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Consumer Compliance Outlook®

A FEDERAL RESERVE SYSTEM PUBLICATION FOCUSING ON CONSUMER COMPLIANCE TOPICS

Inside

Promoting Effective Change Management

By Allison Burns, Senior Examiner, Federal Reserve Bank of Minneapolis

Changes to federal consumer protection laws and regulations have occurred at a rapid pace since the financial crisis. They have ranged from minor and technical changes, such as updating the inflation adjustment for the higher-priced mortgage loan appraisal exemption,[1] to major and substantive ones, such as the TILA-RESPA Integrated Disclosure (TRID) requirements.[2] Ensuring that regulations keep pace with industry changes helps promote a fair and transparent financial services marketplace.

In addition, a financial institution may periodically introduce new products or services, which may subject it to new regulatory requirements that were previously inapplicable. Depending on the nature of the changes, a financial institution might choose to engage a new third-party vendor as well. For financial institutions, changes from external and internal sources are inevitable, and creating a change-resilient compliance management program is critical to success.

The importance of change management is reflected in the updated Uniform Interagency Consumer Compliance Rating System (rating system) issued in November 2016, which specifically incorporates an evaluation of an institution's change management process into the consumer compliance rating.[3] The updated rating system recognizes the importance of an institution's consumer compliance management program and the role it plays in helping financial institutions maintain their commitment to consumer protection.

Creating a change management process can help institutions identify and appropriately respond to changes to consumer protection laws and regulations and help them effectively implement changes to products and services. It is therefore important that the board of directors and senior management have an effective, efficient, and repeatable process for managing change. This article provides a high-level overview of some of the tools financial institutions can use for managing these changes, recognizing that an effective change management system should be appropriate for an institution's size, risk profile, and the complexity of its products and services. Thus, a small community bank with less complex products may be able to successfully manage consumer compliance with a very streamlined process.

Why It Is Important to Manage Change

Inadequate processes to recognize and manage compliance risks resulting from changing regulations or business strategies can expose a financial institution to a range of potential consequences, including violations of laws and regulations, negative supervisory ratings and sanctions, monetary costs, and reputational risk.

Types of Changes That Can Raise Consumer Compliance Risks

Changes requiring a substantive response from bank management can occur both internally and externally. Some changes are within management's control, such as introducing a new product, while others are not, such as Congress enacting a new law. Further, some changes may have a

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VENDOR MANAGEMENT CONSIDERATIONS FOR FLOOD INSURANCE REQUIREMENTS*

BY DANIELLE MARTINAGE, EXAMINER, FEDERAL RESERVE BANK OF BOSTON

Violations of the flood insurance provisions of Regulation H are among the most common compliance violations cited during Federal Reserve examinations.[1] Banks are responsible for complying with the flood insurance provisions of Regulation H, but they often outsource essential functions of flood insurance responsibilities because of the complex regulatory requirements. Vendors can provide a cost-effective way for banks to utilize a third party's knowledge and expertise. However, banks should understand the legal, operational, and reputational risks associated with these relationships because banks are ultimately responsible for complying with applicable laws and regulations. It is, therefore, important for banks to carefully manage their third-party vendors.[2]

Purpose

This article discusses specific provisions of federal flood insurance requirements affecting loan origination and servicing as well as the potential risks vendors pose in these areas and sound practices to mitigate these risks. Specifically, this article reviews requirements, for commercial loans, that the contents of a building located in a special flood hazard area (SFHA) be adequately insured when both the building and the contents secure the loan. The article next examines using vendors to help comply with the requirement that a lender or servicer notify borrowers when a policy lapses or has insufficient coverage. Finally, it reviews the use of vendors for initial and life-of-loan flood insurance determinations.

Commercial Contents

Violations can occur when a bank engages vendors that lack awareness or understanding of the regulatory requirements for flood insurance. Failing to monitor the work performed by the vendor can exacerbate this risk.

The torrential downpours and flooding in the wake of Hurricane Harvey left many commercial areas in Texas under water in 2017.

* *This article previously appeared in the January 2019 issue of* FedLinks: Connecting Policy with Practice*, a Federal Reserve publication.*

Regulation H, 12 C.F.R. 208.25(c)(1), provides in relevant part that "[a] member bank shall not make, increase, extend, or renew any designated loan unless the building or mobile home and any personal property securing the loan is covered by flood insurance for the term of the loan." The current limits under the National Flood Insurance Program (NFIP) are $500,000 for nonresidential structures and $500,000 for contents located in nonresidential structures.

According to Question 39 of the Interagency Questions and Answers Regarding Flood Insurance, "flood insurance is required for a building located in the [SFHA] and any contents stored in that building."[3] More specifically, contents coverage is required when the institution has a security interest in the building and its contents and when the contents are within a building located in an SFHA. Therefore, for buildings located within an SFHA, flood insurance on the contents of the building is required if the security instrument lists the building and its contents as security for the loan. The type of instrument used to secure the collateral (for example, a mortgage or a security agreement) does not determine if flood insurance is required. Instead, any instrument creating a security interest triggers flood insurance requirements. Similarly, the lien on the property does not need to be legally perfected for the flood insurance requirements to apply. The purpose of the lien also does not matter. Whether the security interest is taken as the primary source of collateral or as an abundance of caution, the flood insurance requirements are the same.

Outside attorneys providing settlement services for commercial transactions are considered vendors; they represent an out-sourced function of the bank. In some cases, settlement attorneys are responsible for drafting, or have license to alter, the security instrument. The bank's failure to oversee this function increases the risk of violations. For example, although a bank may intend to secure the loan with real estate only, the institution's settlement attorney may include language in the security instrument that references the institution's security interest in "all inventory" or "all business assets." This broad language can create a security interest in the building's contents, triggering the requirement to obtain contents coverage. If the bank is unaware of this provision in the security agreement, the loan could close without the required flood insurance covering the contents. Further, if the bank fails to effectively monitor its portfolio of loans secured by property located in an SFHA, the contents may remain underinsured for an extended period. It is, therefore, important for the lender to carefully communicate with its outside counsel concerning the scope of the security agreement.

Force-Placed Coverage

> Banks often use third parties to monitor loans secured by property with flood insurance, including tracking policy expirations, notifying borrowers when coverage will lapse, and force placing coverage, if necessary. One common violation noted during consumer compliance examinations is the third party's failure to send a timely notice to the borrower that flood insurance coverage has lapsed. This practice may expose the bank to regulatory risk for failure to provide the required force placement notice.

Regulation H, 12 C.F.R. 208.25(g)(1), provides that, if a member bank, or a servicer acting on the bank's behalf, determines that a "designated" loan (that is, a loan secured by a building or mobile home located in an SFHA for which flood insurance is available) does not have coverage or has an insufficient amount of coverage, the bank or its servicer must notify the borrower to obtain the required amount of flood insurance. If the borrower fails to do this within 45 days after the notice is sent, the bank or servicer must force place the insurance. The bank or its servicer may charge the borrower for the cost of premiums and fees incurred in purchasing the insurance. The Biggert–Waters Flood Insurance Reform Act of 2012 permits banks to begin charging for premiums or fees incurred for coverage beginning on the date on which the flood insurance coverage lapsed or did not provide a sufficient amount of coverage.[4]

Some banks rely on vendors to track policy expirations, provide the notice that the borrower must obtain flood insurance, and force place insurance, if necessary.

As a courtesy, some vendors send notices in advance of a policy expiring to remind the borrower to renew the policy. While this is a permissible practice, a bank or its servicer is still obligated to notify borrowers to obtain coverage once it learns that a policy lapsed or the amount of coverage is insufficient.

Policies issued under the NFIP provide a 30-day grace period during which an expired policy remains in effect, provided the policyholder renews the policy within 30 days of the policy expiration date.[5] A vendor's failure to notify the borrower of a lapsed policy increases the risk the borrower will be unable to renew the NFIP policy within the 30-day grace period, potentially leading to an extended period in which the property is uninsured or to the borrower paying a higher premium for a more costly force-placed insurance policy.

Initial Flood Insurance Determination and Life-of-Loan Monitoring

> Some banks rely on vendors at loan origination to determine if a property securing the loan is located in an SFHA and to monitor if the Federal Emergency Management Agency (FEMA) changes the flood insurance rate maps for the property during the life of the loan.

Flood insurance regulations require that when a lender makes, increases, extends, or renews a designated loan, the borrower must purchase flood insurance in the required amount.[6] If a bank relies on a vendor to determine whether flood insurance is required and the vendor erroneously determines it is not, the bank could originate a loan requiring flood insurance for which it failed to require the borrower to have insurance. Not only is this failure to require flood insurance a violation of Regulation H, but, in the event of a flood, the bank's collateral could be damaged or destroyed, and the loss would not be covered by flood insurance.

Similarly, the National Flood Insurance Act directs FEMA to update flood maps every five years to reflect current conditions.[7] If a lender hires a life-of-loan vendor to monitor whether a property securing a loan is later remapped into an SFHA and the vendor communicates the map change to the lender, the lender is required to ensure that flood insurance is obtained in accordance with the regulation. If the lender or its servicer fails to act on the vendor's notification, the bank faces another violation of Regulation H. Once a lender learns that a designated loan lacks sufficient flood insurance, it must send a notice to the borrower to obtain insurance and force-place insurance within 45 days of notification, if necessary.[8]

Sound Practices

While institutions may rely on outside vendors, an institution is ultimately responsible for ensuring that outsourced activities are conducted in a safe and sound manner and comply with applicable laws and regulations. Therefore, institutions should adopt risk management processes commensurate with the scope and nature of their third-party relationships. The following are some practices that institutions may consider adopting to mitigate the risks associated with vendor management:

1. Perform a risk assessment of the activity that will be outsourced, which should be updated periodically. Supervision and Regulation (SR) Letter 13-19/Consumer Affairs (CA) CA Letter 13-21 recommend determining if outsourcing is consistent with the business strategy of the organization. If so, management should consider:
    - The benefits and risks of outsourcing the activity as well as the risk of using a vendor;
    - Whether qualified vendors are available to perform the service, and
    - Whether the institution has the ability and expertise to oversee the relationship.
2. Conduct due diligence. Vet the vendor properly to ensure that a qualified vendor is selected. Comprehensive research on the third-party vendor should include a review of its:
    - Business background, reputation, and strategy,
    - Financial performance and condition, and
    - Operations and internal controls.
3. Include performance expectations in the service contract. A contract memorializes the parties' obligations. Clearly setting forth performance expectations will help avoid misunderstandings.
4. Conduct oversight and monitoring of third-party vendors to ensure they are operating effectively and in accordance with bank policies and regulatory requirements. The oversight process, including the level and frequency of management reporting, should be risk focused.

Specific issues or questions regarding flood insurance should be discussed with your primary regulator. ■

Endnotes

[1] The federal agencies' implementing regulations for the Flood Disaster Protection Act of 1973 are found at 12 C.F.R. 208.25 (Regulation H) for institutions supervised by the Federal Reserve Board (Board), 12 C.F.R. part 22 for institutions supervised by the Office of the Comptroller of the Currency, 12 C.F.R. part 339 for institutions supervised by the Federal Deposit Insurance Corporation, 12 C.F.R. part 614 (subpart S) for institutions supervised by the Farm Credit Administration, and 12 C.F.R. part 760 for institutions supervised by the National Credit Union Administration. This article refers to the flood insurance requirements of the Board's Regulation H, but the other agencies' regulations are substantially similar.

[2] The Federal Reserve Board has issued guidance on managing vendor risk for the institutions it supervises. See Consumer Affairs Letter 13-21, "Guidance on Managing Outsourcing Risk" (December 5, 2013), available at www.federalreserve.gov/supervisionreg/srletters/sr1319.htm.

[3] See "Interagency Questions and Answers Regarding Flood Insurance," 74 *Fed. Reg.* 35914 (July 21, 2009).

[4] See 42 U.S.C. 4012A(e)(2); 12 C.F.R. 208.25(g)(1).

[5] See https://www.fema.gov/fema-common-faq/expired-flood-policy-grace-period.

[6] See 12 C.F.R. 208.25(c).

[7] See 42 U.S.C. 4101(e).

[8] See 12 C.F.R. 208.25(c)(1).

Promoting Effective Change Management

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domino effect. For example, consumer demands or competitive factors may result in a financial institution offering new products or services.[4] The following discussion identifies some of the significant areas in which managing change is important.

Legal Changes

New laws and regulations can affect the compliance requirements for a financial institution's products and services and the daily duties of its staff. These changes can vary from small, technical updates to larger, more complex changes. Regulatory changes can come from Congress, which can enact new consumer protection laws or amend existing ones, and from federal agencies directed by Congress to enact implementing regulations for these laws. Agencies can also issue supervisory guidance to clarify supervisory expectations and approaches with respect to those laws. For example, the Federal Reserve Board issued guidance in late 2018 to help clarify the key fields that examiners will consider in determining the accuracy of Home Mortgage Disclosure Act (HMDA) data under amendments to Regulation C.

Products and Services Changes

Evaluating and updating product offerings and business strategies is critical to a financial institution's success. Financial institutions want to be responsive to evolving consumer needs and expectations and be positioned to enter new markets and product areas to further their strategic plans. An agile and robust consumer compliance management program can help ensure the smooth launching and execution of new business strategies, including the effective management of consumer compliance risks associated with these strategies.

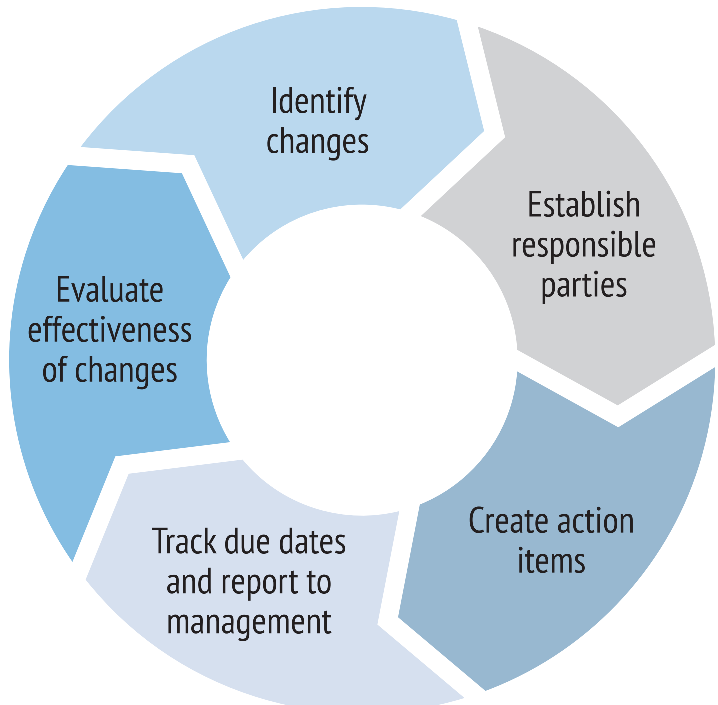
Technology Changes

Finally, it is important to highlight the significance of managing information technology changes at financial institutions, such as system conversions or leveraging fintech developments. These changes may also involve new third-party relationships.[5]

Change management is one of the assessment factors under the FFIEC's Consumer Compliance Rating System.

Technology enhancements and innovations are common and important for the current business models of most community financial institutions. Because most financial institution operations and internal controls are based on automated systems, appropriate management of technology updates and changes can help keep the institution running smoothly and complying with laws and regulations. It is important to work with vendors to effectively implement changes. Although a financial institution may hire a reliable vendor, the institution remains responsible for ensuring that the output from vendor-provided systems and services meets regulatory requirements.

Change Management Process



Elements of an Effective Change Management Process

Change management is one of the assessment factors under the Federal Financial Institutions Examination Council (FFIEC)'s Consumer Compliance Rating System. This factor notes that effective change management processes involve a timely and adequate management response to changes in applicable laws and regulations, market conditions, and products and services offered, by evaluating the change and implementing responses across impacted lines of business. The factor includes evaluating product and service changes both before and after implementing the changes.

The Federal Reserve's Community Bank Risk-Focused Consumer Compliance Supervision Program also underscores the importance of the change management process. The program notes that, "Change management should be a structured and disciplined process that is repeatable since change can always be expected."[6]

Common elements of an effective change management process are highlighted here. It is important to note that the formality of the process is scalable, and how financial institutions execute the process may vary depending on the size, structure, and complexity of the institution, including the resources allocated by the board and senior management and the magnitude and urgency in making the change. While every financial institution is expected to have an effective process for ensuring a timely and adequate response to change affecting the financial institution's compliance with consumer laws and regulations, the nature of an effective program will vary.

Identify Changes

The first component of an effective change management system is the ability of the board and senior management to monitor changes and the associated risks to the institution.[7] Financial institution personnel, such as the compliance officer and staff and other parties (vendors possessing the necessary subject matter expertise), can assist the board and senior management with (1) identifying statutory/regulatory changes that affect the financial institution's operations and (2) determining how changes to the institution's products and services would impact the financial institution's consumer compliance obligations.

Creating a change management process can help institutions identify and appropriately respond to changes to consumer protection laws and regulations.

How an institution monitors legal and regulatory change can vary by institution depending on the size and complexity of the organization, the products and services offered, and the available resources. For example, some institutions may engage vendors or use industry tools such as regulatory calendars to keep track of upcoming rule changes, while other institutions may have more robust internal monitoring systems that may be cross-functional, involving business lines, compliance, and legal departments.

When a statutory or regulatory change occurs, the board of directors should help ensure the financial institution complies with the change. Here are some questions that may be helpful for the board and senior management to consider.

What — What is this regulation/guidance? What is the change and the purpose of the change?

Impact — What is the impact on our institution? What products does it affect, if any? Do we require system upgrades? What is the relative level of difficulty associated with this new/changed regulation? What will be needed to update systems and train staff?

Cost — What is the estimated cost to implement the change, including training and changes to systems and forms?

Plan — What is management's plan for implementing and monitoring compliance?

The repeatable change management process outlined in this article may help compliance management staff respond to these questions.

Sometimes change originates from within the organization. In its First Quarter 2013 issue, *Community Banking Connections* published the article "Considerations When Introducing a New Product or Service at a Community Bank," which discussed the important role of management and the board of directors in successfully managing compliance risks when deciding to launch new products or initiatives. In particular, management and the board should consider if a proposed product change aligns with the financial institution's strategic direction. The financial institution's capacity to make the change should also be evaluated, including the costs to implement the change, and whether the financial institution has the necessary expertise or will instead need to engage third parties. Importantly, a financial institution should consider the costs and benefits to both the financial institution and its customers. Successful management teams ensure that new products do not benefit the financial institution at the expense of its customers. Both business line and compliance experts should be engaged as these strategic factors are explored. Considering these strategic factors may help ensure a successful implementation.

Establish Responsible Parties

Managing change effectively is a team sport. Depending on the individual financial institution, this could involve management and staff from all affected functions — potentially including compliance, accounting, risk, internal audit, and business line management — to review and recommend a proposal for managing change for senior management and/or board approval that clearly articulates expected results.[8] Often an individual or small group will be assigned the lead for managing the change, the particular governance structure often dictated by the nature of the change. Regardless, successful development of a management plan is typically a collaborative effort that includes all functions that have a role in implementing the change.

Create Action Items

The responsible parties could consider creating a road map and timeline for the steps that need to be executed to ensure that the change is implemented effectively. Some actions will need to be sequenced while others may be performed contemporaneously.

Action items could include:

- researching the change (beyond any strategic factors already considered),

- evaluating its impact on specific processes (including software and vendors),
- creating new tools for staff (such as checklists or tip sheets),
- updating policies and procedures as needed, and developing training for staff.

Testing the implemented change, which could include dummy transactions or in-house test subjects, would most effectively occur before the change goes live. This step is particularly important when a change involves technology, to ensure that functionality and disclosures correctly capture the institution's practices and related regulatory requirements. As action items are created, noting and documenting the party responsible for each item will help avoid gaps. Senior management and the board may want to approve a budget as necessary for implementing the change, including the specific resources needed.

Track Due Dates and Report to Management

Creating and tracking due dates can help promote accountability for staff. Depending upon the magnitude of the change, appropriate approval and signoff may be associated with specific steps and documented as part of the tracking process. Further, when changes are significant, tracking progress forms the basis for reporting to senior management and the board of directors. Such reporting reinforces accountability and allows management and the board to remain engaged in the process.

Evaluate the Effectiveness of Changes Post-Implementation

The change management process does not end when the change is implemented, because management also needs to ensure the changes were effectively implemented — for example, using internal and external audits or more targeted reviews. The particular approach may vary depending on the particular change but would typically involve timely testing by compliance or audit, or a combination of both. It may also include corrective action by the business lines if the compliance or audit review identifies weaknesses in the implementation process.

Change Management Example

Here is an example of a scenario in which an effective change management process can help the institution manage its risks. The example is illustrative and not intended to exhaust all of the factors or steps to consider in the change management process.

Example: On June 23, 2018, the permanent extension of the Protecting Tenants at Foreclosure Act (PTFA) became effective (the law had expired at the end of 2014).[9] The PTFA protects renters whose homes are in foreclosure by allowing them to remain in their homes for the greater of 90 days or the term of their lease. In this scenario, an effective change management process might:

- *Identify the Change*: The compliance officer would have a month to identify the change through the financial institution's established risk monitoring processes and implement it because the law was signed by the President on May 24, 2018, one month before its effective date.

The change management process does not end when the change is implemented because management also needs to ensure the changes were effectively implemented.

- *Establish Responsible Parties*: Responsible parties could include the compliance officer and business line representation, such as a residential real estate lender or manager. It could also include input by the staff responsible for sending out foreclosure notices.
- *Create Action Items*: Potential action items include reading the PFTA and understanding its requirements, as well as evaluating how this change would affect the financial institution's policies and procedures, software, vendors, and internal controls. The financial institution may also want to develop training for financial institution staff and document and obtain approvals for any costs associated with implementing these actions.
- *Track Due Dates and Report to Management*: In this case, since the implementation date was 30 days after signing, the compliance officer would want to ensure the institution completes research, implementation, and testing prior to June 23, 2018. The compliance officer may want to provide senior management and the board with status updates on the implementation process and whether testing shows that implementation efforts have been successful.
- *Evaluate the Effectiveness of Changes Post-Implementation*: The financial institution can evaluate the effectiveness of its changes within a reasonable period of time after implementation, with the specific timing dependent on the significance of the change. In this case, the compliance function could incorporate testing of the change once a sufficient volume of transactions allows for such testing. Audit may consider incorporating testing for the change into its audit schedule or reviewing the adequacy of compliance testing.

Conclusion

Consumer banking is a dynamic industry, subject to both external and internal changes, which have occurred more frequently following the financial crisis and advances in technology to deliver financial products and services. To help manage the risks of these changes, financial institution management should recognize the potential benefits of a change management process. We have observed that financial institutions with successful change management programs employ a repeatable process to ensure changes are implemented consistently and appropriately. The complexity of the change management process should be scalable to the size of the institution and commensurate with the risks of its products and services. Any specific issues or questions should be discussed with your primary regulator. ■

Endnotes

[1] "Appraisals for Higher-Priced Mortgage Loans Exemption Threshold," 83 *Fed. Reg.* 59272 (November 23, 2018).

[2] "Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)," 78 *Fed. Reg.* 80225 (December 31, 2013).

[3] "Uniform Interagency Consumer Compliance Rating System," 81 *Fed. Reg.* 79473, 79481 (November 14, 2016).

[4] See Community Bank Risk-Focused Consumer Compliance Supervision Program (RFS), p. 19, https://www.federalreserve.gov/supervisionreg/caletters/Attachment_CA_13-19_Risk-focused_Supervision_Program_Document.pdf.

[5] See Carol Evans, "Keeping Fintech Fair: Thinking About Fair Lending and UDAP Risks," *Consumer Compliance Outlook* (Second Issue 2017); Teresa Curran, "Fintech: Balancing the Promise and Risks of Innovation," *Consumer Compliance Outlook* (Third Issue 2016).

[6] See RFS, p. 23.

[7] See "Uniform Interagency Consumer Compliance Rating System," 81 *Fed. Reg.* at 79478.

[8] See RFS, p. 23.

[9] See Federal Reserve Board CA Letter 18-4, "Restoration of the Protecting Tenants at Foreclosure Act" (June 22, 2018).

Outlook Live

The Federal Reserve System's webinar series on consumer compliance topics.

The Federal Reserve System regularly conducts Outlook Live webinars on consumer compliance topics. Here are the archived webinars from 2017, 2018, and 2019, which are available free of charge. You can view the webinars and presentation slides on the Outlook Live archive page. To receive email notifications of future Outlook Live webinars, register at http://bit.ly/outlook-live.

Date	Webinar	Description
6/18/19	Interagency Flood Insurance Update on Private Flood Insurance Rule	Presenters from the banking agencies explain recent updates to their flood insurance regulations concerning acceptance of private flood insurance policies.
12/3/18	2018 Interagency Fair Lending Hot Topics	Presenters from six federal agencies discuss a variety of fair lending issues and other hot topics, including redlining, pricing risks, and marital status discrimination.
11/1/18	Healthy Communities: Opportunities for CRA Collaboration	Presenters from the Federal Reserve System Community Development Staff discuss the intersection of community and economic development, public health, and health care.
8/29/18	Complaints as a Supervisory and Risk Management Tool	This session explains what an effective complaints management system looks like and explored a complaints management model that can be used by community banks.
7/16/18	Keeping Fintech Fair: Thinking About Fair Lending and UDAP Risks	This session discusses fair lending and unfair or deceptive acts or practices (UDAP) risks that may arise as financial institutions adopt new technologies, with a focus on alternative data.
11/16/17	2017 Interagency Fair Lending Hot Topics	This session focuses on the following fair lending topics: HMDA (Home Mortgage Disclosure Act) Changes and Fair Lending, Compliance Management for Consumer Loans, Denial Investigations and Cases, and Special Purpose Credit Programs.

News from Washington: Regulatory Updates*

The Consumer Financial Protection Bureau (Bureau) issues its spring 2019 regulatory agenda. On May 22, 2019, the Bureau released its spring 2019 regulatory agenda, as part of the spring 2019 Unified Agenda of Federal Regulatory and Deregulatory Actions. The Bureau's spring 2019 agenda lists the regulatory matters that the agency reasonably anticipates having under consideration from May 1, 2019, to April 30, 2020, including initiatives to implement statutory requirements and to address the potential sunset of statutory and regulatory provisions. It includes:

- Rulemaking to implement the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018, such as extending the Truth in Lending Act (TILA)/Regulation Z ability-to-repay requirements and related civil liability provisions to residential "Property Assessed Clean Energy" (PACE) loans and providing a TILA/Regulation Z exemption from higher-priced mortgage loan escrow account requirements to certain creditors with assets of $10 billion or less that meet other specific criteria.
- Rulemaking to implement the requirements of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act), such as revisiting its requirement to engage in Equal Credit Opportunity Act/Regulation B rulemaking to require financial institutions to collect, report, and make public any information about credit applications from women-owned, minority-owned, and small businesses.
- Rulemaking in connection with the July 2020 expiration of an exception to Electronic Fund Transfer Act/Regulation E international remittance transfer disclosure requirements, which allows insured depository institutions and insured credit unions to estimate certain pricing information.

Certain other Bureau rulemaking activities referenced in its spring 2019 agenda relating to the Fair Debt Collection Practices Act, the Home Mortgage Disclosure Act (HMDA)/Regulation C, and payday, vehicle title, and certain high-cost installment loans, are among the items discussed next.

The Bureau issues a Notice of Proposed Rulemaking (NPR) to implement the Fair Debt Collection Practices Act (FDCPA). On May 21, 2019, the Bureau published an NPR in the *Federal Register* to implement the FDCPA. Congress enacted the FDCPA in 1977 in "response to 'abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors.''' However, before Congress enacted the Dodd–Frank Act in 2010, the FDCPA prohibited the issuance of implementing regulations. The Dodd–Frank Act amended the statute to provide discretionary rulemaking authority to the Bureau (15 U.S.C. §1692l(d)). To implement the FDCPA, the proposal would, among other things:

- Provide model forms that describe how consumers can respond to debt collection notices and clarify the statute's requirements for disputing debts;
- Clarify the statute's requirements for debt collector communications, including limiting the number of calls that debt collectors can make to a particular person;
- Specify additional information that collectors must provide about a debt when communicating with consumers;
- Prohibit suits and threats of suit on time-barred debts; and
- Require debt collectors to communicate with a consumer about a debt before reporting it to a consumer reporting agency.

The comment period closed on August 19, 2019.

The Bureau seeks public comment under the Regulatory Flexibility Act (RFA) on the economic effect of its overdraft rule on small entities. On May 15, 2019, the Bureau issued a notice under §610 of the RFA seeking comments on the Regulation E overdraft rule (12 C.F.R. §1005.17). Section 610 of the RFA requires federal administrative agencies to publish a plan for the periodic review of the rules issued by the agency that have a significant economic impact on a substantial number of small entities. Under the plan, the Bureau intends to initiate a §610 review approximately nine years after a rule's publication and complete each review within 10 years of a rule's publication in the *Federal Register*.

In 2009, the Federal Reserve Board (Board) issued the overdraft rule to prohibit financial institutions from imposing overdraft fees for automated teller machine (ATM) and one-time debit card transactions unless their customers opted in for the service after receiving a required disclosure about the terms of the overdraft program. As part of its §610 review of the overdraft rule, the Bureau sought comment on: (1) the nature and extent of the economic effects of the overdraft rule on small entities; (2) how the Bureau could reduce the costs of the rule on small entities; and (3) any other relevant information. The comment period on the overdraft rule closed on July 1, while the comment period of the Bureau's §610 review plan closed on July 15.

The Federal Reserve Board (Board) issues Supervision and Regulation (SR) Letter 19-6 transmitting a new Federal Financial Institutions Examination Council (FFIEC) policy statement on developing Reports of Examination (ROE). On March 11, 2019, the Board issued SR Letter 19-6 transmitting the FFIEC's new Interagency Statement on the Report of Examination, which replaces the 1993 Interagency Policy Statement on the Uniform Core Report of Examination applicable to commercial bank exams. The new policy statement uses a principles-based approach to developing ROEs to better promote consistency while providing supervisors the flexibility to tailor their assessments as appropriate for financial institutions' sizes, activities, risk profiles, and financial and managerial conditions.

The Bureau proposes to exempt more lenders from HMDA's data collection and reporting requirements and separately issues an advanced notice of proposed rulemaking (ANPR) seeking feedback on the costs and benefits of reporting the expanded data set required by the Bureau's rulemaking in 2015 (2015 HMDA Rule). On May 13, 2019, the Bureau issued a notice of proposal NPR to increase the loan thresholds used to determine when lenders are covered by HMDA and must report data on closed-end loans or open-end lines of credit. The proposal seeks to increase the loan threshold

*Links to the announcements are available in the online version of *Outlook* at consumercomplianceoutlook.org used to determine when a lender must collect and report data on closed-end mortgage loans (in addition to the asset size and geographic criteria) from the current 25 to either 50 or 100 closed-end mortgage loans in each of the two prior years. The Bureau proposes the 50 or 100 loan threshold in the alternative and seeks comment on which threshold, or any higher threshold, would be optimal.

The Bureau finds that increasing the closed-end mortgage threshold to 50 loans would relieve approximately 745 depository institutions from HMDA's collection and reporting requirements, and increasing it to 100 loans would relieve approximately 1,682 depository institutions of the 4,263 reporters currently covered by HMDA. The proposal would also extend the current reporting threshold for open-end lines of credit, which is currently set at 500 and scheduled to expire on January 1, 2020, until January 1, 2022, and then permanently set the threshold at 200 open-end lines of credit after that date. The Bureau proposes an effective date of January 1, 2020.

The ANPR solicits information on whether to make changes to data points added or revised by the Bureau's 2015 HMDA Rule. The Bureau seeks this feedback to confirm, in part, that the data requirements established by the 2015 HMDA rule "appropriately balance the benefits and burdens associated with data reporting." This information will help the Bureau determine whether the burden associated with the collection and reporting of certain data is justified by the benefit of having such data. The ANPR also seeks comment on whether to continue coverage and reporting of business or commercial-purpose loans made to a nonnatural person (for example, a corporation, partnership, or trust) and secured by a multifamily dwelling.

The Bureau seeks comment on the following new data points added by the Dodd–Frank Act:

- Property address
- Universal loan identifier
- Age
- Rate spread for all loans
- Credit score
- Total loan cost or total points and fees
- Prepayment penalty term
- Loan term
- Introductory rate period
- Nonamortizing features
- Property value
- Application channel
- Mortgage loan originator identifier.

The Bureau also seeks comment on data points added pursuant to its discretional authority:

- Reasons for denial
- Origination charges
- Discount points
- Lender credits
- Interest rate
- Debt-to-income and combined loan-to-value ratio
- Manufactured home
- Secured property type
- Land property
- Multifamily affordable units
- Automated underwriting system
- Reverse mortgage, open-end line of credit, or business or commercial purpose flags.

Last, the Bureau sought comment on the revised data points requiring additional information:

- Loan purpose
- Occupancy type
- Ethnicity
- Race
- Legal entity identifier.

The comment period for the NPR closed on June 12, 2019, while the comment period for the ANPR closed on July 8, 2019.

The Bureau issued a rulemaking proposal to eliminate the mandatory underwriting provisions of its final rule regulating payday and other certain loans (payday loan rule) and a final rule to delay the compliance date of certain provisions of the payday rule. On February 14, 2019, the Bureau issued a rulemaking proposal to rescind the mandatory underwriting provisions of its November 2017 final rule governing payday, vehicle title, and certain high-cost installment loans (payday loan rule). Under the mandatory underwriting provisions, making a covered short-term or longer-term balloon payment loan, including a payday or vehicle title loan, without reasonably determining that a consumer has the ability to repay the loan would be considered an unfair and abusive practice. The comment period closed on May 15, 2019.

Because the Bureau is reconsidering the payday loan rule, it also issued a final rule to delay the compliance date for the mandatory underwriting provisions from August 19, 2019, to November 19, 2020. The Bureau clarified that the delay would not affect the payment provisions of the payday loan rule, which are still subject to the August 19, 2019, compliance date. Under these provisions, after a lender makes two consecutive withdrawal attempts from the consumer's financial account to repay the loan, and those attempts fail, the lender cannot attempt another withdrawal from the same account unless the lender obtains the consumer's new and specific authorization to make further withdrawals. However, the payday loan rule is the subject of ongoing litigation, and a district court has stayed the compliance date for the entire rule until further action by the court.

FINTECH

A New York federal court ruling on a legal challenge to the Office of the Comptroller of the Currency's fintech charter interprets the National Bank Act (NBA) to limit national bank charters to depository institutions. *Vullo v. OCC*, 378 F. Supp. 3d 271 (S.D.N.Y. 2019). In July 2018, the Office of the Comptroller of Currency (OCC) began accepting Special Purpose National Bank charter applications from nondepository fintech companies. In response, the New York State Department of Financial Services (DFS) filed a lawsuit alleging that the charter was impermissible because the NBA only permits the OCC to charter *depository* institutions. The DFS expressed concern in its complaint that a Special Purpose National Bank charter would upset the balance of the dual banking system by preempting DFS's supervision of OCC-chartered companies and undermine its ability to regulate and protect its financial markets and consumers. The OCC filed a motion to dismiss for lack of jurisdiction or, in the alternative, failure to state a claim, challenging the DFS's legal argument that the NBA limits the OCC's chartering authority to depository institutions. The OCC argued that this statutory phrase authorizing the OCC to charter institutions engaged in the "business of banking" is ambiguous, and therefore, the OCC is entitled to deference in interpreting it under the Supreme Court's opinion in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The OCC interpreted this phrase broadly to include nondepository institutions because receiving deposits is not explicitly required in the NBA text.

In denying OCC's motion to dismiss the case, the district court rejected this argument, finding that *Chevron*'s deference to the OCC's interpretation of the "business of banking" under the NBA was unwarranted. According to the court, as used in the NBA, the "business of banking" "unambiguously requires receiving deposits as an aspect of the business." Thus, the court held, in light of the plain language, the broader context of the statute, and the legislative history, "only depository institutions are eligible to receive national bank charters from OCC."

UNFAIR AND DECEPTIVE ACTS AND PRACTICES (UDAP)

The Ninth Circuit holds that a payday lender's Truth in Lending Act (TILA) disclosures were deceptive under §5 of the Federal Trade Commission Act (FTC Act) because, while technically correct, they were misleading. *FTC v. AMG Capital Mgmt., LLC,* 910 F.3d 417 (9th Cir. 2018). Section 5 of the FTC Act (15 U.S.C. §45) prohibits "unfair or deceptive acts or practices." The defendant offered payday loans to consumers online. Under the loans' terms and conditions — disclosed in fine print below the TILA disclosures — the Loan Note would automatically renew, and the borrower would accrue new finance charges, unless the borrower followed complex steps to "decline" the renewal within a brief deadline before the next scheduled payment. At the end of the application process, the defendant provided the "Loan Note and Disclosure," which contained the TILA disclosures. The TILA disclosures were made based on the assumption that the consumer would make only one payment to satisfy the loan by taking steps to decline automatic renewal.

The FTC alleged that the Loan Note violated §5 of the FTC Act because the TILA disclosures contained terms that did not reflect what was actually enforced. On appeal, the Ninth Circuit noted that §5 prohibits representations whose "net impression" would be likely to mislead — even if such impression "also contains truthful disclosures." Applying this standard, the court found that the Loan Note was deceptive. The court explained that the TILA disclosures suggested the loan would have a single term, when the default option actually was for the loan to renew automatically, and the fine print contained additional misleading statements that did not cure the "net impression" of the TILA disclosures. The court also rejected the lender's argument that the FTC didn't establish actual deception, noting that "[p]roof of actual deception is unnecessary to establish a violation" and a violation occurs if the act or practice "possess[es] a tendency to deceive."

FAIR HOUSING ACT (FHA)

The Eleventh Circuit allows the City of Miami to pursue a claim that it suffered a loss of tax revenue as a result of two lenders' discriminatory lending practices. *City of Miami v. Wells Fargo*, 923 F.3d 1260 (11th Cir. 2019). This appeal was on remand from the U.S. Supreme Court's decision in *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296 (2017). The City of Miami's underlying lawsuit alleged two lenders "carried on discriminatory lending practices that intentionally targeted black and Latino Miami residents for predatory loans" and that these practices increased foreclosures, diminished property values, reduced tax revenue, and increased municipal expenditures, for which the city was seeking compensatory damages.

The Supreme Court held that the city had legal standing to pursue the lawsuit under the FHA if it could establish "some direct relation between the injury asserted and the injurious conduct alleged." The city alleged the violations caused two types of damages: loss of tax revenue and increased cost of providing municipal services. The Eleventh Circuit found "some direct relation" between the city's tax-revenue injuries and the banks' alleged violations of the FHA, and therefore, the city could proceed with those claims. However, the court agreed with the district court that the city failed to adequately plead that the alleged conduct bore a direct relationship to its increased municipal expenditure injury and that it had not presented any way to ascertain which expenditures could be directly tied to the actions of the banks. The case was remanded to the district court.

FAIR CREDIT REPORTING ACT

The Third and Eleventh Circuits issue differing opinions on whether consumers have suffered a "concrete" injury from certain technical violations of the Fair and Accurate Credit Transactions Act (FACTA) amendments to the Fair Credit Reporting Act (FCRA) sufficient to give them standing to sue. *Kamal v. J. Crew Group, Inc.,* 918 F. 3d 102 (3d Cir. 2019) and *Muransky v. Godiva Chocolatier, Inc.,* 918 F. 3d 102 (11th Cir. 2019), *vacating Muransky v. Godiva Chocolatier, Inc.*, 905 F. 3d 1200 (11th Cir. 2018). Congress enacted FACTA as an amendment to the FCRA to help prevent credit card and identity theft by prohibiting merchants that accept electronic payment from printing more than the last five digits of card numbers or the expiration date on receipts. 15 U.S.C. §1681c(g). Responding to a rise in litigation against merchants who printed either too many card digits or card expiration dates on their receipts, Congress enacted the Credit and Debit Card Receipt Clarification Act (Clarification Act), which provides that merchants who printed the expiration dates without printing too many digits, did not violate FACTA amendments. Recent FACTA litigation concerns whether plaintiffs who have received printed receipts displaying more than the last five credit card digits but have not had their identities compromised have Article III standing to sue under the Supreme Court's decision in *Spokeo, Inc., v. Robins,* 136 S. Ct. 1540 (2016), which requires that plaintiffs must have suffered a "concrete" and particularized injury-in-fact.

In *Kamal*, the plaintiff alleged that the retailer J. Crew willfully violated the FCRA's FACTA amendments by printing three separate receipts displaying both the first six and last four digits of his credit card number. The plaintiff argued in district court that, while no one beside himself and the cashier saw the receipts nor was his identity stolen or his credit card number misappropriated, the printing of prohibited information and the increased risk of identity theft are concrete harms. The Third Circuit disagreed, holding that, absent disclosure of the card information to a third party, J. Crew's technical and procedural violation of FACTA did not amount to an actual injury having a "close relationship" to common law torts such as breach-of-confidence. The Third Circuit also found that, absent third-party disclosure or the disclosure of additional data that would make risk of identity theft less speculative, the technical violation did not materially increase the risk of an actual injury as necessary to satisfy the concreteness requirement of *Spokeo*. The Third Circuit further considered the Clarification Act to support the conclusion that not all procedural violations of FACTA amount to a "concrete" injury. The Third Circuit also indicated that the majority of circuits have reached similar conclusions about standing and disagreed with the Eleventh Circuit's since-vacated 2018 holding (discussed next) that printing the first six digits itself was a concrete injury because it is closely related to a breach of confidence under common law. The Third Circuit found otherwise since no third party accessed Kamal's confidential information. Accordingly, the court affirmed the district court's judgment that Kamal lacked standing but remanded the case to be dismissed without prejudice.

In contrast, the Eleventh Circuit's 2019 *Muransky* opinion, which vacated its 2018 opinion, held that the plaintiff had established the same FACTA violation and was a "concrete" injury for standing purposes because it both increased the risk of identity theft and itself created the actual injury of a breach-of-confidence. The Eleventh Circuit rejected the Third Circuit's analysis of the Clarification Act, finding that, instead of undermining the argument that the truncation requirement is a nonconcrete procedural requirement, the act reflects Congress's judgment that the truncation requirement is "necessary to prevent the risk of identity theft." The court found suffering a heightened risk of identity theft as a result of a FACTA violation is a concrete injury. The Eleventh Circuit reasoned that Congress adapted FACTA in part to minimize the risk of harm to a concrete interest and thus any violation of a FACTA procedure, even if the risk of actual injury is only marginally increased, confers standing. Accordingly, the court affirmed the district court's approval of the class-action settlement. The Eleventh Circuit also found that printing the additional credit card information was an actual injury that closely resembles the common law breach-of-confidence tort, even if there was no actual disclosure to a third party.

The Ninth Circuit holds that when employers provide the FCRA job application disclosure, they cannot include any other disclosures and must use clear language. *Gilberg v. Cal. Check Cashing Stores, LLC,* 913 F.3d 1169 (9th Cir. 2019). Section 604(b)(2)(A) of the FCRA generally provides that a consumer report may not be obtained for employment purposes unless a "clear and conspicuous disclosure," in a document that consists "solely of the disclosure," has been provided to the consumer and the consumer has provided written authorization to obtain the report. 15 U.S.C. 1681b(b)(2)(A). In a prior case, *Syed v. M-I, LLC*, 853 F.3d 492 (9th Cir. 2017), the Ninth Circuit held that a disclosure document containing a liability waiver in the same document as the required FCRA disclosure violated the FCRA's standalone disclosure requirement. In *Gilberg*, the court held that "extraneous information relating to various state disclosure requirements" included with the FCRA disclosure also violates the standalone disclosure requirement. The court also found that the employer violated the FCRA's requirement to provide a clear and conspicuous disclosure because it was not "reasonably understandable." The court found that the disclosure used language that a reasonable person would not understand and combined federal and state disclosures in a confusing manner.

*Links to the court opinions are available in the online version of *Outlook* at consumercomplianceoutlook.org

Federal Reserve Board Consumer Affairs Letters for 2017-2019

Consumer Affairs (CA) Letters address significant policy and procedural matters related to the Federal Reserve System's consumer compliance supervisory responsibilities. CA Letters are numbered sequentially by year. For example, the first letter issued in 2019 is numbered CA 19-1. Letters that have been superseded or contain confidential supervisory information are not included.

CA 19-9/SR 19-10*	Final Rule Revising the Board's Delegation Rules for Certain Types of Applications, Notices, and Requests
CA 19-8	Interagency Examination Procedures for Regulation X
CA 19-7	Revised Interagency Examination Procedures for Regulation Z
CA 19-6	Revised Interagency Examination Procedures for Regulation E
CA 19-5	Revised Home Mortgage Disclosure Act Examination Procedures
CA 19-4	Revised "A Guide to HMDA Reporting: Getting It Right!"
CA 19-3/SR 19-4	Supervisory Rating System for Holding Companies with Total Consolidated Assets Less Than $100 Billion
CA 19-2/SR 19-3	Large Financial Institution (LFI) Rating System
CA 19-1	New Markets Tax Credits and Public Welfare Investments
CA 18-9	Designated Home Mortgage Disclosure Act Key Data Fields
CA 18-8	Revised Interagency Examination Procedures for Regulation CC
CA 18-7/SR 18-5	Interagency Statement Clarifying the Role of Supervisory Guidance
CA 18-6	Statement on the Implementation of the Economic Growth, Regulatory Relief, and Consumer Protection Act Amendments to the Home Mortgage Disclosure Act
CA 18-5/SR 18-4	Policy Statement on Interagency Notification of Formal Enforcement Actions
CA 18-4	Restoration of the Protecting Tenants at Foreclosure Act
CA 18-3	Revised Interagency Examination Procedures for Regulation X and Regulation Z
CA 18-2	Revised "A Guide to HMDA Reporting: Getting It Right!"
CA 18-1	CRA Consideration for Community Development Activities in the U.S. Virgin Islands and Puerto Rico Following Hurricane Maria
CA 17-4	Expectations for Supervised Institutions Regarding Amended Regulation C
CA 17-3	Designated Home Mortgage Disclosure Act Key Data Fields
CA 17-2	Revised Interagency Home Mortgage Disclosure Act Sampling, Verification, and Resubmission Procedures
CA 17-1/SR 17-6	Overview of the Federal Reserve's Supervisory Education Programs

* In some cases, CA Letters are issued jointly with the Federal Reserve's Banking Supervision and Regulation Division. Letters issued by that division are commonly known as SR Letters, which address significant policy and procedural matters related to the Federal Reserve System's supervisory responsibilities.

Regulatory Calendar

Effective Date†	Implementing Regulation	Regulatory Change
11/19/2020	12 C.F.R. Part 1041	Final rule to delay compliance date for mandatory underwriting provisions of the payday lending rule
7/1/2020 (most provisions)	Reg. CC	Final rule implementing required adjustments to the Expedited Funds Availability Act's (EFAA) dollar amounts
*	Reg. C	Extension of comment period to Oct. 15, 2019 for advanced notice of rulemaking proposal to modify HMDA data points and coverage
*	Reg. C	Proposed rule to amend to change the HMDA reporting thresholds for closed-end and open-end loans
*	Reg. C	Advanced notice of proposed rulemaking to eliminate some HMDA data fields
*	Reg. F	Proposed rule to implement the Fair Debt Collection Practices Act
4/1/2019	Regs. Z and E	Technical specifications for submissions to the Prepaid Account Agreements Database
*	Reg. Z	Advanced notice of proposed rulemaking to solicit information related to residential Property Assessed Clean Energy (PACE) financing
1/31/2019	Reg. C	Final rule adjusting asset-size threshold for exemption from HMDA reporting
1/31/2019	Reg. V	Final rule adjusting the maximum dollar amount a consumer reporting agency can charge under the Fair Credit Reporting Act for consumer disclosures
1/31/2019	Reg. Z	Final rule adjusting asset-size threshold to qualify for small creditor exemptions
*	Reg. CC	Proposed rule to adjust the calculation methodology used under the EFAA
1/1/2019	Regs. Z and M	Final rule adjusting dollar thresholds for determining exempt consumer credit and transactions in 2019
9/21/2018	Reg. V	Interim final rule to revise two model forms required under Section 609 of the Fair Credit Reporting Act (FCRA)

† We have listed the primary effective date. Some final rules have multiple effective dates for different provisions.
* Proposed rules do not have an effective date.

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Calendar of Events 2019

September 11	**Colorado Interagency CRA Roundtable** Federal Reserve Bank of Kansas City, Denver Branch, Denver, CO
September 26–27	**Banking and the Economy: A Forum for Minorities in Banking** Federal Reserve Bank of St. Louis, St. Louis, MO
October 8	**FDIC Consumer Research Symposium** FDIC Seidman Center, Arlington, VA
October 5–11	**ABA Compliance School** Emory Conference Center Hotel, Atlanta, GA
November 10–13	**2019 CRA and Fair Lending Colloquium** JW Marriott Orlando, Grande Lakes, Orlando, FL

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