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Quarterly Report

Mississippi Regulatory Compliance Group

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BANK REGULATION; CHANGES IN ATTITUDES

In Jimmy Buffet's breakthrough 1977 album, the chorus of the title song "Changes in Latitudes, Changes in Attitudes" begins with "It's these changes in latitudes, changes in attitudes, nothing remains quite the same." While Jimmy certainly wasn't singing about compliance, the lyrics accurately describe what the recent presidential election means for banking in general and compliance more particularly. Few things will remain quite the same.

Leadership at the regulatory agencies is changing. At the CFPB, Kathy Kraninger resigned and President Biden nominated Rohit Chopra to be the new Bureau Director. The nomination requires U.S. Senate approval, and Dave Uejio, formerly the Bureau's Chief Strategy Officer, will serve as acting director in the interim. Mr. Chopra previously served as Bureau Assistant Director in the Office for Students and is currently a Commissioner of the FTC. Mr. Chopra's reputation at the FTC is that of an active supporter of vigorous enforcement, and consumer advocacy groups have hailed his nomination.

It is highly likely the Bureau will revert to its former practice of regulation by enforcement. In fact, in a statement to Bureau employees that was released publicly, Acting Director Uejio said he intended to focus the Bureau's supervision and enforcement tools first on companies responsible for COVID relief including mortgage servicers, student loan servicers, and PPP lenders and will also make fair lending enforcement a top priority.

At the OCC, Acting Comptroller of the Currency Brian Brooks stepped down January 14, 2021 and OCC Chief Operating Officer Blake Paulson became the acting Comptroller. Reports are that President Biden is expected to nominate Michael Barr to the position of Comptroller. Mr. Barr was an Assistant Treasury Secretary for financial institutions during the Obama administration and helped to write the Dodd-Frank Act.

Jelena McWilliams' term as FDIC Chairman extends to 2023 and her seat on the FDIC board expires in 2024. But, the FDIC board has 5 seats, three of which are appointed by the President and the other two are held by the Director of the CFPB and the Comptroller of the Currency. The Vice Chair position is also open at the moment. So, Chairman McWilliams could find herself in the minority on the FDIC board.

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Federal Reserve Chairman Jerome Powell's term ends in 2022 and Fed Governor Randall Quarles term as Vice Chair ends in 2021 while his seat on the Board extends well beyond. The Board of Governors currently has one vacancy President Biden will fill.

With the changes in leadership, we should expect the agencies' rulemaking agenda and enforcement priorities to change as well. While we cannot predict with certainty, several key consumer compliance areas are likely to be quickly zeroed in on.

One is fair lending. The message from the CFPB is clear, and we can expect all the other agencies to redouble their efforts on fair lending examinations and enforcement. Redlining will likely continue to be a focus. The agencies now have HMDA data on HELOCs to look at, so that product will likely get a closer look in examinations. Like the CFPB, other agency examiners may take a look at pandemic related fair lending issues as well, such as mortgage servicing, deferrals and forbearances, and minority access to PPP loans.

On the regulatory front, we should expect the CFPB to move faster on issuing a rule on data collection on small business loans. For the last four years, the Bureau has been very deliberate, some would say deliberately slow, in acting on this unfulfilled Dodd-Frank Act requirement, but it was making progress. The Bureau released a report to its Small Business Advisory Review Panel last September discussing the proposals and alternatives under consideration. Now, it seems more likely we could see a rule requiring expanded data collection with less concern over industry cost or burden. A rollback of the Bureau's HMDA changes for small banks is also possible.

We should expect to see HUD reconsider its rule on disparate impact discrimination. President Biden issued an executive order this week calling on HUD to re-examine Trump administration changes to Fair Housing rules including the disparate impact rule and to develop guidelines to promote racial equity in home ownership. Presumably any change to the disparate impact rule will still have to be consistent with the relevant factors and burden of proof outlined by the U.S. Supreme Court in its 2015 *Inclusive Communities* decision, but the new administration is likely to interpret that decision in a way that would make it easier for plaintiffs and the government to prove a claim.

On a related note, it seems likely we can expect the agencies to make diversity and inclusion a high priority both for the agencies themselves and the financial institutions they regulate. Elsewhere in this newsletter you will find an article discussing the standards adopted by the agencies in 2015 for assessing bank diversity policies and practices. We thought it would be a good time to remind everyone of those standards as we fully expect examiners to begin asking about the bank's policies and practices in this area in the future.

CRA is also likely to get attention sooner rather than later. The OCC issued a final rule in June of 2020 revamping how national banks are evaluated for CRA performance with compliance dates of January 1, 2023 and January 1, 2024, depending on bank type. The FDIC and Federal Reserve declined to join in that rule. The Fed issued an advance notice of proposed rulemaking in September 2020 outlining its thinking on CRA modernization with an extended 120 day comment period ending on February 16, 2021. Nothing official has been forthcoming from the FDIC. It seems likely we can expect reconsideration of the OCC rule and a renewed effort to create a unified rule by all three agencies.

Overdrafts continue to be a major concern for consumer advocacy groups. FDIC and Fed examiners in particular have focused on UDAAP issues with respect to assessing overdraft fees and disclosing overdraft practices to consumers. Consumer groups continue to seek regulatory limits on OD fees and

requirements for banks to offer low cost, no overdraft, checking accounts to consumers. Rulemaking on overdraft services was on the CFPB regulatory priority list in 2015 and listed on its regulatory agenda as being in the pre-rule stage each year until 2018 when it was removed. It seems likely this topic will re-emerge as a regulatory priority. On related subject, the Bureau may also consider re-imposing the ability to repay requirement in its payday and high cost installment loan rule.

Other possibilities include BSA/AML changes. FinCEN has already said it intends to modernize some BSA requirements which could increase the burden on banks. Outside of compliance, agency action on fintech charters and industrial loan companies and Congressional action on things like postal banking, equitable access to banking, marijuana related businesses, restructure of Fannie Mae and corporate tax rate increases are possible and, if approved, will have an impact on how banks conduct business including compliance management.

Managing change has been a big part of the job of a compliance officer for a long while. The pace of change since the financial crisis and passage of Dodd-Frank has been unprecedented, and it now appears that the last four years has just been a brief lull in the action. It's enough to drive a person a little crazy, but, then, some folks say you need to be a little crazy to enjoy working in this area. If that is true, then the very last line of Jimmy Buffet's song may help keep things in perspective. It goes, "If we weren't all crazy, we would go insane." We will do our best to continue to keep you informed and help you to manage the changes as they come.

<Cliff Harrison>

CFPB Advisory Opinion on Special Purpose Credit Programs Under Reg. B

On December 21, 2020, the CFPB issued an advisory opinion addressing the Equal Credit Opportunity Act ("ECOA") and its implementing regulation, Regulation B ("Reg. B"), regarding promoting fair, equitable, and nondiscriminatory access to credit through special purpose credit programs ("SPCPs"). The CFPB's advisory opinion process allows entities seeking to comply with existing regulations to request an interpretive rule to address specific areas of uncertainty. The CFPB's finalized its advisory opinion process late last year, so this is a relatively new process.

As you all know, the ECOA and Reg. B prohibit discrimination in credit transactions on the basis of a number of factors, including race, color, religion, national origin, sex, marital status, or age. These regulations also specifically state that it is not discrimination for a lender to offer SPCPs designed to meet special social needs. In other words, lenders may favorably consider prohibited factors such as race or ethnicity in connection with a compliant SPCP. Examples of compliant SPCPs include lending programs for low-income and/or minority borrowers, and student loan programs based in family income.

Under Reg. B, the key components of a compliant SPCP for a for-profit lender include:

(1) A Demonstrated Need. The SCPC must provide assistance to a class of people who would not ordinarily meet the lender's credit standards. The lender may determine the need for the program using its own data or other sources such as governmental reports or studies.

(2) A Written Plan. The SPCP must be administrated according to a written plan that identifies the protected class that the program is intended to benefit and sets forth the procedures and standards for extending credit pursuant to the program, which must be designed to increase the likelihood that the class of people

will receive credit or receive it on more favorable terms. The plan must also state a specific period of time for which the program will last or contain a statement that the program will be reevaluated to determine its continued need.

(3) No Discrimination. The SCPC must be established and administered so as not to discriminate against an applicant on a prohibited basis, and the lender may require participants to share one or more common characteristics, including race, national origin, or sex. The program must not be designed to evade the requirements of the ECOA and Reg. B.

However, despite having been in existence for over 40 years, SPCPs not been popular, partly due to lack of clear guidance from the federal regulators. As a result, the CFPB issued a request for information in July 2020 seeking public input to identify opportunities to prevent credit discrimination, encourage responsible innovation, promote fair, equitable, and nondiscriminatory access to credit, address potential regulatory uncertainty, and develop viable solutions to regulatory compliance challenges under the ECOA and Reg. B. Additional guidance regarding SPCPs was one specific area in which the CFPB sought additional information in its request, in hopes of encourage lenders to offer compliant SPCPs.

The advisory opinion was released in response to input received from the public pursuant to the CFPB’s request for information. The advisory opinion provides a safe harbor from liability under the ECOA to any act done or omitted in good faith in conformity with the opinion. The advisory opinion also clarifies the three key components described above.

To establish a demonstrated need, a lender may use surveys and other public data in addition to the lender’s own data or HMDA data. The advisory opinion clarifies that lenders may use other external sources such as the SBA’s or Federal Reserve Board’s Small Business Credit Surveys, in addition to any other governmental or academic reports or studies exploring the historical and societal causes and effects of discrimination. The advisory opinion notes that the lender must be able to demonstrate a connection between the data supporting the SPCP and the fact that under the lender’s ordinary credit standards, a specific class of persons would be declined or receive credit on less favorable terms.

Also, a lender cannot collect prohibited information from applicants to determine the need to implement an SPCP, but it may ask applicants for otherwise prohibited information to determine eligibility of a compliant SPCP.

The advisory opinion also makes clear that determination of need for an SPCP is not evidence of discrimination by the lender. Also, establishing an SPCP does not relieve a lender from its obligations under the ECOA and Reg. B, and the CFPB strongly encourages lenders to evaluate their fair lending risk using an effective risk management system.

In developing an SPCP, lenders must ensure that the written plan includes specific procedure and/or standards, which must be designed to increase the likelihood that the class of persons will receive credit or receive it on more favorable terms. The advisory opinion contains examples of procedures and standards that may be contained in an SPCP, including new products or changing terms and conditions for existing products.

To determine which class of persons will benefit from a SPCP, the lender may rely upon protected characteristics. The advisory opinion clarifies that lenders may or may not rely upon characteristics otherwise prohibited from consideration under Reg. B. The advisory opinion lists the following classes of people that may be eligible to borrow under a complaint SPCP: minority residents of low- and moderate-income census tracts; residents of majority-Black census tracts; operators of small farms in rural areas; minority- or women-owned small

business owners; consumers with limited English proficiency; and residents of tribal lands.

<Doug Weissinger>

Diversity and Inclusion

In 2015, the Federal banking agencies (the "Agencies") jointly issued an Interagency Policy Statement on Diversity and Inclusion establishing Standards for Assessing Diversity Policies and Practices of Regulated Entities (the "Standards"). Although it has been quite some time since these Standards were adopted and we have discussed them in the past, we thought a reminder would be appropriate as diversity and inclusion is expected to be a priority of the new administration. The Standards provide a framework for assessing a regulated entity's organizational commitment to diversity.

The Standards refer to diversity as minorities and women but do not prevent institutions from applying a broader definition. According to the Standards, inclusion means "a process to create and maintain a positive work environment and maximize their contributions to an organization." Five areas of consideration for developing a commitment to diversity are set forth in the Standards. They are: an organizational commitment to diversity and inclusion; workforce profile and employment practices; procurement and business practices; practices to promote transparency of organizational diversity and inclusion and self-assessment.

An organizational commitment to diversity and inclusion includes implementing a strategic plan and policy for considering diversity and inclusion in recruiting, hiring, retention and promotion with regular reports to management and the bank's board of directors. Additionally, the bank should place a member of senior management in charge of directing the bank's diversity efforts and conduct training on diversity and equal opportunity employment. Overall, to achieve an organizational commitment to diversity, the bank should be proactive in recruiting, hiring and promoting within a diverse group of women and minorities, as well as in its selection of board members, senior management and other leadership positions.

The next area for consideration per the Standards is creation of workforce profile and employment practices by promoting inclusion of women and minorities, including publicizing job opportunities, creating relationships with minority and women's organizations and including success in meeting diversity goals as an element of evaluating the performance of management.

The Standards provide that banks may consider and implement a policy for supplier diversity to include fair opportunities for minority-owned and women-owned business to compete for the procurement of goods and services. The Joint Standards reiterate a number of methods that can be used to evaluate and assess supplier diversity including inquiring about the suppliers' contracts and subcontracts with minority- and women-owned businesses, outreach to the same pool of contractors and participating in events, workshops, etc. to attract minority-owned and women-owned firms as suppliers.

Transparency and publicity are important aspects of assessing diversity policies and procedures. This may be achieved by including related information such as the bank's diversity strategic plan, a written commitment to diversity and inclusion and demographic profiles for the Bank's current workforce and suppliers. This information could be provided on its website, in promotional materials or provided annually to shareholders, if applicable.

Finally, the Standards encourage banks to conduct ongoing monitoring of its diversity policies and practices as well as conduct an

annual self-assessment of the same using the Standards.

When the agencies adopted these Standards, institutions with 100 or more employees were the primary focus. Currently, a bank may use the Standards in a manner that is appropriate to the unique characteristics of that specific institution corresponding with its size and needs. When issuing the Standards, the agencies provided a statement of understanding that smaller banks and those in rural areas, like many of our member banks, may have different challenges and different available options than those of larger institutions or those in more populated areas. The regulators are not currently including diversity and inclusion as a focus during examinations but stay tuned as this may well change. We plan to provide an update upon any changes as they develop.

<Memrie Fortenberry>

Role of Supervisory Guidance

On January 19, 2021, the FDIC, the OCC, the CFPB and the NCUA adopted separate final rules codifying the Interagency Statement Clarifying the Role of Supervisory Guidance which was issued by the agencies on September 11, 2018. The purpose of codifying this statement in a rule is to reiterate the clarifications provided in the statement that supervisory guidance issued by one or more of the agencies does not have the force and effect of law as would a regulation issued by one or more of the agencies. Further, the agencies confirmed that enforcement actions or supervisory criticisms will not be based on an institution's failure to comply with supervisory guidance. Supervisory guidance is meant to provide a financial institution with the agency's expectations and priorities related to a specific subject while a regulation has the full force of law and non-compliance with such may result in a violation and enforcement action. Further, a notice and comment period is required prior to the issuance of a regulation, but not for supervisory guidance. The Federal Reserve joined in the proposed rulemaking issued in October 2020 and is expected to adopt its version of the final rule in the near future.

<Memrie Fortenberry>

BSA Developments

Since our last meeting, there has been several proposed changes to the Bank Secrecy Act ("BSA"). Penalties for noncompliance with BSA range from corrective action to civil monetary penalties, so it is critical for banks to monitor developments to BSA and Anti-Money Laundering ("AML") regulations. These proposals are described in more detail below.

Enhancing AML Programs

On September 17, 2020, the Financial Crimes Enforcement Network ("FinCEN") issue an advance notice of proposed rulemaking to request comments concerning potential changes to BSA. FinCEN's stated purpose for amending BSA is "to modernize the regulatory regime to address the evolving threats of illicit finance." The proposed rule comes from recommendations from the Bank Secrecy Act Advisory Group, which was formed in 2019 to strengthen the BSA-AML regulatory framework.

The proposed rule aims to make BSA regulations more effective and efficient and requires banks to maintain a BSA-AML program that is "effective and reasonably managed." The proposed rule clarifies that an effective and reasonably managed BSA-AML program is one that (i) assesses and manages risk as informed by a financial institution's risk assessment, including consideration of AML priorities to be issued by FinCEN consistent with the proposed amendments; (ii) provides for compliance with BSA requirements; and (iii) provides for the reporting of information with a

high degree of usefulness to government authorities.

The comment period for public input has closed, so we anticipate seeing a proposed rule in the coming months.

On January 19, 2021, FinCEN, together with the federal banking regulatory agencies, issued a list of frequently asked questions in response to the advanced notice of proposed rulemaking. The FAQ list aims to clarify the regulatory requirements related to SARs to allow banks to focus resources on activities most helpful to law enforcement agencies.

Lower Threshold for International Fund Transfers

On October 29, Federal Reserve and FinCEN proposed a rule that reduce the data collection threshold from $3,000 to $250 for certain fund transfers that begin or end outside of the United States. The threshold for domestic transfer would remain unchanged at $3,000. The proposed rule also expands the definition of the term “money” to apply to digital currencies. FinCEN believes that a lower threshold will help catch bad actors conducting illicit fund transfers. The agencies discovered that financial institutions have filed a substantial number of Suspicious Activity Reports (“SARs”) involving fund transfers of less than $3,000.

Due Diligence Requirements for Charities and Non-Profits

On November 19, 2020, FinCEN and the federal banking regulators issued a joint fact sheet to provide clarity to banks to apply a risk-based approach to customer due diligence on charities and non-profits. The fact sheet emphasizes the importance that legitimate charities and non-profits have access to financial services, and the U.S. government’s view charitable section does not a significant risk to banks through money laundering, terrorist activities, or evasion of sanctions. However, banks should apply a risk-based approach and evaluate charities according to the particular characteristics of each entity. The fact sheet does not alter existing BSA-AML regulations or establish new supervisory expectations.

Section 314(b) Fact Sheet

In December 2020, FinCEN released an updated 314(b) Fact Sheet, which replaces several pieces of guidance and administrative rulings regarding Section 314(b), which is a section of the Patriot Act that permits banks to share otherwise confidential information to identify potential money laundering or terrorist activities.

314(b) is a voluntary program, but FinCEN encourages all eligible institutions to participate. Examples of eligible institutions include, but are not limited to, banks, money service businesses (“MSBs”), casinos, and finance companies.

Under 314(b), a financial institution is given a safe harbor to provide information when they have a reasonable basis to suspect that financial activity involves money laundering or terrorist activities, even if the financial institution cannot identify specific proceeds of a specified unlawful activity.

The 314(b) Fact Sheet is a valuable resource, and we recommend that you read the document. A copy can be found online at fincen.gov/sites/default/files/shared/314bfactsheet.pdf

Digital Currency

On December 8, 2020, FinCEN issued a notice of proposed rulemaking regarding digital currency that would require banks and MSBs to maintain records and submit reports to identify customers for transactions involving digital

currency. Under the proposed rule, banks and MSBs would be required to file transaction reports with FinCEN within 15 days certain transactions involving unhosted digital wallets, which are similar to anonymous bank accounts.

Along with the proposed rulemaking, FinCEN published a list of frequently asked questions regarding digital currency, which is a great resource to help you understand cryptocurrency terminology. We recommend you review the FAQs if you have any questions regarding digital currency transfer.

SAR Exemptions

On December 15, 2020, the FDIC issued a proposed rule and Financial Institutions Letter (FIL-114-2020) to amend the FDIC's SAR regulations. Currently, the FDIC provides exemptions from filing SARs for physical crimes such as robberies, and for lost, missing, counterfeit or stolen securities. The revised rule would permit the FDIC, in conjunction with FinCEN, to grant exemptions from SAR filing requirements on a case-by-case.

Under the proposed rule, the FDIC would seek FinCEN's concurrence with an exemption request involving potential money laundering, BSA violations, or other unusual activity covered by FinCEN's SAR regulation. The proposed rule would allow the FDIC to grant an exemption for a specified period of time and gives the FDIC the ability to extend or revoke the exemption if circumstances change.

On December 17, 2021, the OCC issued a similar rule regarding SAR exemptions applicable to national banks, and on January 22, 2021, the Federal Reserve published a notice of proposed rulemaking to modify the requirements for bank holding companies and Federal Reserve member bank to file SARs.

All three rules are substantially the same, meaning there should be a uniform SAR exemption rule in the near future. The proposed rules are intended to reduce regulatory burden by allowing banks to use "innovative solutions" to meet BSA-AML requirements more efficiently and effectively.

<Doug Weissinger>

Banks' Ability to Withhold Economic Impact Payments

Several banks have inquired if they may withhold portions of, or setoff, Economic Impact Payment ("EIP") amounts directly deposited into customers account with negative balances. Setoff is a self-help right of a bank holding a delinquent debt to obtain payment from assets of the debtor in the bank's possession. For example, if a bank has a customer who is in default on a loan, and the customer also maintains a deposit account with the bank, the bank may exercise a right of setoff against the deposit account to obtain payment on the loan debt.

While all $600 EIPs have been distributed by now, it is possible that more payments may be distributed in the future. Therefore, it is important for banks to understand the rules related to the right of setoff against any potential future stimulus fund payments.

The relevant anti-assignment provision of the new relief bill (H.R. 133) reads as follows:

> "The right of any person to any applicable payment shall not be transferable or assignable, at law or in equity, and no applicable payment shall be subject to, execution, levy, attachment, garnishment, or other legal process, or the operation of any bankruptcy or insolvency law."

This language is substantially similar to the anti-assignment language contained in Section 207 of the Social Security Act, which generally provides that bank accounts funded with social

security benefits are exempt from seizure by judicial execution. The language of that section reads as follows:

> "The right of any person to any future payment under this title shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this title shall be subject to execution, levy, attachment, garnishment, or other legal process or to the operation of any bankruptcy or insolvency law."

However, federal courts have routinely held that banks can legally setoff the balance in an account receiving social security benefits against a debt of that customer. For example, in the case of *Wilson v. Harris Bank N.A.*, 2007 U.S. Dist. LEXIS 65345 (N.D. Ill. Sept. 4, 2007), Federal District Court held that a bank did not violate the anti-assignment provisions of Section 207 of the Social Security Act when it assessed overdraft fees and offset the negative balance in a customer's checking account that was overdrawn because of allegedly unauthorized debit card transactions. Importantly, the court held that the bank could exercise its right of setoff against the social security benefits because the debt to the bank being offset arose from that specific deposit account.

Similarly, in *Lopez v. Washington Mutual Bank*, 302 F.3d 900 (9th Cir. 2002), the Ninth Circuit held that bank did not violate Section 207 when it used social security benefits deposited to checking accounts to obtain repayment of overdrafts and overdraft fees incurred in those accounts. It is important to note that banks may only exercise its right of setoff against debt obligations arising from the deposit accounts being offset. Several court cases have held that a bank may not exercise the right of offset against debt obligations (for example, a separate loan) unrelated to the account receiving social security benefits.

Because the anti-assignment language contained in the new bill is substantially similar to the anti-assignment language in the Social Security Act, and courts have determined that this same anti-assignment language in the Social Security Act does not prevent a bank from offsetting debts arising from that account, it is likely banks may similarly offset EIPs and apply those to overdrafts and fees arising from the accounts the EIPs are deposited to.

While banks are not prohibited from withholding EIPs to cover outstanding debt, many banks have opted not to do so. As with the stimulus payments issued under the CARES Act at the beginning of the pandemic, some banks have instituted policies to defer negative balances or waive overdraft fees so that their customers can receive 100% of their stimulus funds. If your customers are experiencing financial strain due to the pandemic, as so many are, you may want to consider whether automatically offsetting any future relief payments is the right choice.

On a related note, EIPs are considered to be protected federal benefits, so banks receiving third-party garnishments on customer accounts will need to follow their procedures for reviewing accounts, determining whether affected accounts receive protected federal benefits, and if so, calculating the protected amount in determining what funds must be held in responding to the garnishment.

Future laws providing for additional relief payments may or may not include similar anti-assignment language, so it will be important to keep track of future developments. We will track any new bills and keep you updated.

<Doug Weissinger>

Recent Activity at the Consumer Finance Protection Bureau

In recent months, the Consumer Finance Protection Bureau ("CFPB") released several final rules including one particularly relevant to community financial institutions. The CFPB also released a report from the small business panel convened to discuss data collection for certain business loans, which means the CFPB's long awaited final rule may finally arrive. It is important for banks to understand these new rules, since the CFPB has new leadership and a renewed focus on regulatory enforcement. These new rules are discussed in more detail below.

I. Qualified Mortgage ("QM") Loans.

Under Reg. Z, mortgage lenders are required to determine that a customer has the ability to repay a mortgage loan before approving a loan request. Loans that meet the legal standards for QM loans enjoy safe harbor protection from liability for satisfying the ability to repay requirements. On December 10, 2020, the CFPB issued two final rules related to QM loans.

a. General QM Final Rule.

The General QM Final Rule replaces the current requirement for General QM loans that provides that a customer's debt-to-income ("DTI") ratio may not exceed 43% as determined under Appendix Q with a standard based on the loan's pricing. The basic premise of the rule change is that lenders will most certainly verify ability to repay on loans that receive prime or near prime pricing.

Under this rule, a loan receives a safe harbor presumption that the customer has the ability to repay the loan if the annual percentage rate ("APR") does not exceed the average prime offer rate for a comparable transaction by 1.5 percentage points, or more as of the date the interest rate is set. A loan has a rebuttable presumption of the customer's ability to repay if the APR exceeds the average prime offer rate for a comparable transaction by 1.5 percentage points or more, but by less than 2.25 percentage points. Additionally, this rule:

- Provides higher pricing thresholds for loans with smaller loan amounts, for certain manufactured housing loans, and for subordinate-lien transactions;
- Retains the General QM loan definition's existing product-feature and underwriting requirements and limits on points and fees; and
- Requires lenders to consider a customer's DTI ratio or residual income, income or assets other than the value of the dwelling, and debts; removes Appendix Q entirely from Regulation Z; and provides more flexible options for creditors to verify the customer's income or assets other than the value of the dwelling and the customer's debts for QM loans.

The QM categories for qualifying small creditor portfolio loans and balloon payment loans made by lenders that meet certain requirements remain in place. Also, Reg. Z currently also grants QM status to loans that are eligible for purchase or guarantee by Government Sponsored Enterprises ("GSEs") such as Fannie Mae and Freddie Mac. This provision, which was known as "the Patch", was scheduled to expire in January 2021. Under the General QM Final Rule, the Patch will expire on the earlier of the mandatory compliance date

of the General QM Final Rule, which is July 1, 2021, or the date the GSEs exit conservatorship.

II. Seasoned QM Final Rule.

The second final rule creates a new category of QM loans for Seasoned QMs which are first-lien, fixed-rate covered transactions that have met certain performance requirements, are held in portfolio by the originating creditor or first purchaser for at least a 36-month period, comply with general restrictions on product features and points and fees, and meet certain underwriting requirements.

To be eligible to be a Seasoned QM, a loan must: be a first-lien, fixed-rate loan with fully amortizing payments and no balloon payments, have a term not exceeding 30 years, not be HOEPA high cost mortgage, and must meet certain points and fee limitations. Similar to the General QM Final Rule, the creditor must consider the customer's DTI ratio or residual income, income or assets other than the value of the dwelling, and debts and verify the customer's income or assets other than the value of the dwelling and the customer's debts.

The loan must also "season" by meeting certain performance requirements at the end of a "seasoning" period. In particular, a loan can have no more than 2 delinquencies of 30 or more days, and no delinquencies of 60 or more days at the end of the seasoning period. The creditor or first purchaser must hold the loan until the end of the seasoning period. The advantage to the Seasoned QM category is that it provides a QM compliance safe harbor even if the original loan did not originally qualify as a QM for some reason, such as exceeding the 43% DTI limit.

Both the General QM Final Rule and the Seasoned QM Final Rule take effect February 27, 2021, which is 60 days after each rule was published in the *Federal Register*. The General QM Final Rule has a mandatory compliance date of July 1, 2021. Between the General QM Final Rule's effective date and mandatory compliance date, there is an optional early compliance period, during which creditors will be able to use either the current General QM definition or the revised General QM definition. The Seasoned QM Final Rule applies to covered transactions for which creditors receive an application on or after the effective date of February 27, 2021.

III. Higher Priced Mortgage Loan ("HPML") Escrow Final Rule.

On January 19, 2021, the CFPB issued a final rule amending the CFPB's 2013 higher-priced mortgage loan escrow rule to exempt certain insured depository institutions and insured credit unions from the requirement to establish escrow accounts for certain higher-priced mortgage loans. This rulemaking was required by 2018 Economic Growth, Regulatory Relief, and Consumer Protection Act.

Under the final rule, any loan made by a bank or credit union that is secured by a first lien on the principal dwelling of a consumer would be exempt from Reg. Z's HPML escrow requirement if (i) the institution has total assets of no more than $10 billion as of the end of the preceding calendar year; (ii) the institution and its affiliates originated 1,000 or fewer loans secured by a first lien on a principal

dwelling during the preceding calendar year; and (iii) the institution meets certain existing HPML escrow exemption criteria. The current Reg. Z provisions that the final rule includes in the new exemption are (i) the institution must make at least one consumer purpose loan secured by a first lien on a property located in a designated rural or underserved area in the preceding calendar year; (ii) the exclusion from exemption eligibility of transactions involving forward purchase commitments; and (iii) the prerequisite that the institution and its affiliates not maintain an escrow account other than those established for HPMLs at a time when the creditor may have been required by the regulation to do so or escrows established after consummation as an accommodation to distressed consumers to assist such consumers in avoiding default or foreclosure.

The final rule takes effect upon publication in the Federal Register, which is expected to be any day now.

IV. Small Business Lending Data Collection Panel Report.

Section 1071 of the Dodd Frank Act amended the Equal Credit Opportunity Act ("ECOA") to mandate certain reporting requirements for lenders making business loans. Specifically, Section 1071 required banks to identify woman-owned, minority-owned, and small businesses and to collect data related to race, sex, and ethnicity of business owners, as well as the loan's purpose, the action taken on the loan, the business's gross annual revenue, and "any additional data" that would aid the CFPB in fulfilling the purposes of Section 1071. In September 2020, the CFPB released a detailed outline describing various proposals under consideration to implement Section 1071. In October 2020, the CFPB convened a panel to review the proposed Section 1071 rulemaking and to collect input from small businesses likely to be subject to the proposed rules. On December 15, 2020, the CFPB released the panel's report as part of the formal rulemaking process.

The report includes a summary of the feedback the panel received from small entity representatives ("SERs"), as well as findings and recommendations made by the panel. SERs were supportive of the proposed rule, but they expressed concern that the rulemaking would increase compliance costs and decrease lending activity, which would disproportionately affect small banks. SERs requested, and the panel agreed, that the CFPB should issue implementation and guidance materials when the final rule is issued, and to consider providing sample disclosure language for compliance with Section 1071.

The CFPB will take the panel's recommendations into consideration but will also consider feedback from other stakeholders. A proposed rule was expected to be revealed soon. However, with the change in leadership of the Bureau, it is possible the agency will give further consideration to the scope and requirements of any proposed rule.

<Doug Weissinger>

MRCG and MSRCG February 2021 Meetings

The MRCG and MSRCG will hold combined February meetings on February 18 and February 23, 2021. As we did last year, we will continue to use the Zoom online webinar format,

and we will divide the agenda into two sessions each lasting about an hour and a half from 10:00 a.m. – 11:30 a.m. each.

During these sessions, we will have presentations on what to expect from the regulatory agencies following the presidential election and changes in leadership, diversity and inclusion standards, the role of supervisory guidance, recent exam experiences and preparing for your next compliance exam, QM loan rule changes, HPML escrow exemption changes, the status of business loan data collection rulemaking, Reg. B special purpose credit programs and a recent CFPB advisory opinion, and recent BSA/AML developments.

We ask that you e-mail your registration to Liz Crabtree no later than Friday, February 12, 2021, to give us an indication of how many plan to participate for each session. We will email you in advance with instructions for accessing the webinars.

We look forward to the day, hopefully soon, when we can all be together again in person. In the meantime, we hope to "see" you all online in February. Be well.

<Cliff Harrison>

MRCG-MSRCG COMPLIANCE CALENDAR

01/01/2020 – Extension of HMDA open-end coverage threshold of 500 loans effective until 01/01/2022	01/21/2021 – MRCG-MSRCG Joint Steering Committee meeting.
07/01/2020 – Reg. CC inflation adjustments of availability dollar amounts effective	02/16/2021 – Comments due on Fed. Reserve ANPR on modernizing CRA
07/01/2020 – HMDA closed-end coverage threshold permanently increases from 25 to 100 loans	02/18/2021 – MRCG/MSRCG Quarterly Meeting Webinar Part 1
08/21/2020 – FDIC rule on federal interest rate authority effective	02/23/2021 – MRCG/MSRCG Quarterly Meeting Webinar Part 2
10/01/2020 – OCC revised CRA rule effective, with compliance dates of 01/01/2023 (large banks) and 01/01/2024 (small and intermediate banks)	04/15/2021 – MRCG-MSRCG Joint Steering Committee meeting
10/20/2020 – CFPB rule rescinding underwriting requirements of Payday Lending Rule effective	05/20/2021 – MRCG Quarterly Meeting
10/26/2020 – HUD rule on disparate impact standards under Fair Housing Act effective	05/25/2021 – MSRCG Quarterly Meeting
11/03/2020 – Comments due on proposed revision of Interagency Q&A regarding flood insurance	07/01/2021 – Mandatory compliance date for revised standard QM loans; GSE QM loan category removed
11/27/2020 – Comments due on FinCEN proposed change to Travel Rule coverage for international funds transfers	07/15/2021 – MRCG-MSRCG Joint Steering Committee meeting
12/14/2020 – Comments due on CFPB outline of proposals for implementing data collection on loans to women and minority owned small businesses	08/19/2021 – MRCG Quarterly Meeting
12/29/2020 – OCC true lender rule effective	08/24/2021 – MSRCG Quarterly Meeting
12/31/2020 – Temporary rule on deferral of appraisals for up to 120 days after closing on certain residential and commercial loans expires	09/16/2021 – MRCG-MSRCG Joint Steering Committee meeting
__/__/2021 – Exemption from HPML escrow requirements for certain institutions of $10 billion or less effective on publication in Fed. Register	11/16/2021 – MSRCG Quarterly Meeting
03/01/2021 – CFPB rule revising standard QM definition effective (07/01/2021 mandatory compliance date);	11/18/2021 – MRCG Quarterly Meeting
03/01/2021 – CFPB rule creating new seasoned loan QM loan category effective	01/01/2022 – HMDA open-end coverage threshold permanently adjusts to 200 loans