Financial Services Regulatory Reform

SPRING FORWARD EDITION

March 31, 2021

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These slides are designed to be a reference tool for the financial regulatory reform landscape. They gather in one place the state of play on a number of topics and set forth our views on the general outlook. They will be updated from time to time. To stay up to date on all topics related to financial regulatory reform, we invite you to visit our one-stop website and blog at www.FinRegReform.com.

The Road Ahead: On the Agenda

- **Social Policy at the Forefront:** The Biden Administration is focused on activity at the intersection of financial regulation and social policy. This intersection is also a key goal of House Financial Services Committee (**HFSC**) Chairwoman Waters and Senate Banking Committee (**SBC**) Chairman Brown.
- **Congressional Legislative Priorities:** Although we do not expect that financial regulatory legislation will be a top focus for the Biden Administration, the Democratic majority in both houses of Congress opens up the possibility of legislative changes, especially in areas of common focus between Chairwoman Waters and Chairman Brown. Chairman Brown, in particular, has several bills pending. We highlight these in the slides that follow.
- **Oversight and Regulation:** We expect aggressive oversight of both the financial sector and the financial regulatory agencies through hearings in both chambers.
  - Chairwoman Waters has provided the Biden Administration with a long list of regulatory actions taken during the Trump Administration that she would like to see reversed. Chairman Brown has publicly stated that he would like to see the recommendations in a September 15, 2020 report by Better Markets (Better Markets Report) implemented. There is a great deal of overlap in their policy initiatives.
  - Hearings thus far have focused on topics including market volatility, pandemic relief, climate change, lending discrimination and fair housing.
- **On Deck:** In addition to the topics covered on the following slides, we expect to see Congressional and regulatory attention turn to areas including nonbanks and FSOC activities regulation, the LIBOR transition, cross-border payments, fiduciary standards under the purview of the SEC and the Department of Labor and executive accountability and compensation.
- **Regulatory Leadership:** The pace and tenor of change under the Biden Administration will be heavily influenced by the leadership of and senior personnel at the federal prudential and market regulators. For the status of financial regulatory leadership changes so far in the Biden Administration, see the next slide.

The Road Ahead:
Financial Regulatory Leadership Changes

As of March 31, 2021

Treasury

Secretary Yellen

Deputy Secretary Adeyemo

TO BE NOMINATED

Under Secretary for International Affairs

TO BE NOMINATED

Under Secretary for Terrorism and Financial Intelligence

TO BE NOMINATED

Under Secretary for Domestic Finance

Federal Reserve

Chair Powell

Vice Chair Clarida

Vice Chair for Supervision Quarles

Governor Brainard

Governor Waller

Governor Bowman

TO BE NOMINATED

Governor

FDIC

Chairman McWilliams

TO BE NOMINATED

Vice Chairman

Director Gruenberg

Rohit Chopra*

CFPB Director

TO BE NOMINATED

OCC Comptroller

SEC

Gary Gensler*

Chairman

Commissioner Lee

Commissioner Crenshaw

Commissioner Peirce

Commissioner Roisman

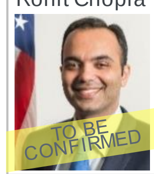
OCC

TO BE NOMINATED

Comptroller

CFPB

Rohit Chopra*



Director

CFTC

Commissioner Behnam

Commissioner Berkovitz

Commissioner Stump

Commissioner Quintenz

TO BE NOMINATED

Commissioner

*** The nominations of Gensler and Chopra have each been reported out of the SBC and are awaiting confirmation by the full Senate.**

Climate Change

- **General Outlook:** Addressing climate change is one of the highest priorities of the Biden Administration. The President has set a goal to transition to a net-zero carbon emissions economy by 2050. This goal is consistent with the Paris Climate Agreement, which the U.S. has re-entered. Financial regulators continue to increase their attention on climate-related issues.
- **Federal Reserve:** Chair Powell has stated that the Federal Reserve is "very actively in the early stages of...getting up to speed" on how climate risks will affect the financial sector.
  - The Federal Reserve first discussed climate risk in its November 2020 Financial Stability Report.
  - The Federal Reserve has announced two committees specifically focused on climate risk:
    - The Federal Reserve System-wide Supervision Climate Committee (**SCC**), announced by FRBNY in January 2021
    - The Financial Stability Climate Committee (**FSCC**), announced by Governor Brainard in a March 2021 speech
      - Governor Brainard described the SSC as working on microprudential safety and soundness and the FSCC as taking a macroprudential perspective to identify, assesses and address climate related-risks to financial stability.
  - The FRBNY's former Head of the Supervision Group, Kevin Stiroh, was seconded to the Federal Reserve Board to chair the new Federal Reserve System-wide SCC.
    - Stiroh is also co-chairing a Basel Committee task force on climate-related financing risks. The task force is evaluating how the Basel framework incorporates climate risk and is aiming to issue recommendations by mid-2021.
  - In testimony before the HFSC in March 2021, Chair Powell stated that the Federal Reserve is "at a very early stage of understanding the risks to regulated financial institutions from climate change" and emphasized that the Federal Reserve's policy is not to mandate which businesses banks may or may not lend to.
    - In a similar vein, Treasury Secretary Yellen stated at the same HFSC hearing that financial regulators "have no plan to regulate what lending or investments can be done." She added that climate change is a top priority for the Biden administration, but that "financial regulators should be assessing the risks to financial institutions through stress testing and other techniques, and…investors need disclosure of risk."
    - In testimony before the SBC the next day, Secretary Yellen stated that it is appropriate for the government to encourage banks, financial institutions and other lenders to think about potential adverse impacts of their investments.

Climate Change

- Governor Brainard has also been vocal in the climate area. She has expressed support for standardized and mandatory climate-related disclosures by companies and has suggested that scenario analysis may be a useful tool for banks and supervisors to assess microprudential and macroprudential climate-related risks.

- While Federal Reserve examination of climate change risks is at an early stage, materials from lawmakers, regulators, academics, think tank commentators and advisers to the Biden campaign, as well as transition, platform and related documents, would put the following items on the regulatory agenda:
  - Conducting climate-related scenario analysis and explicitly taking into account climate change in systemic risk regulation
  - Supervisory focus on financial institutions' risk management practices relating to climate risk, including exposure to floods and wildfires, as well as transition risk from a shift to carbon neutrality
  - Critical evaluation of portfolio concentrations and the extent of credit underwriting related to sectors and assets deemed not climate friendly (e.g., fossil fuel companies)
  - Linking higher or lower risk-weighting of assets for capital purposes to whether associated activities are "climate change-accelerating", although we expect that any such move would involve coordination with the Basel Committee
  - Encouragement of investment in local community disaster recovery and other environmental efforts by including them as Community Reinvestment Act-eligible activities, with an emphasis on the effect of climate change on "particularly vulnerable" low-to-moderate income communities; for further discussion of Community Reinvestment Act initiatives, see the Community Reinvestment Act section at slide 23.

- Others have expressed skepticism about the Federal Reserve's authority to regulate climate change, including Republican members of the Senate Banking Committee who expressed their views in a March 2021 letter to Chair Powell, available here.

Climate Change

- **FSOC:** Climate change is on the FSOC's agenda for its March 31, 2021 meeting.
  - In her March 2021 HFSC testimony, Secretary Yellen stated that FSOC can play a coordination role with respect to climate change and can facilitate identification of data and information.
- **SEC:** The SEC has also recently been active in the climate change area. Actions taken in March 2021 include:
  - Acting Chair Lee directed staff to evaluate the SEC's disclosure rules "with an eye toward facilitating the disclosure of consistent, comparable, and reliable information on climate change," and requested public input to facilitate the staff's assessment. Comments are due in June 2021.
  - The Division of Examination announced that its 2021 examination priorities would include a greater focus on climate-related risks.
  - The SEC announced the creation of a Climate and ESG Task Force in the Division of Enforcement, which will be led by Acting Deputy Director of Enforcement Kelly L. Gibson.
- **CFTC:** In March 2021, building on past work, Acting CFTC Chairman Behnam announced the creation of a Climate Risk Unit to focus on the role of derivatives in understanding, pricing and addressing climate-related risk and transitioning to a low-carbon economy.
- **Legislative Initiatives:** Regulatory initiatives may be mandated by legislation.
  - Among other pertinent potential legislation, Democrats in both chambers of Congress introduced the Addressing Climate Financial Risk Act in March 2021, which could accelerate the gathering of data and bolster emerging efforts to embed climate risks into actions taken by financial regulatory agencies. It would, among other things:
    - Establish an FSOC committee dedicated to assessing and providing recommendations to federal and state financial regulatory agencies and Congress about climate risk and the financial system, including through publication of an annual report
    - Require federal bank and credit union regulatory agencies to update applicable supervisory guidance to include climate risk
    - Require the FSOC to update its guidance regarding nonbank SIFI designations to specify how climate risk will factor into such determinations.

Consumer Financial Protection

- **General Outlook:** We expect a focus on:
  - Increased enforcement efforts, which would build on the recent upward trend, with a reinvigorated Office of Fair Lending and Equal Opportunity empowered to target lenders found to engage in discriminatory practices
  - Use of the disparate impact standard to hold "major financial institutions accountable for discriminatory lending practices," as advocated in Biden campaign materials and discussed on slide 9 in the Disparate Impact section
  - Enhanced scrutiny of higher education lenders, servicers and debt collectors and forbearance of federal student loans
  - Establishment of a federal standard for appraisals and appraiser training requirements to address racial biases that contribute to persistent undervaluation of properties in communities of color
  - Small dollar lending practices and underwriting standards, and the establishment of a federal usury limit, though this would require Congress to act
  - Bolstering protections against abusive debt collection practices
- **Enforcement:** Acting CFPB Director Uejio has also said that the CFPB is "planning to rescind public statements conveying a relaxed approach to enforcements of the laws in our care." Consistent with this statement, on March 11, 2021, the CFPB rescinded self-imposed restrictions put in place by previous leadership on its ability to collect civil penalties and disgorgement from banks and financial companies for abusive acts and practices.
- **Housing Protections:** Low interest rates and a possible tax credit for first-time homebuyers are expected to increase demand for mortgages. The creation of a new Homeowner and Renter Bill of Rights, which the Biden Administration has highlighted as a vehicle to penalize predatory mortgage lending, may receive Congressional consideration.

Consumer Financial Protection

- **Strengthen Fair Lending:** The Biden Administration has signaled that it anticipates rolling back regulatory measures undertaken during the Trump Administration that are viewed as reducing the efficacy of fair housing protections, including:
  - Reversing the Trump Administration's decision to scrap the Affirmatively Furthering Fair Housing Rule, which was adopted under President Obama and which ties the receipt by communities of certain federal funding to a requirement to affirmatively track housing patterns and root out policies with discriminatory effect
  - Reinstating the federal risk-sharing program to incentivize private sector funding of affordable housing
  - On March 9, 2021, the CFPB issued an interpretive rule clarifying that the prohibition against sex discrimination under the Equal Credit Opportunity Act and implementing Regulation B extends to discrimination involving sexual orientation and gender identity
- **Credit Reporting:** The creation of a Public Credit Reporting Agency may receive Congressional consideration.
  - Former CFPB Director Cordray has characterized such an agency as "a big, big undertaking," cautioning that "it's not an easy thing to do, and it's not going to be done quickly."
  - Nonetheless, we believe that there may be continued pressure on the credit rating agency business models. House Democrats have sponsored a bill to give consumers greater rights with respect to their credit reports, including an appeal process for reports, limitations on the use of reports by prospective employers and a shorter time period in which negative information would appear on reports.

Disparate Impact

- **Fair Lending:** We expect an increase in fair lending enforcement actions by the CFPB, including based on disparate impact.
  - Acting CFPB Director Uejio expressed his desire for the CFPB to take "bold and swift action on racial equity." Acting Director Uejio said that fair lending enforcement will be a top priority for the CFPB, with a focus on racial equity, but that the CFPB will also "look more broadly, beyond fair lending, to identify and root out unlawful conduct that disproportionately impacts communities of color and other vulnerable populations."
  - Rohit Chopra, President Biden's nominee for CFPB Director, affirmed his commitment to fair lending enforcement in his confirmation hearing before the SBC.
  - The CFPB's fair lending enforcement focus will not be limited to racial discrimination. The CFPB stated in a March 2021 interpretive rule that the ECOA and Regulation B prohibit discrimination by lenders based on sexual orientation and gender identity.
  - The CFPB may issue a rule or guidance clarifying its approach to disparate impact analysis under the Equal Credit Opportunity Act (**ECOA**) and/or Regulation B, as the CFPB suggested in a July 2020 request for information.
- **Fair Housing:** We expect a new HUD rule on disparate impact standards under the Fair Housing Act (**FHA**) and an increase in related enforcement actions by HUD.
  - The Trump Administration's rule on disparate impact standards under the FHA, which, among other things, would have introduced new pleading requirements for plaintiffs making disparate impact claims, was due to go into effect in October 2020 but was stayed by a Massachusetts federal district court ruling. In January 2021, President Biden issued an executive order directing HUD to examine the effects of the Trump Administration's rule and to take any necessary steps to administer its programs in a manner that affirmatively furthers fair housing and HUD's overall duty to administer the FHA, including by preventing practices with an unjustified discriminatory effect.
  - Like the CFPB, HUD announced in February 2021 that it will administer and enforce the FHA to prohibit discrimination based on sexual orientation and gender identity.
- **AI and Alternative Data:** The major financial regulators have issued a request for information on the use of AI and alternative data. The request includes multiple questions on AI and fair lending, including on the risks that AI can be biased and/or result in discrimination on prohibited bases.

Underbanked and Basic Access

- **Banking Access:** President Biden's campaign materials emphasized the necessity of universal access to basic, low-cost banking services. The following are some of the most prominent proposals to increase banking and financial services access.
- **Banking for All Act:** Chairman Brown continues to voice his support for the Banking for All Act, which would require Federal Reserve member banks to offer digital U.S. dollar accounts to all U.S. individuals and businesses.
  - Banks would be required to offer certain minimum banking services no less favorable than those that the bank offers for existing transaction accounts, provide a minimum interest rate and banks would not be able to charge account fees or have minimum or maximum balance requirements.
  - In areas with limited access to Federal Reserve member banks, banks would be required to partner with U.S. Postal Service retail facilities to provide access to accounts.
  - As discussed on slide 26 in the Central Bank Digital Currency section, the Banking for All Act and two other pending bills would also provide for direct digital dollar accounts for individual and businesses at Federal Reserve Banks.
- **Postal Banking:** Although we believe that postal banking is unlikely to gain traction, several Democrats in both the Senate and the House are vocal proponents, including Senators Sanders and Warren. Short of full postal banking, the U.S. Postal Service could be leveraged to facilitate access to other programs, as proposed in the Banking for All Act.
  - Chair Powell has evinced some skepticism however, replying in the negative when asked, at a hearing before the SBC on March 24, whether the Federal Reserve is equipped to service individual retail and commercial accounts. He went on to underscore that "that has never been our role and it's really not been the role of other major central banks. It would be quite a dramatic change in our role in the economy and one that I think should require very careful thought."

Underbanked and Basic Access

- **Public Banking:** Today, only one state-owned bank exists, in North Dakota, but there has been a movement by some on the progressive left to expand state and locally owned and operated public banks. In 2019, California passed legislation that allows California counties and cities to create public banks, and several other states have introduced bills to permit chartering of public banks. At the federal level, Representatives Tlaib and Ocasio-Cortez introduced a bill for the Public Banking Act, which would promote the chartering of state and local public banks.
- **Fintech and Innovation:** The Chief Innovation Officers at both the OCC and CFTC have stated that their agencies will be thinking about how technological innovations can help the under and unbanked, as well as address other structural issues that present barriers to expanded financial inclusion. As financial regulatory leaders change under the Biden Administration, more concrete actions may be taken.

Cannabis-Related Banking and Marijuana Legalization

- **General Outlook**
  - The direction of the federal regulatory and enforcement framework for financial institutions providing services to U.S. cannabis-related businesses has been unclear, with most banking organizations finding the provision of banking services to such businesses too perilous. In March 2021, FinCEN reported that as of 1Q 2021, there were only 684 financial institutions providing banking services to cannabis-related businesses.
  - A March 2021 cease and desist order issued by the NCUA is believed to be the first enforcement action against a financial institution for non-compliance with FinCEN requirements for servicing marijuana-related businesses
  - Statements by members of the Biden Administration and the Democrat-controlled Congress have signaled support for policy changes at the federal level regarding cannabis or cannabis-related banking.
    - "We will decriminalize marijuana, and we will expunge the records of those who have been convicted of marijuana." *—Vice President Harris, at her October 7, 2020 debate with then-Vice President Pence*
    - "It does not seem to me a useful use of the limited resources that we have to be pursuing prosecutions in states that have legalized and that are regulating the use of marijuana, either medically or otherwise." *—Attorney General Garland at his confirmation hearing (speaking of the Cole Memorandum)*
- **Different Legislative Approaches**
  - The **Secure and Fair Enforcement Banking Act** (**SAFE Banking Act**) would permit "depository institutions" and insurers to provide financial services to cannabis-related businesses that comply with state laws.
  - The **Marijuana Opportunity Reinvestment and Expungement Act** (**MORE Act**) would deschedule cannabis on a nationwide basis while accomplishing social justice goals, such as expunging criminal records related to non-violent marijuana offenses, granting pardons and imposing a social equity tax.
    - As a Senator, Vice President Harris sponsored the MORE Act. The MORE Act passed the House on December 4, 2020 but has not yet been reintroduced in this Congress.

Cannabis-Related Banking and Marijuana Legalization

- The **Strengthening the Tenth Amendment Through Entrusting States Act** (**STATES Act**) would amend the Controlled Substances Act to render inapplicable its prohibitions on cannabis-related conduct that complies with state law.
- The SAFE Banking Act and STATES Act have received bipartisan sponsorship, which has largely been absent for the MORE Act.

- **Upcoming Legislative Slate**
  - On March 18, the SAFE Banking Act was reintroduced in the House, and a companion Act was reintroduced in the Senate on March 23. The House bill has 109 sponsors, and the Senate bill has 31 sponsors.
  - The Clarifying Law Around Insurance of Marijuana Act (**CLAIM Act**), introduced by Senator Menendez on March 18, would prohibit:
    - Penalizing or discouraging an insurer from providing coverage to legal cannabis businesses or associated businesses
    - The termination or limitation of an insurer's policies solely because it has worked with a cannabis-related business.
  - On February 1, Senate Majority Leader Schumer and Senators Booker and Wyden released a statement on forthcoming cannabis reform legislation. Although the text of the bill has not been released, it will likely incorporate elements of the MORE Act, and reportedly end the federal cannabis prohibition and focus on restorative justice, expungement of convictions, community reinvestment and public health.
- **Our visual memorandum analyzing the SAFE Banking Act, MORE Act, and STATES Act is available here.**

Bank M&A

- **General Outlook:** There has been a clear uptick in bank M&A compared to the pandemic-driven lows of early 2020.
  - Several significant regional bank deals have been announced and M&A may also increasingly become a vehicle for fintechs to enter into full-service banking more quickly than would be possible through the de novo charter process. Meanwhile, consolidation in the asset management industry is likely to continue and larger banking organizations may be players in that consolidation.
  - In the Biden Administration, potential bank M&A transactions are likely to be subject to enhanced regulatory and political scrutiny. It does not necessarily mean that deals will not be approved, but the speed of approvals is likely to slow down.
- **Financial Stability Considerations:** Financial stability considerations have been a key feature of the Federal Reserve's review of significant post-financial crisis acquisitions, and this is likely to continue under the Biden Administration.
  - There may be some lessons that can be drawn from the pattern of approvals, dissents and abstentions by Governor Brainard in 2019 and 2020.
    - Governor Brainard voted to approve BB&T's merger with SunTrust in 2019, suggesting that the financial stability factor does not present an absolute barrier to large regional bank M&A transactions.
    - Governor Brainard dissented, however, from the Federal Reserve's 2020 approvals of Morgan Stanley's acquisition of E*TRADE and TD Bank's minority investment in Charles Schwab in connection with Charles Schwab's acquisition of TD Ameritrade.
      - It is not clear whether Governor Brainard's objection to these acquisitions related to the parties involved, a belief that large M&A activity should not be approved in the midst of the COVID-19 pandemic, or a combination of these or other concerns.

Bank M&A

- **Competitive Factors:** The Biden Administration is likely to embrace a more robust review of the competitive aspect of proposed transactions across a range of industries, including in banking.
  - For instance, Tim Wu was recently announced as an antitrust advisor to President Biden, and Lina Khan has been nominated as an FTC commissioner. Both Columbia law professors have written extensively on antitrust concerns in Big Tech.
  - As another example, Rohit Chopra, an FTC commissioner nominated by President Biden to lead the CFPB, has called for a stricter framework for bank M&A review. Mr. Chopra, if confirmed, would also serve on the FDIC's board of directors and would have a vote on bank M&A transactions involving state nonmember banks and ILCs.
- The framework through which competitive aspects of bank mergers are reviewed may also be revised.
  - In September 2020, the Department of Justice announced that it was considering a long overdue update to the 1995 Bank Merger Competitive Review guidelines, and requested comment on the extent to which thrift and digital bank deposits should be taken into account in the DOJ's analysis of competitive effects. Given the change in administration, the future path for the DOJ's review is uncertain.
  - Separately, Governor Michelle Bowman stated in a February 2021 speech that the Federal Reserve is in the process of reviewing its approach to banking antitrust analysis, and has engaged in conversations with community banks on the effects of the Federal Reserve's current competitive analysis framework on community banks' business strategies and long-term growth plans.
    - Governor Bowman advocated for revisions to the Federal Reserve's framework to "better reflect the competition that smaller banks face in an industry quickly being transformed by technology and non-bank financial companies."

Bank M&A

- **Public Interest Factors:** Banking regulators reviewing proposed M&A transactions are also required to consider factors such as convenience and needs of the communities to be served and Community Reinvestment Act compliance. These factors, always important to the banking regulators and community groups, are likely to take on even greater importance in the Biden Administration.
  - Even if not explicitly required by statute, we expect that consideration of these factors may take into account environmental, social responsibility and governance issues, as well as considerations related to diversity, equity and inclusion.

Capital, Liquidity and Stress Testing

- **Recent Federal Reserve Developments on Pandemic Changes:** The Federal Reserve continues to give attention to bank capital requirements, including capital actions taken in response to the pandemic. The Federal Reserve recently announced the following developments:
  - Termination of exclusion of reserves held at the Federal Reserve and U.S. Treasury securities from total leverage exposure of the supplementary leverage ration (**SLR**)
    - On March 19, 2021, the Federal Reserve announced that the SLR relief would expire at the end of March and that it would "soon" seek comment on measures to adjust the SLR, which would "not erode the overall strength of bank capital requirements."
    - One option that the Federal Reserve could consider is a permanent exclusion from the SLR denominator for reserves and potentially U.S. Treasury securities, along with adjusting the SLR minimum and buffer requirements upwards. A similar proposal has been floated by some, including President Biden's nominee for undersecretary for domestic finance at the Treasury Department.*
  - Termination of supervisory limitations on dividends and share repurchases for most banking organizations subject to CCAR after June 30, 2021
    - On March 25, 2021, the Federal Reserve extended the temporary supervisory limitations on dividends and share repurchases currently in place for banking organizations subject to CCAR until June 30, 2021. After completion of the current round of CCAR/DFAST stress tests, firms with capital levels above those required by the stress test will no longer be subject to these supervisory limitations
- **Tailoring:** Both Chairwoman Waters and Chairman Brown have expressed support for changes to the application of the SLR, LCR and NSFR requirements and reinstating the CCAR qualitative objection, all of which would require amendments to the relevant final rules. While legislative change is unlikely, Chairwoman Waters and Chairman Brown may pressure the U.S. banking agencies to amend the regulatory thresholds and criteria for application of certain prudential requirements above the statutory thresholds.

* Nellie Liang & Patrick Parkinson, *Enhancing the Liquidity of U.S. Treasury Markets Under Stress*, Brookings Institute (Dec. 16, 2020)

Capital, Liquidity and Stress Testing

- Chairman Brown voted against the bipartisan Economic Growth, Regulatory Relief, and Consumer Protection Act, and has been openly critical of the Federal Reserve's tailoring of capital requirements pursuant to that Act.
  - Consistent with Chairman Brown's broad support for the agenda set out in the Better Markets Report, we can expect him to focus on material increases in "the quantity and quality of capital throughout the banking and financial systems," and note that he sponsored legislation in 2013 that would have imposed a 15% minimum leverage ratio on financial institutions with $500 billion or more in total consolidated assets.

- **Stress Testing and Capital Planning:** Changes to stress-testing and capital planning requirements might include:
  - More severe stress scenarios, which could have the effect of increasing the stress capital buffer
  - Possible return of the formal qualitative objection to capital plans
- **Climate Change Initiatives:** There are a number of ways that the Biden Administration's emphasis on climate change could make its way into capital requirements. These include:
  - Increasing risk weights for exposure to fossil fuel companies and decreasing risk weights for exposures to clean energy companies, bringing social goals into what has, until now, been largely a credit risk analysis
    - Any such change would presumably be coordinated with the Basel Committee.
  - Incorporating a climate change scenario either into CCAR/DFAST stress testing or otherwise
- **GSIB Requirements:** Changes to the regulations applicable to GSIBs could include:
  - Adjustments to the factors underlying GSIB surcharge scores, including further emphasis on the short term wholesale funding factor and the possibility of a more graduated surcharge structure (i.e., reducing cliff effects)
  - Increased external TLAC requirements
  - New internal TLAC requirements

Capital, Liquidity and Stress Testing

- **Other Initiatives:** There are a number of pending rulemaking initiatives on the banking agencies' agenda, including:
  - Finalization of the implementation of Basel III, including significant amendments to the market risk capital rule (Fundamental Review of the Trading Book) and the standardized approach for credit risk, among other changes
  - Potential deployment of the countercyclical capital buffer in BAU as a means of stimulating lending in stress:
    - On March 30, 2021, Federal Reserve Vice Chair for Supervision Quarles reportedly stated, "When you look at some of those other jurisdictions that were in a position to have turned on their countercyclical capital buffer going into this stress, and then turned it down, it didn't actually prove to be that useful in creating the space for those institutions to continue to lend through the crisis."

Reforms to Short-Term Funding Markets

- **More Work to be Done:** In the aftermath of the Financial Crisis, regulatory changes sought to decrease reliance on the use of short-term wholesale funding (including money market funds (**MMFs**), repo and commercial paper), and to enhance the stability of short-term funding markets. The COVID-19 shock in the spring of 2020 again revealed vulnerabilities in short-term funding markets, making clear that the post-2008 reforms had not fully achieved their aims and that more needs to be done. There has been bipartisan focus on further reforms, but no consensus on what reforms in this area of interconnectedness between the banking and nonbanking sectors might look like.

Reform Ideas

- In December 2020, the President's Working Group on Financial Markets released a report (**PWG Report**) offering several MMF reform ideas:
  - Removing the tie between MMF liquidity and fee and gate thresholds
  - Reforming conditions for imposing redemption gates
  - Minimum balance at risk (**MBR**) rules, meaning that a portion of a shareholder's recent balances in an MMF would be available for redemption only on a delayed basis
  - New or modified liquidity management requirements, including new categories of liquidity requirements or additional Weekly Liquid Assets (**WLAs**) thresholds to augment current liquidity buffers
  - Countercyclical WLA requirements, under which minimum WLA requirements could be calibrated such that they would automatically decline in certain circumstances, including when net redemptions are large
  - Floating net asset value (**NAV**) requirements for all prime and tax-exempt MMFs
  - Swing pricing rules, meaning that when a fund's NAV "swings" down, redeeming investors would receive less for their shares, thus imposing costs stemming from redemptions directly on redeeming investors, rather than on other investors in the fund
  - Capital buffer requirements
  - Requiring prime and tax-exempt MMFs to be members of a private liquidity exchange bank
  - New requirements governing sponsor support that would clarify who bears MMF risks by establishing clear rules for when a sponsor would be required to provide support
- The PWG Report, which was released while President Trump was still in office, was careful to note that it is not at this time endorsing any given measure listed above. The SEC later requested comment on the reform ideas in the PWG Report.

Reforms to Short-Term Funding Markets

Reform Ideas

- In a March 2021 speech, Federal Reserve Governor Brainard noted the need for further short-term funding market reforms and referenced the PWG Report and the SEC's related request for comment.
  - In particular, Governor Brainard highlighted three MMF reform ideas: swing pricing, MBR rules and capital buffers.
- Governor Brainard's speech also noted other areas of structural vulnerability in short-term funding markets, observing that the COVID-19 shock also highlighted the vulnerabilities associated with investment vehicles that offer daily liquidity while investing in less-liquid assets, such as corporate bonds, bank loans, and municipal debt.
  - Here, Governor Brainard again suggested that swing pricing could be helpful in reducing run risk.

Reform Arenas

- In the United States, reforms to short-term funding markets will require regulatory coordination by multiple agencies. FSOC may be called upon to play a coordinating role, or may even seek to use its powers under Title VII to force changes in these markets.
- In terms of MMF reform, it is not clear whether the SEC will again make the final decisions on MMF reforms, as it did after the Financial Crisis, or if the Biden Administration will approach MMF reform from a different direction.
  - In 2014, the SEC when adopting its MMF reforms noted that it had considered adopting certain reform recommendations made by FSOC, including MBR rules and capital buffers, but concluded that FSOC's recommendations ""would not achieve our regulatory goals as well as the reforms we are adopting today."
- At the global level, the FSB has created a steering group of public and private individuals to study the role of nonbank financial institutions at the beginning of the pandemic, including their role in the short-term funding markets.
  - According to FSB Chair Quarles, the FSB intends to publish in July 2021 a report setting out "consequential policy proposals to improve MMF resilience."
  - Among other things, this report will "consider the relationship between MMFs and short-term funding markets, with a particular focus on commercial paper and certificate of deposit markets and the impact of dealer behavior."

BSA/AML

- **General Outlook:** Regulatory change to the Bank Secrecy Act (**BSA**)/anti-money laundering (**AML**) regime remains a high priority.
- **Legislative and Regulatory Changes:** The Anti-Money Laundering Act of 2020 (**AMLA**) is the most important BSA/AML legislation in years and could have a significant impact on AML compliance and supervision once it is fully implemented.
  - The legislation's ultimate impact will be determined by implementing regulations to be issued by the Treasury Department and other government stakeholders and which are not expected in the near term.
  - Once implemented, AMLA will affect banks' and other financial institutions' AML compliance obligations and the way they are evaluated through:
    - Issuance of national AML and countering the financing of terrorism priorities
    - The creation of a national beneficial ownership registry maintained by FinCEN
    - Pared back beneficial ownership requirements applicable to banks and other covered institutions
    - Streamlined Suspicious Activity Reports
    - Codification of the BSA's applicability to virtual currency
- **Our visual memorandum on AMLA is available** here.
- **Continuation of Ongoing AML Reform Efforts:** Initiatives begun in 2020, such as FinCEN's ANPR on Program Effectiveness and significant changes to the Travel and Recordkeeping Rules, will continue despite new Treasury leadership.
- **AML Supervision and Enforcement:** AML is likely to continue to be a high priority for the financial regulators and, while overall enforcement numbers have been down in recent years, regulators, especially the New York State Department of Financial Services, will not be hesitant to use their enforcement powers in cases involving serious AML program breakdowns.
- **Greater scrutiny of Fintechs/Crypto:** Greater regulatory scrutiny for AML compliance is expected for Fintechs (especially payments-related) and crypto firms as they assume an increasingly important role in financial services.

Community Reinvestment Act

- **Biden Administration Plans:** The Biden Administration has committed to expanding the reach and impact of the Community Reinvestment Act (**CRA**) by:
  - Expanding the CRA to mortgage and insurance companies, payment companies, marketplace lenders and fintechs (which would likely require legislative action)
  - Requiring financial institutions to produce explicit statements setting out their public interest commitments (which could likely be done at the regulatory level).
- **Climate Resiliency:** In February 2021, the NYDFS issued guidance that allows banks to earn credit under New York's CRA by financing activities that bolster climate resiliency in low- to moderate-income communities—a similar expansion of qualifying activities may occur on the national level.
  - Furthermore, there has been recent discussion of legislative expansion of the CRA to include investments promoting climate resiliency (see, e.g., Marilyn Waite's March 2021 testimony to the Senate Banking, Housing and Urban Affairs Committee). For further discussion of climate initiatives, see the Climate Change section at slides 4–6.
- **Another Shot at Harmonizing**
  - In May 2020, the OCC, under then-Comptroller Otting, finalized its rule to modernize the CRA without sign-on from the other agencies. A number of democratic lawmakers and community organizations opposed this rule as they believed it weakened the CRA.
  - The Federal Reserve released its own CRA modernization proposal in September 2020, which addresses some of the main criticisms of the OCC rule related to CRA scoring, data collection and assessment areas.
  - With a change of administration, there is an expectation that the OCC final rule will be reviewed and revised and renewed hope of a harmonized interagency approach. In a February 2021 hearing before the HFSC, Federal Reserve Chair Powell said "I think there is an opportunity for a harmonized rule among the agencies … we are engaged … with the [FDIC] and the OCC and we're working on that very thing."

Digital Assets

- **General Outlook:** Established market participants will continue to provide onramps to the sector as digital assets slowly move into the mainstream, while a lack of regulatory clarity risks cutting legacy financial institutions off from innovative developments being advanced by new entrants.
- **Ripple Lawsuit:** The SEC's complaint against Ripple Labs and two of its executives, alleging they raised over $1.3 billion through an unregistered, ongoing digital asset securities offering of its XRP token since 2013, may establish important precedent for the Howey test and the application of securities laws to the sale of digital assets.
  - Recent legislative efforts to exempt digital tokens from the securities laws face an uphill battle.
- **Stablecoins:** FSOC may take a deep look at stablecoins, especially after the statement released by the President's Working Group on Financial Markets on December 23, 2020. The statement provided an initial assessment of key regulatory and supervisory considerations of stablecoins.
- **FinCEN:** Increased AML/BSA obligations for transactions involving un-hosted wallets proposed at the end of the Trump Administration could force activity away from regulated financial institutions, but FinCEN's recent extension of the initial 15-day comment period suggests the Biden Administration may take a different approach.
- **Custody:** The OCC's interpretive letter on the custody of digital assets is unlikely to be overturned and the SEC's no-action position on custody of digital asset securities by special purpose broker-dealers further opened the regulatory door to trading of digital asset securities. Although the broader project on updating custody rules for digital assets will slow down, we expect both legacy financial institutions and new entrants to continue to enter the space.
- **NFTs:** Recent, high-profile sales of digital art, facilitated by non-fungible tokens (**NFTs**), demonstrate emerging use cases and continued enthusiasm for digital assets and blockchain technology.
  - NFTs represent unique digital items and are tracked on a blockchain to provide proof of ownership.

For more information, please visit the *FinReg* blog—"SEC Takes No-Action Position on Custody of Digital Asset Securities by Special Purpose Broker-Dealers" (Jan. 14, 2021) and "*FinCEN and the Federal Reserve Board Propose Travel Rule Amendments to Lower the Threshold for Cross-Border Transfers and to Explicitly Cover Convertible Virtual Currencies and Digital Money*" (Oct. 29, 2020).

Central Bank Digital Currency

- **Overview:** The Federal Reserve and other central banks around the world are assessing whether to issue digital currencies to supplement or replace traditional paper currencies in their jurisdictions. In recent months, Chair Powell and other global leaders have signaled a substantial shift, no longer viewing central bank digital currencies (**CBDC**) as novel and unnecessary but potentially as a major innovation requiring careful consideration before decisions are made regarding its implementation.
  - Developing a U.S. CBDC is a "very high priority project" for the Federal Reserve, Chair Powell stated in February 2021.
  - CBDC raises a host of legal and regulatory issues that are the subject of vibrant debate and a growing body of scholarship, including issues of data privacy, combating financial crimes, monetary policy and impact on the commercial banking sector.
  - In March 2021, Chair Powell remarked that "we don't need to rush this project, and we don't need to be first to market.
- **Background:** Electronic central bank money exists in the United States today. The key difference between existing central bank digital money—available only to Federal Reserve member banks through Federal Reserve Bank accounts—and CBDC is that a CBDC would be available broadly to retail and commercial users.
- **Congressional Action:** The Federal Reserve's authority to issue a retail CBDC is unclear under existing law, and legislation is likely necessary to authorize and implement it.
  - "Depending on what we do, we could well need legislative authorization for such a thing," Chair Powell testified to the HFSC on February 24, 2021.
  - In his testimony before the HSFC on March 22, 2021, Chair Powell suggested that the Federal Reserve would not act without authorizing legislation: "we would need a buy-in from Congress" before there is a digital dollar and he reiterated "you can expect us to move with great care and transparency."

Central Bank Digital Currency

- Notably, Chair Powell further testified that a Fed digital dollar would not be intended as a competitor or alternative to nongovernment cryptocurrencies such as bitcoin and Ethereum. He views them playing a role in the global financial system but not replacing the function of a central bank currency due to their speculative nature.
- As of March 2021, three bills to implement a digital dollar have been introduced in the U.S. Congress—sponsored by Chairman Brown, Chairwoman Waters and Representative Tlaib—but none have progressed to committee or the floor.
  - All three bills provide for Federal Reserve Banks to establish and maintain digital dollar wallets branded as FedAccounts that would allow individuals and businesses to hold "dollar balances consisting of digital ledger entries recorded as liabilities in the accounts of any Federal Reserve Bank."
  - The Tlaib bill would also require Treasury to develop and administer a system of token-based "digital dollar cash wallets," which could expand the potential role of nonbanks in providing payment and other services involving CBDC.
  - The bills have been influenced by the work of a few key legal scholars in this area. We expect that legal and other scholarship, as well as lessons learned from other countries, will continue to shape legislative proposals in the future.
- **For more detailed discussion and analysis of digital dollars and CBDC, our client memorandum is available here.**

Fed Faster Payments

- **General Outlook:** The Federal Reserve announced on August 5, 2019 that it intends to build a new round-the-clock real-time payment and settlement service called the FedNow Service to support faster payments in the United States. The 24x7x365 real-time gross settlement (**RTGS**) service for retail payments, which the Federal Reserve expects to be available in 2023, may be accompanied by a separate expansion of hours for the Fedwire Funds Service and the National Settlement Service (**NSS**), which are designed for large-value wholesale payments. On August 6, 2020, the Federal Reserve announced further details of the FedNow Service in a release describing its core functionality and future implementation. Our client memorandum discussing the August 2020 release is available here.
  - The August 2020 release provided additional detail on the planned rollout of the FedNow Service and confirmed that the Federal Reserve intended to create and deploy a liquidity management tool, FedNow LMT, capable of operating in a 24x7x365 environment by allowing FedNow Service participants to transfer funds between accounts at the Reserve Banks.
- **Reactions**
  - Larger financial institutions generally favor the Federal Reserve developing a liquidity management tool, but are against the Federal Reserve developing its own RTGS service for retail payments.
    - Concerns center around interoperability of the Federal Reserve's FedNow Service with the current RTP: Real-Time Payments System operated by The Clearing House, unnecessary competition between the Federal Reserve and the private sector and duplicative costs.
      - These concerns appear to be shared, at least to some extent, by Federal Reserve Vice Chair for Supervision Quarles. Vice Chair Quarles voted against the August 2019 announcement and stated that he does not "see a strong justification for the Federal Reserve to move into this area and crowd out innovation when viable private-sector alternatives are available." Notably, Quarles voted in favor of the August 2020 release, possibly indicating newfound support for the initiative.

Fed Faster Payments

- In contrast, community banks and credit unions strongly support the Federal Reserve developing an RTGS service for retail payments.
- The community banks and credit unions have found allies in the form of fintechs and general retail corporates, which favor the Federal Reserve's development of an RTGS service for retail payments. While these firms have voiced support for the extension of FedNow to non-banks, the Federal Reserve has reiterated that the service would be available only to "banks eligible to hold accounts at the Reserve Banks under applicable federal statutes and Federal Reserve rules, policies, and procedures."
- The House and Senate held hearings on the Federal Reserve's proposal on September 25 and 26, 2019, with witnesses including the president of the Federal Reserve Bank of Kansas City. The hearings raised similar concerns as those discussed in these slides.

- **Next Steps**
  - The Federal Reserve announced in January 2021 that more than 110 financial institutions and processors were participating in the FedNow Service pilot program to test the system's functionality. The same release provided that an "ecosystem participant" pilot program would be launched later in 2021 to solicit feedback from organizations that provide payment systems and services for financial institutions and end users.
  - On February 2, 2021, the Federal Reserve announced that the FedNow launch date would be sooner than the initially projected 2023–24 timeframe, and it now anticipates that the service will launch in 2023.

Bank Charters

- **General Outlook:** The digital transformation and fintech competition can be expected to intensify, which will lead to a continued focus on obtaining bank charters through M&A activity or de novo charter applications.
  - Fintechs seeking to obtain a bank charter are pursuing various approaches, influenced by their business priorities.
    - The benefits of a bank charter include direct access to the payment system, the ability to use deposits as a low-cost source of funds, the ability to export interest rates, exemption from or preemption of state licensing requirements and, for national banks, federal preemption of state lending laws.
    - Certain bank charter options avoid causing the bank's parent company and the parent company's controlling shareholders to be subject to the Bank Holding Company Act, but these options have their own drawbacks.
  - Receptiveness to non-traditional bank charter applications under the Biden Administration will be heavily influenced by the leadership of and senior personnel at the federal financial regulators.
  - We expect most neo-banks to enhance their partnerships with banks and most marketplace lenders to either acquire banks or be acquired by banks.
- **ILCs and Other State Charters**
  - The FDIC's approval of applications for federal deposit insurance by two de novo ILCs in 2020 suggests that an ILC charter is one charter option for fintechs.
    - In January, Japanese e-commerce and financial technology company Rakuten filed its third application for FDIC deposit insurance for a de novo ILC. Other startup fintechs have also recently applied for ILC charters and deposit insurance.
  - We expect digital currency-oriented state bank charters such as the Wyoming special purpose depository institution (**SPDI**) charter and the proposed Illinois special purpose trust charter to continue to grow, but such charters may come under SEC or prudential banking agency pressure.

Bank Charters

- **OCC Charters**
  - In early 2021, the OCC issued an interpretation of the National Bank Act that broadened the permissible fiduciary activities of national trust banks. The OCC then conditionally approved applications by two digital currency-focused state-chartered trust banks to convert into national trust banks.
  - The OCC's special purpose nondepository national bank charter for fintechs has been stalled in litigation. See the Fintech Charter section at slides 32 and 33 for further details.
  - An alternative to pursuing the special purpose nondepository national bank charter for fintechs is chartering a national bank that does not accept insured deposits or demand deposits. State bank regulators have challenged the OCC's statutory authority to grant a charter to such an institution, and it remains to be seen whether a Biden-appointed Comptroller will be supportive of issuing such charters.
  - Then-Comptroller Brooks announced in 2020 that the OCC planned to introduce "Payments Charter 1.0," which he characterized as a "national version of a state money transmission license." The prospects for this project moving forward under a Biden-appointed Comptroller are unclear.

Open Banking and Data Access

- **Potential Expansion of Open Banking**
  - In October 2020, the CFPB issued an ANPR soliciting public comments on how to implement Section 1033 of the Dodd-Frank Act, which provides for consumer rights to access financial records. It is expected that the CFPB leadership under the Biden Administration will continue this endeavor.
  - The CFBP ANPR recognizes the following:
    - The providers of consumer financial products and services generally accumulate data about consumers and their use of those products and services.
    - Consumer access to these data allow consumers to manage their financial accounts and can enhance consumers' control of their financial matters.
      - For example, consumers may benefit from authorizing third parties to access these data on their behalf and allowing those third parties to deliver new or improved financial products and services.
      - Use cases for consumer-authorized data include personal financial management, making and receiving payments, and assisting consumers with improving savings outcomes.
    - While consumer access to financial records can enable the development of innovative and beneficial consumer financial products, it can also present consumer risks.
  - The ANPR seeks comments and information on costs and benefits of consumer data access; competitive incentives; standard-setting; access scope; consumer control and privacy; and data security and accuracy.
  - For a fintech company's (Plaid) perspective on why additional CFPB regulation is needed, see Plaid's February 5, 2021 comment letter on the CFPB's ANPR, available here.

ON THE DOCKET

Fintech Charter

- **General Outlook:** The fintech charter is likely to stay bogged down in court cases for some time, even as the debate over who should regulate payments continues and becomes more urgent as real-time payments expand. There is a chance that a Biden-appointed Comptroller may modify or even reverse the OCC's position, developed during the Obama Administration and continued by the Trump Administration, or adopt a wait-and-see approach that would delay the OCC's consideration of any potential fintech charter applications. Among the modifications it might consider are more explicit commitments by fintech applicants to promote financial inclusion and comply with the CRA.
- **Where Things Stand**
  - After first proposing the fintech charter in 2016 during the Obama Administration, the OCC announced in mid-2018 that it would begin accepting applications for special purpose nondepository national bank charters from fintech companies.
  - The release of the OCC's final policy statement and accompanying licensing manual supplement was quickly followed by criticism as well as litigation from the NYDFS and the Conference of State Bank Supervisors (**CSBS**), which had previously sued the OCC over its 2016 proposal to issue such charters.
  - The OCC has had mixed success in defending the fintech charter in court, creating short-term disincentives for prospective applicants and long-term uncertainty around the charter's future. The current posture of ongoing litigation with the NYDFS makes a timely resolution on the merits unlikely.
    - In 2019, the SDNY denied the OCC's motion to dismiss the NYDFS suit and issued a final judgment setting aside the OCC's chartering authority with respect to special purpose nondepository national bank charters, finding that the OCC lacked authority under the National Bank Act to grant such charters. The OCC appealed the decision in December 2019 and the Second Circuit held oral argument on that appeal on March 9, 2021.
      - The March 9 oral argument focused largely on the OCC's argument that NYDFS lacked standing to sue given that no fintech has applied for, let alone received, a special purpose nondepository national bank charter.

Fintech Charter

- Following two previous suits by the CSBS against the OCC, both of which were dismissed by the U.S. District Court for the District of Columbia due to standing and ripeness concerns, the CSBS filed a new suit in the same court in December 2020.
  - In the suit, the CSBS challenges the authority of the OCC to grant a new special purpose nondeposit national bank charter, as well as its authority to grant a full purpose charter to a national bank that limits its deposit-taking to long-term uninsured certificates of deposit issued solely to accredited investors in minimum denominations of $250,000. The CSBS argues that the OCC is exceeding its limited chartering authority under federal statute by seeking to grant national bank charters to institutions that are not permitted to take any deposits or limit their deposit-taking to deposits that are not insured by the FDIC.
  - The suit furthermore seeks to invalidate the OCC's preemption regulations that would allow, among other things, the OCC's new charter framework to take the place of state licensing, regulation and supervision, arguing that those regulations are inconsistent with procedural requirements enacted as part of the Dodd-Frank Act.

- **What it Means**
  - The official position of the Biden Administration on the fintech charter, including whether the new principals believe that Congress, not the OCC, should decide the issue of whether a national bank can be nondepository, remains unknown for now.
    - A new Comptroller could change the OCC's litigation position in the Second Circuit so that the OCC no longer defends the nondeposit fintech charter, even though it was originally proposed by the OCC during the Obama Administration, or a full purpose national bank charter that is conditioned on the bank limiting its deposit-taking to long-term, uninsured certificates of deposit issued solely to accredited investors in minimum denominations of $250,000.
    - Alternatively, a new Comptroller could adopt a wait-and-see approach, declining to consider charter applications from fintechs for nondepository or uninsured national banks while the litigation is ongoing or until Congress weighs in on the issue, or impose more explicit obligations to promote financial inclusion or to comply with the CRA as a condition to granting such charters.
    - At stake is whether the emerging fast and real-time payments systems will be subject to 50 different state regulators or a national regulator at the federal level.

Valid-When-Made/True Lender

- **General Outlook:** In mid-2020, the OCC and the FDIC issued final rules affirming a longstanding "valid-when-made" doctrine, which the 2nd Circuit's 2015 Madden decision did not address or even acknowledge thereby creating uncertainty about the enforceability of a loan's interest rate following the assignment of that loan to a non-bank. The ultimate fate of these rules now rest with the courts.
- **OCC and FDIC Final Rules**
  - OCC rule (June 2, 2020): A loan that is legally originated by national banks and savings associations continues to be valid upon its transfer, sale, or other assignment, so that interest permissible under 12 U.S.C. § 85 or § 1468(g) before the transfer continues to be permissible after the transfer.
  - FDIC rule (June 25, 2020): Whether interest on a loan is permissible under § 27 of the FDIA is determined as of the date the loan was made and shall not be affected by the sale, assignment, or other transfer of the loan, in whole or in part.
- **Reactions and Further Developments**
  - These final rules were issued despite strong oppositions—see e.g., the November 2019 letter from six Democratic Senators, including Chairman Brown and Senator Warren, to then-Comptroller Otting and FDIC Chairman McWilliams; Representative Porter's December 2019 letter to Chairman McWilliams; January 2020 letter from the state AGs of 22 states, including NY, to then-Comptroller Otting.
  - In July 2020, state AGs from CA, IL, and NY filed a complaint challenging the final rules on the grounds, among others, that the procedures for preemption were not followed and that the rules were arbitrary, capricious, and an abuse of discretion, creating a regulatory vacuum effectively exempting some market participants from state and federal oversight, and that the OCC rule, in particular, impermissibly seeks to expand National Bank Act preemption beyond national banks.
  - In March 2021, the OCC filed a reply in support of its motion for summary judgment in the lawsuit filed by the state AGs.
    - The OCC argues that the challenged final rule is a reasonable interpretation of § 85 of the National Bank Act and should be upheld and that the AGs' opposition is "premised on the erroneous assumption that the [final rule] preempts state law and inappropriately extends § 85 to non-banks."

Valid-When-Made/True Lender

- **True Lender:** In Oct. 2020, the OCC issued a rule that the true lender in a partnership between a federally chartered bank and a fintech firm or other nonbank would be considered the bank if it funds the loans or is named as the lender in the loan documents at the date of origination. 12 C.F.R. § 7 (2020).
  - The OCC is of the view that its true lender rule should not be subject to the limitations on its authority to preempt state consumer finance laws imposed by the Dodd-Frank Act. OCC Interpretive Letter (Dec. 2020).
  - In Jan. 2021, State AGs, including from CA, NY, CO, and MA, brought a lawsuit against the rule.
  - On Mar. 25, Senator Van Hollen and other Democrats including SBC Chairman Brown introduced a Senate resolution to rescind the true lender rule through the use of the Congressional Review Act, arguing that the rule "allows predatory lenders to skirt state laws meant to curb interest rates on loans and opens the doors for these lenders to prey on vulnerable consumers." Van Hollen's Press Release (Mar. 25, 2021). Congressman Chuy Garcia is backing a House version of the resolution, according to a statement issued by Chairman Brown's office. See Reuters article.
  - It seems unlikely that the FDIC would issue a comparable true lender rule for state-chartered banks. Leonard Chanin, the FDIC Deputy to the Chairman for Consumer Protection & Innovation, stated in a PLI conference that the FDIA does not grant the same authority to the FDIC as the National Bank Act does to the OCC.

For more on this topic, please refer to our white paper, *Federal Banking Regulators Can and Should Resolve* Madden *and True Lender Developments* (Aug. 14, 2018). and to the *FinReg* blog—"*The OCC Reaffirms the Valid-When-Made Doctrine*" (June 1, 2020).

CFPB Task Force/Advisory Committee

- **Background:** In October 2019, the CFPB created a Taskforce on Federal Consumer Financial Law (the **Taskforce**) to examine ways to harmonize and modernize federal consumer financial laws.
- **Plaintiff's Claims:** The National Association of Consumer Advocates (**NACA**), the U.S. Public Interest Research Group (**US PIRG**), and Professor Kathleen Engel (collectively, the **Plaintiffs**) filed law suit pursuant to the Federal Advisory Committee Act (**FACA**) in the U.S. District court for the District of Massachusetts on June 16, 2020 alleging that the CFPB did not comply with the FACA when creating the Taskforce, specifically:
  - The CFPB did not meaningfully consult with the General Services Administration before creating the Taskforce, and did not prepare a membership balance plan as required by FACA regulations
  - The CFPB failed to give adequate advance notice of, and allowing public participation at, Taskforce meeting
  - The CFPB failed to make Taskforce records publicly available
  - The CFPB failed to comply with the FACA requirement that an advisory committee be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."
- **Partial Motion to Dismiss:** The CFPB filed a partial motion to dismiss on August 17, 2020 requesting that the Court dismiss the Plaintiff's first and fourth claims and the elements of the Plaintiff's prayer for relief that requested a declaration that the creation and establishment of the Taskforce is unlawful, the court to set aside the Taskforce's charter and appointments of Taskforce members, an injunction barring the Taskforce from meeting, advising the Director, or otherwise conducting business, and an injunction barring the Bureau from relying on or using any Taskforce recommendations or advice
  - The CFPB alleged that the Plaintiffs did not have standing and, in a brief filed after oral arguments on January 6,2021, that the January 5, 2021 release of the Taskforce's report rendered the suit moot.
- A magistrate judge **denied the CFPB's motion for partial dismissal** on February 25, 2021, ruling that the Plaintiffs had standing and that their claims were not moot because the Plaintiff's alleged injuries can be redressed by an injunction that prohibits the CFPB from relying on the report.