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Recent Supervisory Actions

Bank & Thrift

New York Fed Survey Indicates More Positive Small Business Lending Environment

The Federal Reserve Bank of New York (FRBNY) released its latest *Small Business Credit Survey* on February 12, 2014. The survey highlights the credit experiences of small businesses in New York, New Jersey, Connecticut, and Pennsylvania. Survey results indicate a good credit market for experienced and profitable firms and a generally positive business outlook for the first half of 2014. More than half of credit applicants were approved for credit and nearly two in three that were approved received all the credit they sought. Profitable firms that applied for large amounts of capital (over \$100,000) were among the most successful applicants. The survey also found that managing uneven cash flows was the top business concern, ranking above access to capital for the first time since 2010, when the FRBNY began the survey.

More than half of respondents expected revenues to increase and 30 percent expected to add employees, compared to 19 percent that reported adding employees in 2013. Twenty-nine percent of firms (similar to the first half of 2013) plan to apply for credit in the first half of 2014 and 18 percent are considering applying.

Despite the positive signs, small businesses also reported high credit search costs and a more challenging credit market for firms seeking \$100,000 or less in capital. On average, firms spent 26 hours searching and applying for credit, contacted three financial institutions and submitted three credit applications. Firms that applied for \$100,000 or less had a 46 percent approval rate versus a 60 percent approval rate for firms seeking more than \$100,000 in financing.

OCC Guidance Clarifies Expectations for Secured Consumer Debt Discharged in Chapter 7 Bankruptcy Proceedings

On February 14, 2014, the Office of the Comptroller of the Currency (OCC) released Bulletin 2014-4 to clarify the agency's supervisory expectations for national banks and federal savings associations (collectively, banks) regarding secured consumer debt discharged in Chapter 7 bankruptcy proceedings.

In general, the guidance describes:

- The analysis necessary to “clearly demonstrate and document that repayment is likely to occur,” which would preclude any charge-off as required by the Uniform Retail Credit Classification and Account Management Policy. Such analysis should document:
 - The existence of orderly repayment terms for structured collection of the debt without the existence of undue payment shock or the need to refinance the balloon amount;
 - A history of payment performance that demonstrates the borrower's ongoing commitment to satisfy the debt before and through the bankruptcy proceeding; and
 - Consideration of post-discharge capacity that indicates the borrower can make future required payments from recurring, verified income (mirroring the ability-to-repay requirements).

- When a bank may consider post-discharge payment performance as evidence of collectability and when this performance demonstrates both capacity and willingness to repay the full amounts due. Three factors should be considered:
 - Monthly payments include both principal and interest that fully amortizes the remaining debt over the remaining term;
 - Sustained performance of at least six months; and
 - Collateral levels support the likelihood that the bank will recover the full amount due even if payments cease.

OCC to Host Workshop for New and Experienced Bank Directors

The Office of the Comptroller of the Currency (OCC) announced that it will host a workshop in Denver from March 31 to April 2 for directors of national community banks and federal savings associations.

Entitled “Mastering the Basics: A Director’s Challenge,” the three-day workshop is designed exclusively for directors of institutions supervised by the OCC and provides practical information on the roles and responsibilities of a community bank director. The workshop will focus on directors’ duties and core responsibilities, the regulatory environment, board reports, bank ratings, among other things.

“The workshop is a low-risk environment where a director can gain a greater understanding of how to be an effective board member,” said David Baker, Assistant Deputy Comptroller for Specialties & Operations for the Western District Office in Denver. “Participants hear firsthand from bank examiners and peers about the challenges, pitfalls, and best practices of board participation. The instruction and active exchange of ideas make this workshop a valuable opportunity for board members of all tenures.”

Enterprise & Consumer Compliance

House of Representatives Passes Bill to Modify CFPB

On February 11, 2014, the U.S. House of Representatives approved H.R. 3193, the *Consumer Financial Protection Safety and Soundness Protection Act of 2014*. The bill would modify the current Consumer Financial Protection Bureau (CFPB) by:

- Establishing a five member commission to lead the CFPB;
- Eliminating the CFPB’s exemption from the budgetary process and subjecting it to regulatory authorization and appropriation processes;
- Requiring CFPB employees to be compensated on the GS pay scale;
- Lowering the threshold at which the Financial Stability Oversight Council (Council) may set aside CFPB regulations from a two-thirds vote of the Council to a simple majority vote, excluding the Director of the CFPB;
- Modifying the standard for the Council’s review to CFPB regulations that are inconsistent

- with the safe and sound operations of United States financial institutions; and
- Prohibiting the CFPB from requesting, accessing, collecting, using, retaining, or disclosing nonpublic personal information about a consumer unless specified conditions are met.

Similar legislation has passed the House in previous sessions but has not passed the Senate.

OCC Issues “Retirement Plan Products and Services” Booklet

The Office of the Comptroller of the Currency (OCC) issued the “Retirement Plan Products and Services” booklet of the *Comptroller’s Handbook* on February, 12, 2014, replacing a similarly titled booklet issued in December 2007. The booklet provides updated guidance to examiners and bankers on retirement plan products and services offered to customers of national banks and federal savings associations (collectively, banks), explains the risks inherent in such products and services, and provides a framework for managing those risks.

Highlights of the booklet include:

- Updated examination procedures grouped by risk, which supplements the core assessment standards in the “Large Bank Supervision” and “Community Bank Supervision” booklets of the *Comptroller’s Handbook*;
- Updated references and a list of abbreviations;
- References to recent significant U.S. Department of Labor regulations and policy issuances;
- A discussion of the *Bank Secrecy Act*/Anti-Money Laundering and Regulation R; and
- A discussion of board of director and senior management responsibilities regarding oversight of risk management.

The booklet applies to all OCC-supervised banks that provide retirement plan products and services, including community banks.

Federal Reserve Seeks Comment on Proposals to Repeal Its Regulations DD and P, and to Amend Its Regulation V

On February 12, 2014, the Federal Reserve Board (Federal Reserve) requested comment on proposals to repeal its Regulation DD (*Truth in Savings*) and Regulation P (*Privacy of Consumer Financial Information*) and to make amendments to the Identity Theft Red Flags rule in Regulation V (*Fair Credit Reporting*).

Title X of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) transferred rulemaking authority for a number of consumer financial protection laws from the Federal Reserve to the Consumer Financial Protection Bureau (CFPB), except with respect to certain motor vehicle dealers. The Federal Reserve states that because the CFPB has already issued interim final rules that are substantially identical to the Federal Reserve’s Regulation DD and Regulation P, it is proposing to repeal its versions of those regulations.

The Federal Reserve is also seeking comment on a proposed amendment to provisions of its Regulation V that require financial institutions and creditors to implement identity theft prevention programs. The proposal would revise the rule to reflect amendments to the *Fair Credit Reporting Act* (FCRA) made by the *Red Flag Program Clarification Act of 2010* that add a definition of “creditor” for these purposes. In particular, the proposal would clarify that these provisions apply only to creditors that regularly extend credit or obtain consumer reports in the ordinary course of their business. The Federal Reserve notes the amendments to the

FCRA were intended to narrow the scope of the law so that it would not be applied to professionals, such as doctors or lawyers, who sometimes allow consumers to delay payment.

Comments on the proposals must be submitted within 60 days from the date of publication in the *Federal Register*.

Capital Markets & Investment Management

FSB to Review Foreign Exchange Benchmarks

The Financial Stability Board (FSB) announced the establishment of a new Foreign Exchange (FX) Benchmarks sub-group on February 14, 2014, which will incorporate an assessment of FX benchmarks into the FSB's ongoing program of financial benchmark analysis. According to the FSB, the FX Benchmarks sub-group "will undertake a review of FX benchmarks and will analyze market practices in relation to their use and the functioning of the FX market as relevant."

The FSB was tasked by the G20 in 2013 to co-ordinate and guide work on the necessary reforms to short-term interest rate benchmarks, in order to ensure that widely-used benchmarks are held to appropriate standards of governance, transparency, and reliability. Within its broader mandate, the FSB states that it will promote adoption and implementation of principles and good practices that emerge regarding the benchmark setting process.

FINRA Approves Rule Prohibiting Conditioning Settlements of Customer Disputes on a Customer's Agreement Not to Oppose Expungement

The Financial Industry Regulatory Authority (FINRA) announced that its Board of Governors approved a rule proposal on February 13, 2014 that would prohibit firms and associated persons from conditioning settlements of customer disputes on, or otherwise compensating customers for, an agreement not to oppose a request to expunge information from an associated person's Central Registration Depository (CRD) record. FINRA states that the proposal is designed to help ensure that the CRD system continues to contain "information that is critical to investor protection."

Richard Ketchum, FINRA Chairman and Chief Executive Officer, said, "We continually make improvements to the arbitration and expungement process to further enhance investor protections. FINRA feels strongly that expungement of customer dispute information shouldn't be "bargained for" through settlement negotiations or otherwise."

FINRA operates the CRD system, which is an online registration and licensing system. The CRD system contains information regarding members and associated persons, including

information such as personal, registration and employment history, as well as disclosure information such as criminal matters, regulatory and disciplinary actions, civil judicial actions, and information relating to customer disputes. Most information in that system is available to investors through FINRA BrokerCheck. Brokers who wish to have customer dispute information removed from the CRD system and, thereby, from BrokerCheck, must obtain a court order directing expungement or confirming an arbitration award containing expungement relief.

The rule proposal will be submitted to the Securities and Exchange Commission for review, public comment, and approval.

CFTC Announces Measures to Promote Trading on SEFs and Support an Orderly Transition to Mandatory Trading

On February 10, 2014, the Commodity Futures Trading Commission (CFTC or Commission) announced measures to promote trading on swap execution facilities (SEFs) and support an orderly transition to mandatory trading of swaps, which was scheduled to go into effect on February 15, 2014 for certain interest rate swaps.

“As a result of the trade execution mandate, next week many swaps for the first time will trade on regulated platforms and benefit from market-wide, pre-trade transparency,” said Acting CFTC Chairman Wetjen. “These measures, in conjunction with the Commission’s implementation of the trade execution mandate, will maximize the level of trading on these regulated platforms and support the transition to a transparent, risk-reducing swap-market structure under CFTC oversight. These platforms promise to improve pricing for the buy-side, commercial end-users, and other participants and add to liquidity by streamlining participation in the swap markets.”

In connection with the commencement of the trading mandate, the CFTC and the Division of Market Oversight (DMO) announced that they have taken the following measures:

- In order to protect the identities of counterparties trading on SEFs and incentivize anonymous trading on regulated platforms, the CFTC issued an interim final rule clarifying that, consistent with the requirements of section 21(c)(6) of the *Commodity Exchange Act*, a party to an anonymous trade executed on a SEF or designated contract market (DCM) cannot access information in swap data repositories in order to obtain the identity of its counterparty.
- The DMO issued a no-action letter providing relief until May 15, 2014 from mandatory trading of certain swaps executed as part of a “package transaction.” The DMO reminded SEFs that they may facilitate the trading of swaps subject to the trade mandate, if executed as part of such a “package transaction,” only if (1) the methods for executing such swaps comply with the trading protocols applicable to Required Transactions in § 37.9 of the Commission’s regulations or (2) such SEFs have rules in effect that permit the trading of package transactions under the terms of the relief.
- The DMO published guidance clarifying that, while Rule 37.202(b) requires that market participants trading on a SEF consent to its jurisdiction, it is a reasonable interpretation that such consent need not be obtained through an affirmative writing. The DMO stated that at this time a SEF may comply with Rule 37.202(b) by providing in its rulebook that any person initiating or executing a transaction on or subject to the rules of the SEF directly or through an intermediary, and any person for whose benefit such a transaction has been initiated or executed, consents to the jurisdiction of the SEF.

- The DMO announced that it published a centralized list of swaps subject to the mandate on the CFTC's Web site. The Web page is intended to provide notice to market participants of the swaps subject to the mandate and includes specific terms defining each such swap.

Enforcement Actions

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

- The SEC announced that two Hong Kong-based asset management firms whose accounts were frozen in a major insider trading case have agreed to pay nearly \$11 million to settle the charges against them.
- The CFTC announced a summary judgment order against a licensed attorney and a default judgment order against two other individuals in a CFTC enforcement action charging the individuals, all based in Nebraska, with commodity pool fraud in violation of the *Commodity Exchange Act* (CEA) and CFTC Regulations.
- The CFTC announced an order for a permanent injunction against a North Carolina-based asset management firm and its president and owner. The order requires the firm and the individual to jointly pay restitution totaling \$1.3 million and a civil monetary penalty of \$3.9 million. The order also imposes permanent trading and registration bans against the defendants and prohibits them from violating the CEA and CFTC Regulations.
- The CFTC announced the revocation of a North Carolina-based financial investment advisory firm's registration as a Commodity Trading Advisor and ordered the firm to pay \$6.9 million in civil monetary penalties and restitution of over \$4.1 million. The U.S. District Court for the Western District of North Carolina found that the firm fraudulently solicited and accepted more than \$4.7 million from multiple pool participants for investment in one or more commodity pools that traded commodities and futures contracts, among other things. The order also found that the firm misappropriated pool participant funds, posted false trading returns on a website where fund managers could post unverified historical returns for prospective clients to view, sent false trading results to at least one of the firm's pool participants, and issued false account statements.

Recent Supervisory Actions against Financial Institutions

Last Updated: February 17, 2014

Agency	Institution Type	Action	Date	Synopsis of Action
CFPB	Mortgage lender	Notice of Charges	1/29	The Consumer Financial Protection Bureau initiated an administrative proceeding against a New Jersey-based mortgage lender and its affiliates for a mortgage insurance kickback scheme. The Bureau is seeking a civil fine, a permanent injunction to prevent future violations, and restitution.
CFPB	Mortgage lender	Consent Order	1/16	The Consumer Financial Protection Bureau ordered a Missouri-based mortgage lender and its former owner and current president to pay \$81,076 for funneling illegal kickbacks to a bank in exchange for real estate referrals.
OCC	Large financial institution	Order for Civil Money Penalty	1/7	The Office of the Comptroller of the Currency announced a \$350 million civil money penalty against three affiliated banks for <i>Bank Secrecy Act</i> (BSA) violations. The penalty follows a January 2013 cease and desist order in which the three banks were directed to correct deficiencies in their compliance programs.
Federal Reserve Board	State member bank	Civil Money Penalty	01/09	The Federal Reserve Board entered into an Order of Assessment of Civil Money Penalty with a Texas-based state member bank to address violations of the National Flood Insurance Act.
Federal Reserve Board	State member bank	Civil Money Penalty	01/09	The Federal Reserve Board entered into an Order of Assessment of Civil Money Penalty with a New York-based state member bank to address violations of the National Flood Insurance Act.
CFPB	Large financial institution	Consent Order	12/23	The Consumer Financial Protection Bureau entered into a Consent Order with a large financial institution to resolve the CFPB's claims that the institution engaged in a pattern or practice of discrimination on the basis of race and national origin in residential mortgage lending in violation of the <i>Equal Credit Opportunity Act</i> . The Consent Order requires the institution to pay \$35 million in restitution.
CFPB, OCC, FDIC	Various	Consent Order, Order for Restitution, Order for Civil Money Penalty	12/23	The Consumer Financial Protection Bureau, Office of the Comptroller of the Currency, and Federal Deposit Insurance Corporation each participated in actions against a financial institution and certain of its subsidiaries to address unfair and deceptive marketing practices related to credit card "add on" products. Collectively, the orders require \$59.5 million in restitution and civil money penalties of \$16.2 million.
CFPB	Large financial institution	Consent Order, Civil Money Penalty	12/20	The Consumer Financial Protection Bureau entered into a Consent Order to with a resolve the CFPB's claim that the financial institution, an indirect auto lender, violated the anti-discrimination provisions of the <i>Equal Credit Opportunity Act</i> . The institution was required to pay \$80 million in damages to affected borrowers and an additional \$18 million civil money penalty.

Contact Us

This is a publication of KPMG's Financial Services Regulatory Practice

John Ivanoski, Partner, National Leader, Regulatory Risk	jivanoski@kpmg.com
Hugh Kelly, Principal, Bank Regulatory Safety & Soundness	khelly@kpmg.com
Amy Matsuo, Principal, Enterprise & Consumer Compliance	amatsuo@kpmg.com
John Schneider, Partner, Investment Management Regulatory	jschneider@kpmg.com
Tracy While, Principal, Capital Markets Regulatory	twhile@kpmg.com
Pamela Martin, Managing Director, Americas' FS Regulatory Center of Excellence	pamelamartin@kpmg.com

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Additional Contacts

Asset Management, Trust, and Fiduciary

Bill Canellis wcanellis@kpmg.com

Bank Regulatory Reporting

Brett Wright bawright@kpmg.com

Capital Markets Regulation

Stefan Cooper stefancooper@kpmg.com

Capital/Basel II and III

Paul Cardon pcardon@kpmg.com

Commodities and Futures Regulation

Dan McIsaac dmcisaac@kpmg.com

Consumer & Enterprise Compliance

Kari Greathouse cgreathouse@kpmg.com

Cross-Border Regulation & Foreign Banking Organizations

Philip Aquilino paquilino@kpmg.com

Safety & Soundness, Corporate Licensing & Governance, and ERM Regulation

Greg Matthews gmatthews1@kpmg.com

America's FS Regulatory Center of Excellence

Pamela Martin pamelamartin@kpmg.com

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