Community Bankers of Michigan Regulatory Dispatch

May 1, 2024

Timely news and resources community bankers can use

to better stay on top of a rapidly changing world.

FTC Announces Rule Banning Noncompetes

The Federal Trade Commission issued a final rule to promote competition by banning noncompetes nationwide, protecting the fundamental freedom of workers to change jobs, increasing innovation, and fostering new business formation.

“Noncompete clauses keep wages low, suppress new ideas, and rob the American economy of dynamism, including from the more than 8,500 new startups that would be created a year once noncompetes are banned,” said FTC Chair Lina M. Khan. “The FTC’s final rule to ban noncompetes will ensure Americans have the freedom to pursue a new job, start a new business, or bring a new idea to market.”

The FTC estimates that the final rule banning noncompetes will lead to new business formation growing by 2.7% per year, resulting in more than 8,500 additional new businesses created each year. The final rule is expected to result in higher earnings for workers, with estimated earnings increasing for the average worker by an additional $524 per year, and it is expected to lower health care costs by up to $194 billion over the next decade. In addition, the final rule is expected to help drive innovation, leading to an estimated average increase of 17,000 to 29,000 more patents each year for the next 10 years under the final rule.

Banning Noncompetes: Good for workers, businesses, and the economy.

Noncompetes are a widespread and often exploitative practice imposing contractual conditions that prevent workers from taking a new job or starting a new business. Noncompetes often force workers to either stay in a job they want to leave or bear other significant harms and costs, such as being forced to switch to a lower-paying field, being forced to relocate, being forced to leave the workforce altogether, or being forced to defend against expensive litigation. An estimated 30 million workers—nearly one in five Americans—are subject to a noncompete.

Under the FTC’s new rule, existing noncompetes for the vast majority of workers will no longer be enforceable after the rule’s effective date. Existing noncompetes for senior executives - who represent less than 0.75% of workers - can remain in force under the FTC’s final rule, but employers are banned from entering into or attempting to enforce any new noncompetes, even if they involve senior executives. Employers will be required to provide notice to workers other than senior executives who are bound by an existing noncompete, that they will not be enforcing any noncompetes against them.

In January 2023, the FTC issued a proposed rule which was subject to a 90-day public comment period. The FTC received more than 26,000 comments on the proposed rule, with over 25,000 comments in support of the FTC's proposed ban on noncompetes. The comments informed the FTC's final rulemaking process, with the FTC carefully reviewing each comment and making changes to the proposed rule in response to the public's feedback.

In the final rule, the Commission has determined that it is an unfair method of competition, and therefore a violation of Section 5 of the FTC Act, for employers to enter into noncompetes with workers and to enforce certain noncompetes.

The Commission found that noncompetes tend to negatively affect competitive conditions in labor markets by inhibiting efficient matching between workers and employers. The Commission also found that noncompetes tend to negatively affect competitive conditions in product and service markets, inhibiting new business formation and innovation. There is also evidence that noncompetes lead to increased market concentration and higher prices for consumers.

Fact Sheet on FTC's Proposed Final Noncompete Rule

Comment: This new Final Rule from the FTC preempts conflicting laws, thus banning even those previously permitted noncompete agreements under existing state laws. It is notable that carefully crafted non-disclosure agreements (NDAs), training repayment agreements, non-solicitation agreements, no-hire agreements, and "no-business" agreements may continue to be permissible unless those agreements serve the same functional effects as noncompete agreements. Furthermore, these agreements focus on the real desired outcome, namely the protection of the bank's proprietary information and customers.

CBM Insights

Q: What are the homeownership counseling and notice requirements and their applicability?

A: There are three separate requirements pre-origination and one post-origination.

For loans subject to Regulation X (RESPA) under §1024.20, a lender must provide a list of approved 'homeownership counseling organizations' to all applicants except for reverse mortgages and timeshare loans. Note that business purpose loans are exempt from coverage under RESPA in general and HELOCs subject to RESPA are covered by the homeownership counseling notice requirement. See below:

(a) Provision of list.

(1) *Except as otherwise provided in this section, not later than three business days after a lender, mortgage broker, or dealer receives an application, or information sufficient to complete an application, the lender must provide the loan applicant with a clear and conspicuous written list of homeownership counseling organizations that provide relevant counseling services in the loan applicant's location. The list of homeownership counseling organizations distributed to each loan applicant under this section shall be obtained no earlier than 30 days prior to the time when the list is provided to the loan applicant from either:*

(i) *The Web site maintained by the Bureau for lenders to use in complying with the requirements of this section; or*

(ii) *Data made available by the Bureau or HUD for lenders to use in complying with the requirements of this section, provided that the data is used in accordance with instructions provided with the data*

Source link.

For loans subject to Regulation Z (TILA) under §1026.34(a)(5), a lender must ensure the consumer applicant has 'obtained counseling' in connection with a high-cost mortgage. Outlined in the regulation:

(i) Certification of counseling required. *A creditor shall not extend a high-cost mortgage to a consumer unless the creditor receives written certification that the consumer has obtained counseling on the advisability of the mortgage from a counselor that is approved to provide such counseling by the Secretary of the U.S. Department of Housing and Urban Development or, if permitted by the Secretary, by a State housing finance authority.*

Source link.

For loans subject to Regulation Z (TILA) under §1026.36(k), a lender must ensure the consumer applicant has 'obtained counseling' in connection with a first-time borrower the resulting loan of which may result in negative amortization. Outlined in the regulation:

(1) Counseling required. *A creditor shall not extend credit to a first-time borrower in connection with a closed-end transaction secured by a dwelling, other than a reverse mortgage transaction subject to § 1026.33 or a transaction secured by a consumer's interest in a timeshare plan described in 11 U.S.C. 101(53D), that may result in negative amortization, unless the creditor receives documentation that the consumer has obtained homeownership counseling from a counseling organization or counselor certified or approved by the U.S. Department of Housing and Urban Development to provide such counseling.*

Source link.

Finally, the Homeownership Counseling Act requires notification of the availability of homeownership counseling to any 'eligible homeowner' who fails to pay any amount by the due date under the terms of the home loan.

Applicability

All creditors that service loans secured by a mortgage or lien on a one-family residence (home loans) are subject to the homeownership counseling notification requirements. Home loans include conventional mortgage loans and loans insured by the Department of Housing and Urban Development (HUD). In addition, the original purpose of the loan is not relevant to the notification requirement. Therefore, a mortgage on the primary residence or a commercial or agriculture loan that includes the primary residence as collateral would also be subject to this notification requirement.

Source link.

Note that an 'eligible homeowner' is a borrower with a loan secured by the homeowner's principal residence. The purpose of the loan is irrelevant.

Items of Interest

Bank Management

	FDIC BOARD OF DIRECTORS MEETING (04/23/2024) – The FDIC Board of Directors met in open session on Thursday, April 25, 2024. ***Comment: A recording of the full webcast is available here.***
	OCC Announces Enforcement Actions for April 2024 (04/18/2024) – WASHINGTON—The Office of the Comptroller of the Currency (OCC) released enforcement actions taken against national banks and federal savings associations (banks), and individuals currently and formerly affiliated with banks the OCC supervises. The OCC uses enforcement actions against banks to require the board of directors and management to take timely actions to correct the deficient practices or violations identified. Actions taken against banks are:

	Formal Agreement with First FS & LA of Lorain, Lorain, Ohio, for unsafe or unsound practices, including those related to the failure of the board of directors and bank management to develop and implement an appropriate strategic plan; appropriately manage and control liquidity and interest rate risks; implement effective Bank Secrecy Act ("BSA") /Anti-Money Laundering internal controls; and appoint a BSA Officer with the requisite skills and expertise to oversee the BSA program, and the bank's violation of law, rule, or regulation, including a violation relating to conducting ongoing customer due diligence. (Docket No. AA-CE-2024-3) Cease and Desist Order against Heritage Bank, N.A., Spicer, Minnesota, for unsafe or unsound practices, including those related to capital adequacy, capital and strategic planning, credit review, ongoing monitoring of the credit portfolio, liquidity and liquidity management practices, and the allowance methodology. (Docket No. AA-WE-2024-24). The OCC also terminated the bank's formal agreement dated October 27, 2023 (Docket No. AA-WE-2023-32), which was replaced by the cease and desist order. (Docket No. AA-WE-2024-36) Formal Agreement with Minnstar Bank, N.A., Lake Crystal, Minnesota, for unsafe or unsound practices, including those related to concentrations of credit, credit underwriting and administration, appraisals, allowance for credit losses, strategic planning, incentive compensation, capital planning, and liquidity risk management, and violations of law, rule, or regulation, including those relating to loans to executive officers, lending limits, and appraisals. (Docket No. AA-CE-2024-2) ***Comment: While we don't usually include enforcement actions in Regulatory Dispatch, at times they do provide insights into the agency's thought processes. These three actions all mention appropriate strategic planning.***

BSA / AML

	FinCEN Reminds Financial Institutions to Remain Vigilant to Environmental Crimes (04/22/2024) – WASHINGTON—As the nation reflects on the many ways to protect our environment this Earth Day, the Financial Crimes Enforcement Network (FinCEN) reminds financial institutions to remain vigilant in identifying and reporting suspicious activity related to environmental crimes. Environmental crimes frequently involve transnational criminal activity related to several of FinCEN's Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) National Priorities, including corruption, fraud, human trafficking, and drug trafficking. FinCEN has previously published resources to help stakeholders identify and combat environmental crimes and associated illicit financial activity. FinCEN's December 2021 Financial Threat Analysis contains information on wildlife trafficking threat patterns and trend information identified in Bank Secrecy Act (BSA) data. FinCEN's Notice FIN-2021-NTC4 provides financial institutions with specific Suspicious Activity Report (SAR) filing instructions and highlights illicit financial activity related to several types of environmental crimes such as wildlife trafficking and illegal logging, fishing, or mining. SAR filings, along with effective implementation of BSA compliance requirements, are crucial to identifying and stopping environmental crimes and related money laundering. FinCEN Resources on Environmental Crimes Financial Threat Analysis: Illicit Finance Threat Involving Wildlife Trafficking and Related Trends in Bank Secrecy Act Data (December 2021) FIN-2021-NTC4: FinCEN Calls Attention to Environmental Crimes and Related Financial Activity (November 2021)

Deposit / Retail Operations

No news to report this week.

Human Resources

DOL Overtime Pay (04/23/2024) – The U.S. Department of Labor announced a final rule, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, which will take effect on July 1, 2024. The final rule updates and revises the regulations issued under section 13(a)(1) of the Fair Labor Standards Act implementing the exemption from minimum wage and overtime pay requirements for executive, administrative, and professional (EAP) employees. Revisions include increases to the standard salary level and the highly compensated employee total annual compensation threshold, and a mechanism that provides for the timely and efficient updating of these earnings thresholds to reflect current earnings data.

The federal overtime provisions are contained in the Fair Labor Standards Act (FLSA). Unless exempt, employees covered by the Act must receive overtime pay for hours worked over 40 in a workweek at a rate not less than time and one-half their regular rates of pay. There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, unless overtime is worked on such days.

The Act applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours — seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.

Comment: As announced, the salary threshold for the so-called "white-collar" exemptions will rise from $35K to about $44K on July 1 and will jump to $59K at the start of 2025 – workers will need to earn at least this new threshold to even be considered exempt from OT pay under the "white-collar" exemptions.

Lending

CFPB Takes Action to Stop Illegal Junk Fees in Mortgage Servicing (04/24/2024) –The Consumer Financial Protection Bureau (CFPB) published an edition of *Supervisory Highlights* describing the agency's actions to combat junk fees charged by mortgage servicers, as well as other illegal practices. CFPB examinations found servicers charging illegal junk fees, such as prohibited property inspection fees; sending deceptive notices to homeowners; and violating loss mitigation rules that help struggling borrowers stay in their homes. In response to the CFPB's findings, financial institutions refunded junk fees to borrowers and stopped their illegal practices.

The mortgage servicing examination work announced today builds on prior CFPB exam work combatting junk fees in the mortgage servicing and other consumer financial markets. In October of last year, the CFPB announced that its examination work from February to August of 2023 resulted in $140 million refunded to consumers for unlawful junk fees in the areas of bank account deposits, auto loan servicing, and international money transfers. Since that time, the CFPB's supervision junk fee work has resulted in more than $120 million in additional junk fee refunds in the area of bank account deposits.

“Homeowners cannot just simply switch providers if their mortgage servicer charges them illegal junk fees," said CFPB Director Rohit Chopra. "Since mortgage borrowers are captive to a company they never chose to do business with, we are working hard to detect and deter violations of law.”

Mortgage servicers are the companies responsible for, among other things, processing mortgage payments and managing mortgage accounts. They play a critical role in assisting homeowners with repayment, including by helping mortgage borrowers access repayment options when they face financial difficulties. A mortgage servicer is chosen by the lender or investor that owns the mortgage, and not by the homeowner. Residential mortgage servicers currently handle more than $13 trillion in mortgage balances.

Over the last few years, the CFPB has prioritized combatting illegal junk fees in a wide range of consumer financial markets. Most recently, the CFPB announced a final rule that, when it goes into effect, would reduce credit card late fees by more than $10 billion every year. The CFPB has also proposed a rule that would save consumers more than $3.5 billion in overdraft fees every year, and has addressed junk fees charged on international money transfers. Overdraft and non-sufficient funds fees have declined by more than $6.1 billion since the CFPB began scrutinizing junk fees.

The CFPB has also announced that it is working to address other anticompetitive mortgage fees, including those charged in connection with closing costs.

Some key findings from today’s edition of *Supervisory Highlights* include mortgage servicers:

- **Illegally charging and obscuring fees:** Mortgage servicers charged homeowners prohibited and unauthorized fees. These included prohibited fees for property inspections and late fees that exceeded amounts allowed by their mortgage loan agreements. Mortgage servicers also failed to explain the reasons for fees by not describing them adequately on statements.
- **Keeping homeowners on the hook for fees during COVID-19:** During COVID-19, many servicers used a streamlined process to determine repayment options for struggling homeowners. Some servicers failed to waive late fees and penalties, as required.
- **Missing deadlines to pay property tax and home insurance:** Mortgage servicers that accepted or required money from borrowers to pay taxes and insurance failed to make those payments in a timely manner, which caused some borrowers to incur penalties. Servicers only took responsibility for those penalties for missed on-time payments if homeowners submitted complaints.
- **Deceiving homeowners and failing to properly evaluate them for repayment options:** Some servicers sent notices to homeowners in financial distress that stated they had been approved for a repayment option. In fact, no final decisions had been made, and some of the homeowners were ultimately rejected. Examiners also found servicers sent some homeowners false notices saying that they had missed payments and should apply for repayment options. Servicers also improperly denied requests for help and failed to evaluate struggling borrowers for repayment options as required under the CFPB’s mortgage servicing rules.

In response to the CFPB’s findings, mortgage servicers are taking corrective actions, including changes to their policies and procedures. For the fee-related findings, servicers are remediating homeowners, including providing refunds.

The CFPB has been looking at ways to streamline mortgage servicing rules, while making sure mortgage servicers fulfill their obligations to treat homeowners fairly. Findings from this edition of *Supervisory Highlights* will help inform of any proposed changes.

Read this edition of Supervisory Highlights.

Read consumer complaints about mortgage servicers.

	Comment: While these fees are often legitimate and are properly disclosed, they can vary widely from one lender to another, and not every lender charges every type of fee. That's partly given rise to the "junk" label. The agency cited concerns that mortgage lenders are overcharging for three types of fees specifically: discount points, title insurance and credit checks.

Technology / Security

	CISA Cisco Releases Security Updates Addressing ArcaneDoor, Vulnerabilities in Cisco Firewall Platforms (04/24/2024) – Cisco released security updates to address ArcaneDoor—exploitation of Cisco Adaptive Security Appliances (ASA) devices and Cisco Firepower Threat Defense (FTD) software. A cyber threat actor could exploit vulnerabilities (CVE-2024-20353, CVE-2024-20359, CVE-2024-20358) to take control of an affected system. Cisco has reported active exploitation of CVE 2024-20353 and CVE-2024-20359 and CISA has added these vulnerabilities to its Known Exploited Vulnerabilities Catalog. CISA strongly encourages users and administrators to apply the necessary updates, hunt for any malicious activity, report positive findings to CISA, and review the following articles for more information: • Cisco Blog: ArcaneDoor - New espionage-focused campaign found targeting perimeter network devices • Cisco Event Response: Attacks Against Cisco Firewall Platforms
	CISA Adds One Known Exploited Vulnerability to Catalog (04/23/2024) – CISA has added one new vulnerability to its Known Exploited Vulnerabilities Catalog, based on evidence of active exploitation. • CVE-2022-38028 Microsoft Windows Print Spooler Privilege Escalation Vulnerability These types of vulnerabilities are frequent attack vectors for malicious cyber actors and pose significant risks to the federal enterprise. Binding Operational Directive (BOD) 22-01: Reducing the Significant Risk of Known Exploited Vulnerabilities established the Known Exploited Vulnerabilities Catalog as a living list of known Common Vulnerabilities and Exposures (CVEs) that carry significant risk to the federal enterprise. BOD 22-01 requires Federal Civilian Executive Branch (FCEB) agencies to remediate identified vulnerabilities by the due date to protect FCEB networks against active threats. See the BOD 22-01 Fact Sheet for more information. Although BOD 22-01 only applies to FCEB agencies, CISA strongly urges all organizations to reduce their exposure to cyberattacks by prioritizing timely remediation of Catalog vulnerabilities as part of their vulnerability management practice. CISA will continue to add vulnerabilities to the catalog that meet the specified criteria.

Selected federal rules – proposed

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

PROPOSED RULES WITH REQUEST FOR PUBLIC COMMENT

03.28.2024 **FinCEN** Request for Information and Comment on Customer Identification Program Rule Taxpayer Identification Number Collection Requirement SUMMARY: FinCEN, in consultation with staff at the

Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), and the Board of Governors of the Federal Reserve System (Board) (collectively, the "Agencies"), seeks information and comment from interested parties regarding the Customer Identification Program (CIP) Rule requirement for banks to collect a taxpayer identification number (TIN), among other information, from a customer who is a U.S. person, prior to opening an account (the "TIN collection requirement"). Generally, for a customer who is an individual and a U.S. person ("U.S. individual"), the TIN is a Social Security number (SSN). In this request for information (RFI), FinCEN specifically seeks information to understand the potential risks and benefits, as well as safeguards that could be established, if banks were permitted to collect partial SSN information directly from the customer for U.S. individuals and subsequently use reputable third-party sources to obtain the full SSN prior to account opening. FinCEN seeks this information to evaluate and enhance its understanding of current industry practices and perspectives related to the CIP Rule's TIN collection requirement, and to assess the potential risks and benefits associated with a change to that requirement. This notice also serves as a reminder from FinCEN, and staff at the Agencies, that banks must continue to comply with the current CIP Rule requirement to collect a full SSN for U.S. individuals from the customer prior to opening an account ("SSN collection requirement"). This RFI also supports FinCEN's ongoing efforts to implement section 6216 of the Anti-Money Laundering Act of 2020, which requires FinCEN to, among other things, identify regulations and guidance that may be outdated, redundant, or otherwise do not promote a risk-based anti-money laundering/countering the financing of terrorism (AML/CFT) regime. **DATES: Written comments on this RFI are welcome and must be received on or before May 28, 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)**