Community Bankers of Michigan Regulatory Dispatch

March 27, 2024

Timely news and resources community bankers can use

to better stay on top of a rapidly changing world.

Agencies Extend Applicability Date of Certain Provisions of their Community Reinvestment Act Final Rule

Federal bank regulatory agencies today jointly issued an interim final rule that extends the applicability date of certain provisions in their Community Reinvestment Act (CRA) final rule issued in October 2023. The agencies also requested comments on the extension. To promote clarity and consistency, the agencies extended the applicability date of the facility–based assessment areas and public file provisions from April 1, 2024, to January 1, 2026.

Therefore, banks will not have to make changes to their assessment areas or their public files as a result of the 2023 CRA final rule until January 1, 2026. This extension aligns these provisions with other substantive parts of the 2023 CRA final rule that are applicable on January 1, 2026. For example, all provisions about where banks are evaluated will now apply on the same date. Comments on the extended applicability date must be received 45 days after the rule is published in the Federal Register.

In addition, the agencies also issued technical, non–substantive amendments to the CRA final rule and related agency regulations that reference it. For example, one of these technical amendments clarifies that banks do not need to make changes to their public notices until January 1, 2026.

In October 2023, the agencies finalized updates to strengthen and modernize regulations implementing the CRA to better achieve the purposes of the law. The CRA is a landmark law enacted nearly 50 years ago to encourage banks to help meet the credit needs of their entire communities, including low– and moderate–income neighborhoods, consistent with banks' safe and sound operation.

Comment: The interim final rule extends the applicability date of the facility-based assessment areas provision and public file provision in the 2023 CRA Final Rule, from April 1, 2024, to Jan. 1, 2026. According to the agencies, the change will, among other things, make these provisions applicable concurrent with the definition of key terms, as well as reduce uncertainty and ensure consistency of the requirements, applicable as of Jan. 1, 2026.

CBM Insights

Q: I have a question regarding ESIGN. We are wanting to email a customer a copy of their consumer loan documents. The intent is for the customer to print the loan documents, wet sign them, and mail the originals back to the bank. In this situation, would the ESIGN apply since the documents will be wet signed?

Follow up question. Would this be the same for a commercial loan transaction?

A: Documents emailed, wet signed and mailed back logically, has nothing to do with ESIGN. That is still a physical paper record and does not create an 'electronic record.'

But the answer requires a deeper dive because when dealing with 'electronic documents' you have both UETA and ESIGN.

ESIGN grants legal recognition to electronic signatures and records if all parties to a contract choose to use electronic documents and to sign them electronically. When banks are legally required to make information available to a consumer in writing, the information can be delivered electronically as long as there is prior compliance with ESIGN's consumer consent requirements.

UETA grants that when a law requires either a writing or a signature, an electronic record or an electronic signature can satisfy that requirement when the parties to the contract or transaction have agreed to proceed electronically.

Additionally, ESIGN allows the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing with specific delivery requirements, if the consumer has affirmatively consented ('demonstrable consent') to such use and has not withdrawn such consent.

If your 'loan documents' contain any disclosure required by statute (think, for example, a Closing Disclosure) you need 'demonstrable consent' to send, even if the intention is to print off and return to the bank.

For a commercial transaction, you would just need simple consent. If you and your commercial customer wish to substitute electrons for ink on documents that normally are required to be written, you need to come to a simple agreement before delivery. Unlike consumer consent under ESIGN, commercial assent does not require the front-end information and the 'demonstrative consent' step.

Below is from a Consumer Compliance Outlook entitled *Moving from Paper to Electronics: Consumer Compliance Under the E-Sign Act* that has some very helpful information on consent under ESIGN.

Six-Step Consumer Consent Process

Step 1 - Availability of Paper Delivery or Paper Copies *Before seeking a consumer's consent to use electronic records, institutions must inform the consumer in a clear and conspicuous statement of any right or option to have the record provided in nonelectronic form, the right to withdraw that consent, the consequences of withdrawing consent (including terminating the relationship), and any fees imposed in the event of withdrawal. Institutions must also inform consumers of their right to request a paper copy of an electronic record and whether any fees apply.*

Step 2 - Consent Choices *Before seeking a consumer's consent to the use of electronic records, a financial institution must inform the consumer in a clear and conspicuous statement whether consent relates to a particular transaction only or whether consent relates to broader categories of information. Most financial institutions choose a product-by-product consent process.*

Step 3 - Consumer Actions *Financial institutions must disclose to consumers the procedures to withdraw consent at a later date and to update the consumer's contact information, such as notifying the financial institution when the consumer's e-mail address changes.*

Step 4 - Hardware/Software Requirements *Financial institutions must provide consumers with a statement detailing the hardware and software requirements to access and retain electronic records.*

Step 5 - Affirmatively Consent *To ensure a consumer can communicate electronically with the financial institution to which consent has been provided, the E-Sign Act requires that the consumer provide consent electronically "in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent."*

Step 6 - "After Consent" Disclosure *To ensure continued electronic access, financial institutions must provide consumers with a statement detailing any revised hardware and software requirements for access to and retention of electronic records, and the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed. After providing this statement, institutions must again obtain consumers' affirmative consent as in Step 5. The procedures in Step 6 must be followed when the changes in hardware and software requirements create a material risk that consumers will not be able to access or retain electronic records.*

The most difficult part of the E-Sign Act's rules involves the correct method for consumers to "demonstrate" that they can access the required information electronically (Step 5). To ensure compliance with this requirement, financial institutions are encouraged to develop procedures to ensure they maintain records of the consumer's consent process. A financial institution's failure to obtain consumer consent properly can significantly affect its compliance with consumer laws and regulations such as Regulation E's error resolution procedure. Under Regulation E, the customer generally has 60 days from receiving a periodic statement to claim an error.5 If the statements are sent only electronically and the e-sign consent requirement was not obtained properly, the error period could be extended until a paper statement that includes the error is provided.

Source link.

Items of Interest

Bank Management

FRB Statement of Michelle W. Bowman on the Interim Final Rule and Final Rule Amending the Community Reinvestment Act Regulations (03/21/2024) – *The interim final rule and final rule amending the Community Reinvestment Act ("CRA") regulations before the Board, less than six months following the CRA rule's approval, provide more evidence of the rushed and overzealous nature of the CRA rulemaking process. As I noted at that time, the CRA final rule is unnecessarily complex and extraordinarily lengthy.*
In my view, the appropriate approach to address the changes considered by these amendments, and the other more substantive issues with the final rule, would have been a re-proposal. Now, less than six months after voting on the final rule, we have already identified at least one significant issue that warrants changing the finalized regulation. I am concerned that this change will not be the only significant issue that will require further consideration given the length and complexity of the final rule as the agencies continue to work toward implementation of the changes.

As I noted in my statement during the open Board meeting in October, the new requirement for "large" banks to delineate entire counties rather than allowing those banks to continue to use partial counties for their assessment areas could introduce unintended consequences. Under the current final rule, these "large" banks would have to redefine the new, broader full county assessment areas by April 1, 2024 (in less than two weeks' time).

Some of these banks would no longer be subject to these requirements after January 1, 2026, due to the redefinition of a "large" bank as of that date under the rule. While the interim final rule is helpful in that it aligns the requirements for these banks to January 1, 2026, and gives other "large" banks more time to comply with the requirement to redefine full county assessment areas, it is unrealistic to expect that banks have not already expended significant resources to comply with this new requirement. Banks do not wait until a week before a new rule becomes effective to ensure that they are in compliance.

This interim final rule illustrates the rushed, overly complex, and unwieldy nature of the CRA rulemaking.

Comment: Last October, Governor Bowman was the only member of the Fed board to vote against moving forward with the CRA final rule. She spelled out her concerns with the rule, saying its positives were outweighed by its negatives.

FTC to Hold Virtual Informal Hearing on April 24, 2024 As Part of its Review of the Proposed Rule Prohibiting Junk Fees (03/21/2024) – The Federal Trade Commission will hold a virtual informal hearing on April 24, 2024, on its proposed Rule on Unfair or Deceptive Fees, commonly known as junk fees. During the hearing, which will be open to the public and viewable on the FTC's website, interested organizations will have the opportunity to provide oral statements.

On October 11, 2023, the Federal Trade Commission announced a proposed rule to prohibit junk fees. The proposed rule would ban businesses from running up the bills with hidden and bogus fees, ensure consumers know exactly how much they are paying and what they are getting, and help spur companies to compete on offering the lowest price. Businesses would have to include all mandatory fees when telling consumers a price, making it easier for consumers to comparison shop for the lowest price.

Comment: While the FTC does not have jurisdiction over banks, the prudential regulators apply various FTC rulemaking aimed at protecting consumers to bank accountholders.

FDIC Proposed Revisions to the Statement of Policy on Bank Merger Transactions (03/21/2024) – The FDIC Board of Directors has proposed revisions to the Statement of Policy (revised SOP) on Bank Merger Transactions. The revised SOP is being published in the Federal Register for public comment.

Statement of Applicability: The contents of, and material referenced in, this FIL apply to all FDIC-insured financial institutions.

Highlights:

The revised SOP:

- Updates, strengthens, and clarifies the FDIC's policies and expectations related to the evaluation of bank merger transactions.
- Reflects legislative and other developments that have occurred since the current SOP was last updated in February 2008.
- Addresses evaluative considerations for each statutory factor, including the risk to the stability of the United States banking or financial system.
- Reflects consideration of comment letters submitted in response to the FDIC's March 2022 Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions.

	• Written comments must be received on or before 60 days after publication in the Federal Register. In a separate Federal Register notice, the FDIC, as part of its obligations under the Paperwork Reduction Act of 1995, invites comment on the renewal of the existing information collected in the FDIC Supplement to the Interagency Bank Merger Act application form (OMB Control No. 3064-0015). https://www.fdic.gov/news/board-matters/2024/2024-03-21-notice-dis-b-fr.pdf
	CSBS Do Ag Banks View Risks Differently? (03/19/2024) – By Temple University Professor of Finance Jonathan A. Scott and CSBS Chief Economist Thomas F. Siems Community banks that specialize in agricultural lending play a pivotal role in supporting the U.S. economy by providing financial services to farmers and ranchers that helps ensure a stable and reliable food supply. Comprising 26% of the overall population of the nation's community banks, state-chartered agricultural banks (Ag banks) help satisfy seasonal borrowing needs and encourage investments in newer technologies and better practices that improve productivity and sustainability in the agriculture sector. In this blog, we examine how responses from Ag banks, which made up 21% of the respondents to the 2023 CSBS Annual Survey of Community Banks, differ from non-Ag banks. While the top three risks for Ag banks are the same as those for non-Ag banks (net interest margins, the cost of funds, and core deposit growth), Ag banks view competition and loan demand as significantly more important risks than non-Ag banks, and it appears that location and liquidity drive these differences.

BSA / AML

	No news to report this week.

Deposit / Retail Operations

	FDIC Demands Three Companies Cease Making False or Misleading Representations about Deposit Insurance (03/19/2024) – WASHINGTON — The Federal Deposit Insurance Corporation (FDIC) issued letters demanding three companies and certain associated parties cease and desist from making false and misleading statements about FDIC deposit insurance. The FDIC is demanding that PrizePool, Inc. (PrizePool), AmeriStar, LLC (AmeriStar), and HighLine Gold, LLC (HighLine Gold) take immediate corrective action to address these false or misleading statements. In the case of AmeriStar and HighLine Gold, the FDIC has reason to believe these companies are related entities sharing several of the same principals and the same physical address, and therefore, issued a joint letter to them. Based upon evidence collected by the FDIC, these companies and certain associated parties made false representations by: (1) stating or suggesting they are FDIC-insured or that certain uninsured financial products are insured by the FDIC; (2) misusing the FDIC name or logo; (3) misrepresenting the nature or extent of deposit insurance; and/or (4) failing to clearly identify the insured depository institutions with which they have a relationship for the placement of customer deposits and into which funds may be deposited. The evidence suggests these misrepresentations are causing harm, or have the potential to cause harm, to consumers. "The Federal Deposit Insurance Act prohibits any person from engaging in false advertising by misusing the name or logo of the FDIC or from making knowing misrepresentations about the existence of or the extent or manner of deposit insurance," said FDIC Chairman Martin J. Gruenberg. "Combatting

misrepresentations about deposit insurance coverage goes to the heart of the FDIC's mission of maintaining stability and public confidence in the nation's banking system."

The FDI Act prohibits any person from representing or implying that an uninsured financial product is FDIC–insured or from knowingly misrepresenting the extent and manner of deposit insurance. The FDI Act further prohibits companies from implying that they are FDIC-insured or that their products are FDIC–insured by using "FDIC" in the company's name, advertisements, or other documents. The FDIC is authorized by the FDI Act to enforce this prohibition against any person.

On December 20, 2023, the FDIC Board of Directors adopted a final rule to amend part 328 of its regulations, which updates the FDIC's regulations regarding false advertising, misrepresentations of deposit insurance coverage, and misuse of the FDIC's name and logo. For example, the final rule clarifies that FDIC–associated terms or images may not be used in marketing and advertising materials to inaccurately imply or represent that any uninsured financial product or non–bank entity is insured or guaranteed by the FDIC.

FDIC deposit insurance protects customers in the unlikely event of the failure of an insured depository institution. To determine if an institution is FDIC–insured, you can ask a representative of the institution, look for the FDIC sign at the institution, or use the FDIC's BankFind tool. For general information about FDIC deposit insurance, read the following frequently asked questions. For more information about FDIC insurance and digital asset companies, read the following fact sheet.

Comment: Back in January, the FDIC targeted five other entities for basically making the same claims. Everyone — including fintechs, other non-bank companies, and associated individuals — that either partners with banks or seeks to provide alternatives to insured deposits must comply with the FDIC's deposit insurance advertising regulations and other applicable federal law.

Human Resources

No news to report this week.

Lending

OCC Reports Mortgage Performance for Fourth Quarter of 2023 (03/19/2024) – WASHINGTON—The Office of the Comptroller of the Currency (OCC) reported on the performance of first-lien mortgages in the federal banking system during the fourth quarter of 2023.

The OCC Mortgage Metrics Report, Fourth Quarter 2023 showed that 97.2 percent of mortgages included in the report were current and performing at the end of the quarter, an increase from the 97.1 percent in fourth quarter 2022, and a decrease from the previous quarter's 97.3 percent.

The percentage of seriously delinquent mortgages—mortgages that are 60 or more days past due and all mortgages held by bankrupt borrowers whose payments are 30 or more days past due—increased from the prior quarter; however, it has trended down since the fourth quarter of 2021.

Servicers initiated 8,320 new foreclosures in the fourth quarter of 2023, a decrease from a year earlier and from the previous quarter.

Servicers completed 7,382 modifications during the fourth quarter of 2023, a 0.7 percent decrease from the previous quarter's 7,436 modifications. Of these 7,382 modifications, 6,416 or 86.9 percent, were

	"combination modifications"—modifications that included multiple actions affecting the affordability and sustainability of the loan, such as an interest rate reduction and a term extension. The first-lien mortgages included in the OCC's quarterly report comprise 22.2 percent of all residential mortgage debt outstanding in the United States or approximately 11.7 million loans totaling $2.9 trillion in principal balances. ***Comment: Servicers initiated 8,320 new foreclosures in the fourth quarter of 2023, a decrease from the prior quarter of 645 quarter to quarter and a decrease from a year earlier of 846.***

Technology / Security

	No news to report this week.

Selected federal rules – proposed

Proposed rules are included only when community banks may want to comment. The date posted may not be the same as the Federal Register Date.

PROPOSED RULES WITH REQUEST FOR PUBLIC COMMENT

01.29.2024 **FinCEN** Comment Request; Beneficial Ownership Information Requests SUMMARY: FinCEN invites all interested parties to comment on the proposed information collection associated with requests made to FinCEN, by certain persons, for beneficial ownership information, consistent with the requirements of the Beneficial Ownership Information Access and Safeguards final rule. The details included in the information collection are listed below. This request for comment is made pursuant to the Paperwork Reduction Act of 1995. **DATES: Written comments must be received on or before April 1, 2024.**

01.17.2024 **CFPB** Overdraft Lending: Very Large Financial Institutions SUMMARY: The Consumer Financial Protection Bureau (CFPB) proposes to amend Regulations E and Z to update regulatory exceptions for overdraft credit provided by very large financial institutions, thereby ensuring that extensions of overdraft credit adhere to consumer protections required of similarly situated products, unless the overdraft fee is a small amount that only recovers applicable costs and losses. The proposal would allow consumers to better comparison shop across credit products and provide substantive protections that apply to other consumer credit. **DATES: Comments must be received on or before April 1, 2024.**

10.25.2023 **FRB** Requests Comment on a Proposal to Lower the Maximum Interchange Fee That a Large Debit Card Issuer Can Receive For a Debit Card Transaction SUMMARY: Regulation II implements a provision of the Dodd-Frank Act that requires the Board to establish standards for assessing whether the amount of any interchange fee received by a debit card issuer is reasonable and proportional to the cost incurred by the issuer with respect to the transaction. Under the current rule, for a debit card transaction that does not qualify for a statutory exemption, the interchange fee can be no more than the sum of a base component of 21 cents, an ad valorem component of 5 basis points multiplied by the value of the transaction, and a fraud-prevention adjustment of 1 cent if the issuer meets certain fraud-prevention-standards. The Board developed the current interchange fee cap in 2011 using data voluntarily reported to the Board by large debit card issuers concerning transactions performed in 2009. Since that time, data collected by the Board every other year on a mandatory basis from large debit card issuers show that certain costs incurred by these issuers have declined significantly; however, the interchange fee cap has remained the same. For this reason, the Board proposes to update all three components of the interchange fee cap based on the latest data reported to the Board by large debit card issuers. Further, the Board proposes to update the interchange fee cap every other year going forward by directly linking the interchange fee cap to data from the Board's biennial survey of large debit card issuers. Initially, under the proposal, the base component would be 14.4 cents, the ad valorem component would be 4.0 basis points (multiplied by the value of the transaction), and the fraud-prevention adjustment would be 1.3 cents for debit card transactions performed from the effective date of the final rule to June 30, 2025. The Board also proposes a set of technical revisions to Regulation II. **DATES: Comments must be received on or before May 12, 2024. (Extended from February 12, 2024)**