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February 2024 Regulatory Round-Up

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As February already begins to wind down and all of us are wondering what we might have missed so far this year, here is a round-up of additional regulatory activities in financial services:

- CFPB Publishes Updated Supervisory Procedural Rule. On February 16th, the Consumer Financial Protection Bureau ("CFPB") published an updated supervisory procedural rule that revises the process supervised institutions must follow when they want to appeal compliance ratings and exam findings. This is the second revision since the CFPB first issued this procedural rule in October 2012, with the last revision occurring in 2015. Effectively, the revised rule provides more flexibility for both the CFPB and the supervised entities. The CFPB now has the ability to pull "potential members of the appeals committee" broader pool that includes "any CFPB manager who did not participate in the underlying matter being appealed and who has relevant expertise." Supervised entities may now appeal any compliance rating (i.e., not just negative ratings). Finally, the process now allows the appeal to be resolved in three ways – the existing options of upholding or rescinding the finding still hold, but now the appeal may be resolved by remanding the matter to the staff of the Department of Supervision for re-consideration. This rule became effective once it was published by the CFPB and while it does not resolve the persistent problem of the appeals process being an "echo chamber" for supervised institutions, the new resolution option offers a less black-and-white, we-win-and-they-lose path that could be useful.

- CFPB Tackles the Credit Card Industry. Across the credit score spectrum, the CFPB produced a report on February 16th showing that credit cards offered by community banks and credit unions have significantly lower rates than the rates the largest 25 credit card issuers in the United States charge. The difference is so stark that customers with cards from the smaller institutions

"average savings of $400 to $500 a year" per $5000 of balance carried over on the credit card. Coming from the CFPB Office of Markets, the report remarked that "research has found high levels of concentration and evidence of practices that imply anti-competitive behavior in the consumer credit card market" and that such anti-competitive effects explain the higher interest rates at the bigger institutions. The Consumer Bankers Association resoundingly disagreed with the CFPB's conclusion pointing out that "[t]here are more than 640 individual credit card products and nearly 4,000 banks today in this highly competitive marketplace. This may be the only time that anyone has pointed to a market with vastly different prices as an indication of competition problems." In response to widespread criticism from the industry, the CFPB demonstrated that they are not concerned and published a blog post discussing additional market information and drawing additional conclusions on February 22nd. This time, the CFPB remarks that "credit cards have never been this expensive" and explains that the largest credit card issuers are charging higher annual percentage rates ("APRs") because they "are reliant on revenue from interest charged to borrowers who revolve on their balances to drive overall profits." That may not seem like new news, but the CFPB wrote an entire blog post to support that statement, and that should not be taken lightly.

- FDIC Creates Animated Timeline About Its History. On a cheerier note than most of the regulatory happenings that get reported on, the Federal Deposit Insurance Corporation ("FDIC") created a new animated timeline about its history that is engaging and celebrates their 90th anniversary (which actually occurred June 16, 2023).

- OCC Proposes Revised Rule on Bank Mergers. On January 29th, the Office of the Comptroller of the Currency ("OCC") published a proposed rule seeking to revise practices related to its review of bank mergers under the Bank Mergers Act ("BMA"). Basically, the OCC proposes to remove certain provisions that presently allow for expedited or streamlined review of bank mergers, and to include an appendix to the rule that is comprised of a policy statement "that would discuss general principles the OCC uses in its review of applications under the BMA and discuss the OCC's consideration of the financial stability, financial and managerial resources and future prospects, and convenience and needs factors." The proposed Appendix to the rule lists out 13 qualities that applications that are generally approved tend to have, including having strong overall ratings as well as strong ratings regarding the Community Reinvestment Act and consumer compliance. Then, the Appendix walks through how the OCC looks at the effect of the proposed application on financial stability for the institutions and the marketplace; describes the balancing test used to ensure an approved application results in financial stability; explains how the OCC approaches considerations relating to financial and managerial resources; and discusses its viewpoint on considering the "probably effects of the proposed business combination on the community to be served", seeking to ensure that community convenience will not be severely impacted and that community needs will continue to be addressed. Finally, the Appendix discusses various additional factors that could apply in individual situations related to financial resources, managerial risks, and future prospects. Comments are due on April 15, 2024, and regardless of how the comments lead to changes in the final rule, the

publication of the Appendix provides useful transparency today and will likely remain largely unchanged.

- SEC Annual Report to Congress on Credit Agencies. On February 16th, the Securities and Exchange Commission ("SEC") issued its annual staff report to Congress regarding credit agencies, or National Recognized Statistical Rating Organizations ("NRSROs"). The SEC is required to examine credit agencies annually and the report identified the following potential risks as areas of focus for exams in the next year: 1) Looking more closely at how NRSROs monitor low-rated companies in the wake of higher interest rates for debt service payments; 2) Also as a result of higher interest rates, reviewing NRSRO surveillance of collateralized loan obligations ("CLOs") and securitizations backed by consumer assets and auto loans; 3) Focusing upon how securitizations in the rental income market have been rated; and 4) Ensuring that credit agencies are documenting their use of artificial intelligence and other technologies to produce models, but also how those technologies are used for analytical tools, with a particular focus on whether NRSROs make appropriate distinctions between the approval and use of these technologies when used for models versus when they are used for analytical tools.

- SEC Approves FINRA Rule Regarding Post-Trade Transparency In Treasury Markets. On February 7th, the SEC issued a statement discussing its approval of a rule proposed by the Financial Industry Regulation Agency ("FINRA") that supports post-trade transparency, such that trades in Treasury markets will be available for review on a trade-by-trade basis, rather than on an aggregated basis. As Chairman Gensler remarks, this rule seeks to "align Treasury post-trade transparency with what we've come to benefit from in corporate, municipal, and mortgage markets."

- FTC Sends ECOA Letter to CFPB. Before the CFPB was in operation, the Federal Trade Commission ("FTC") submitted an annual report on its activities involving the Equal Credit Opportunity Act ("ECOA") to Congress every year, but now the FTC submits its report to the CFPB, which it did on February 16th. The report covers three areas the FTC focused on with respect to "fair lending" in 2023, including enforcement efforts, research and policy development and consumer and business education. One of the leading pieces of the research and policy development portion of the FTC's ECOA work was the joint statement issued with the CFPB, Department of Justice and the Equal Employment Opportunity Commission describing principles for enforcement actions intended to ensure that artificial intelligence being used by companies and financial institutions does not lead to discrimination in the marketplace due to "outcomes [skewed] by unrepresentative or imbalanced datasets, datasets that incorporate historical bias, or datasets that contain other errors."