP authority would be consistent with and similar to the FTC's UDAP authority. Specifically, the bill aimed to eliminate the "abusive" standard under UDAAP, which Luetkemeyer felt created too many compliance questions among industry members.

Quick Tips for Ensuring UDAP and UDAAP Compliance:

- Identify and ensure proper monitoring for areas that pose considerable UDAP/UDAAP risks, including products for which salespeople earn commission or any incentivized benchmarks for employee performance regarding client- or consumer-facing services.
- Review sales scripts and monitor sales calls to ensure that no consumer receives any deceptive or misleading claims during a sales transaction. It may also be prudent to construct product scripts that more holistically encompass the variety of customers your institution serves, rather than providing a one-size-fits-all telephone script that does not account for client variability.
- Maintain sufficient monitoring of backend processes and post-sales interactions, including fee disclosures, timeliness of notifications and repricing. Provide proper training to customer service representatives and be sure to explain what types of language or claims may constitute a "misrepresentation."
- Evaluate customer complaints, which can be one of the greatest sources of insight for an institution to flag areas of concern. Not only can your institution uncover UDAP/UDAAP violations by reviewing and assessing complaints, but regulators also have access to related documentation and can impose penalties for lack of awareness or tardiness in reparation.
- Evaluate training content and strategy related to UDAAP, considering a balanced enterprise-wide approach while also accounting for job-specific risks of UDAAP violations. ❖

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