The Banking Law Journal

Established 1889

An A.S. Pratt™ PUBLICATION OCTOBER 2021

EDITOR'S NOTE: CRYPTOCURRENCY
Steven A. Meyerowitz

CRYPTOCURRENCY AND OTHER NEW FORMS OF FINANCIAL TECHNOLOGY: POTENTIAL TERRORIST FINANCING CONCERNS AND LIABILITY
Chase D. Kaniecki, Samuel H. Chang, Michael G. Sanders, and Rathna J. Ramamurthi

WHAT TO EXPECT FROM NEW SEC CHAIR GARY GENSLER ON CRYPTOCURRENCY
Carol W. Sherman

FINCEN ANNOUNCES NATIONAL AML/CFT POLICY PRIORITIES AND ALSO PROPOSES RULEMAKING TO ESTABLISH "NO-ACTION LETTER" PROCESS
Eddie A. Jauregui, Andres Fernandez, Brian N. Hayes, and Jennifer Correa Riera

PAYMENT CARD ISSUERS FACE MIXED RESULTS SEEKING LOSS RECOVERY ON MERCHANT DATA BREACHES
Jennifer Hall

CONSUMER FINANCIAL PROTECTION BUREAU UPDATES GUIDANCE REGARDING "UNAUTHORIZED TRANSFERS" UNDER THE ELECTRONIC FUND TRANSFER ACT
Arthur E. Anthony and Cameasha Turner

FEDNOW SERVICE PILOT PROGRAM GAINING TRACTION AND SUPPORT
J.C. Boggs, Matthew B. Hanson, George M. Williams jr, Justin M. King, and Andrea Demick

BIDEN COMPETITION ORDER MAY INFLUENCE BANK MERGER APPROVALS
Clifford S. Stanford, Sanford M. Brown, Adam J. Biegel, Jordan A. Jensen, and Elizabeth A. Dunn

***FORD V. MONTANA*: THE U.S. SUPREME COURT'S LATEST FORAY INTO PERSONAL JURISDICTION AND WHAT IT MIGHT MEAN FOR BANKS**
Mark G. Hanchet, Christopher J. Houpt, Robert W. Hamburg, and Anjanique M. Watt

THE FEDERAL RESERVE'S PROPOSED GUIDELINES ON REQUESTS FOR ACCOUNTS AND PAYMENT SERVICES AT FEDERAL RESERVE BANKS: EIGHT THINGS TO KNOW
Jeremy Newell, Michael Nonaka, Karen Solomon, Jenny Scott Konko, and Andrew Ruben

ESG LEGISLATION TARGETS CLIMATE RISK DISCLOSURE
Wayne J. D'Angelo, John M. Foote, Jennifer E. McCadney, Courtney L. Kleshinski, and Maggie C. Crosswy

LexisNexis

THE BANKING LAW JOURNAL

VOLUME 138 **NUMBER 9** **October 2021**

Editor's Note: Cryptocurrency
Steven A. Meyerowitz 491

Cryptocurrency and Other New Forms of Financial Technology: Potential Terrorist Financing Concerns and Liability
Chase D. Kaniecki, Samuel H. Chang, Michael G. Sanders, and Rathna J. Ramamurthi 494

What to Expect From New SEC Chair Gary Gensler on Cryptocurrency
Carol W. Sherman 502

FinCEN Announces National AML/CFT Policy Priorities and Also Proposes Rulemaking to Establish "No-Action Letter" Process
Eddie A. Jauregui, Andres Fernandez, Brian N. Hayes, and Jennifer Correa Riera 505

Payment Card Issuers Face Mixed Results Seeking Loss Recovery on Merchant Data Breaches
Jennifer Hall 514

Consumer Financial Protection Bureau Updates Guidance Regarding "Unauthorized Transfers" Under the Electronic Fund Transfer Act
Arthur E. Anthony and Cameasha Turner 522

FedNow Service Pilot Program Gaining Traction and Support
J.C. Boggs, Matthew B. Hanson, George M. Williams jr, Justin M. King, and Andrea Demick 526

Biden Competition Order May Influence Bank Merger Approvals
Clifford S. Stanford, Sanford M. Brown, Adam J. Biegel, Jordan A. Jensen, and Elizabeth A. Dunn 534

***Ford v. Montana*: The U.S. Supreme Court's Latest Foray into Personal Jurisdiction and What It Might Mean for Banks**
Mark G. Hanchet, Christopher J. Houpt, Robert W. Hamburg, and Anjanique M. Watt 539

The Federal Reserve's Proposed Guidelines on Requests for Accounts and Payment Services at Federal Reserve Banks: Eight Things to Know
Jeremy Newell, Michael Nonaka, Karen Solomon, Jenny Scott Konko, and Andrew Ruben 543

ESG Legislation Targets Climate Risk Disclosure
Wayne J. D'Angelo, John M. Foote, Jennifer E. McCadney, Courtney L. Kleshinski, and Maggie C. Crosswy 547

LexisNexis

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:
Matthew T. Burke at .... (800) 252-9257
Email: .... matthew.t.burke@lexisnexis.com
Outside the United States and Canada, please call .... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:
Customer Services Department at .... (800) 833-9844
Outside the United States and Canada, please call .... (518) 487-3385
Fax Number .... (800) 828-8341
Customer Service Website .... http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call
Your account manager or .... (800) 223-1940
Outside the United States and Canada, please call .... (937) 247-0293

ISBN: 978-0-7698-7878-2 (print)
ISSN: 0005-5506 (Print)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

(2021–Pub.4815)

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF
STEVEN A. MEYEROWITZ
President, Meyerowitz Communications Inc.

EDITOR
VICTORIA PRUSSEN SPEARS
Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS
BARKLEY CLARK
Partner, Stinson Leonard Street LLP

CARLETON GOSS
Counsel, Hunton Andrews Kurth LLP

MICHAEL J. HELLER
Partner, Rivkin Radler LLP

SATISH M. KINI
Partner, Debevoise & Plimpton LLP

DOUGLAS LANDY
White & Case LLP

PAUL L. LEE
Of Counsel, Debevoise & Plimpton LLP

TIMOTHY D. NAEGELE
Partner, Timothy D. Naegele & Associates

STEPHEN J. NEWMAN
Partner, Stroock & Stroock & Lavan LLP

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2021 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW, Third Floor, Washington, DC 20005-2207.

The Federal Reserve's Proposed Guidelines on Requests for Accounts and Payment Services at Federal Reserve Banks: Eight Things to Know

Jeremy Newell, Michael Nonaka, Karen Solomon, Jenny Scott Konko, and Andrew Ruben*

The Board of Governors of the Federal Reserve System has proposed guidelines that would guide Reserve Bank evaluation of requests for Reserve Bank master accounts and payment services.

The Board of Governors of the Federal Reserve System ("Federal Reserve" or "Board") has proposed guidelines[1] articulating a series of principles to be used by Federal Reserve Banks ("Reserve Banks") in evaluating requests for Reserve Bank master accounts and payment services (the "Proposed Guidelines").

POLICY GOALS

The Federal Reserve intends for the Proposed Guidelines to promote key policy goals with respect to the banking system, financial stability, monetary policy, consumer protection, and the payment system.

The Proposed Guidelines are intended to create a transparent and consistent framework for Reserve Banks to evaluate requests for accounts and services in the face of rapid technological innovations in financial services and the emergence of novel bank charter types.

The Proposed Guidelines state that the Reserve Banks have received an increasing number of requests for access to accounts and payment services from institutions with non-traditional federal and state charter types (e.g., non-federally insured institutions), including fintech companies and cryptocurrency companies. The Proposed Guidelines note that establishing a transparent and consistent framework for all Reserve Banks to use in evaluating applications from both traditional and non-traditional charter types would benefit the financial system by, among other things, limiting forum shopping across Reserve Banks and establishing consistent policies for institutions with similar business models and risk profiles.

---

* Jeremy Newell and Michael Nonaka are partners in Covington & Burling LLP. Karen Solomon is a senior of counsel at the firm. Jenny Scott Konko and Andrew Ruben are associates at the firm. The authors may be contacted at jnewell@cov.com, mnonaka@cov.com, ksolomon@cov.com, jkonko@cov.com, and aruben@cov.com, respectively.

[1] https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20210505a1.pdf.

The Proposed Guidelines would sidestep the question of what types of financial institutions are eligible for Reserve Bank accounts and services.

Although the Proposed Guidelines would require each applicant to be eligible under the Federal Reserve Act or other federal statute to maintain a Reserve Bank account, the Proposed Guidelines would not provide any explanation or discussion of what types of firms are legally eligible under those statutes. However, the Proposed Guidelines note that the Federal Reserve is considering whether it may be useful to provide further clarity on eligibility under the Federal Reserve Act in the future.

The Proposed Guidelines would reaffirm the Federal Reserve's existing position that legal eligibility for Reserve Bank accounts and services does not by itself grant a financial institution the right to obtain an account with its Reserve Bank.

Under the Proposed Guidelines, Reserve Banks would maintain discretion to approve or deny access requests from institutions as they see fit.

On their face, the Proposed Guidelines would grant Reserve Banks significant discretion to evaluate and act on applications for Reserve Bank accounts and services, with only limited Board involvement.

Under the Proposed Guidelines, each Reserve Bank would retain discretion to evaluate applications on a case-by-case basis. Although consultation with other Reserve Banks and the Board would be required in a Reserve Bank's evaluation of two of the six principles articulated in the Proposed Guidelines (i.e., the financial stability and monetary policy principles), the Proposed Guidelines otherwise would not describe any specific Board role or responsibilities in evaluating and/or granting applications.

SIX PRINCIPLES

The Proposed Guidelines articulate six principles, which center on financial stability, monetary policy, and risk management and mitigation, that would guide Reserve Bank evaluation of applications.

In addition to legal eligibility, all Reserve Banks would be required to evaluate the following five principles for each applicant:

1. The provision of an account and services to the institution should not present or create undue credit, operational, settlement, cyber, or other risks to the Reserve Bank;
2. The provision of an account and services to the institution should not adversely affect the Federal Reserve's ability to implement monetary policy. The provision of an account and services to the institution

should not present or create undue credit, liquidity, operational, settlement, cyber, or other risks to the overall payment system;

3. The provision of an account and services to the institution should not create undue risk to the stability of the U.S. financial system;
4. The provision of an account and services to the institution should not create undue risk to the overall economy by facilitating activities such as money laundering, terrorism financing, fraud, cybercrimes, or other illicit activity; and
5. The provision of an account and services to the institution should not adversely affect the Federal Reserve's ability to implement monetary policy.

The Proposed Guidelines would outline a range of more specific factors that Reserve Banks should take into account when evaluating each principle. These factors would relate, for example, to the applicant's risk management program, compliance with regulatory and supervisory requirements, financial condition, and ability to meet its obligations to the Reserve Bank.

The Proposed Guidelines would not provide any information about the process or methodologies that Reserve Banks would be required to employ when applying the Proposed Guidelines' six principles, nor what degree of independent diligence and/or examination the Reserve Banks may undertake in verifying whether certain criteria are met.

Because the six principles themselves are expressed at a relatively high level and susceptible to a variety of interpretations in practical application, the Proposed Guidelines would leave open a range of key questions regarding how they are likely to be applied to applicants in practice and thus create uncertainly for the industry and non-traditional charter types in particular.[2] These questions likely will need to be identified and resolved through the comment process.

The Proposed Guidelines generally would not subject applications by federally-insured institutions to extensive due diligence.

---

[2] For example, the Proposed Guidelines would instruct the Reserve Banks to incorporate the assessments of an applicant by its state and federal supervisors "to the extent possible." In certain respects, the Proposed Guidelines also would call for a Reserve Bank to "confirm" that an institution has acceptable risk management and governance systems in place. The Proposed Guidelines would not directly address the appropriate balance between a Reserve Bank's reliance on information from other supervisors and its direct confirmation of facts key to its evaluation of an applicant's request.

The Federal Reserve anticipates that most applications by federally-insured institutions will be straightforward, because many of the factors listed above are commonly used in the regulation and supervision of these institutions.

The Proposed Guidelines may result in enhanced scrutiny of applicants with non-traditional charters.

CONCLUSION

Although the Proposed Guidelines may create opportunities for non-traditional charter types to access Reserve Bank accounts and services, these applicants may undergo more extensive due diligence by the Reserve Banks. The Proposed Guidelines would state that such diligence may be appropriate, because these institutions are not subject to the same regulation and supervision regimes as federally-insured institutions.

Additionally, when evaluating the financial stability and monetary policy principles noted above, the Proposed Guidelines would require a Reserve Bank to consider not only the risks created by the applicant itself, but also the risks created by a group of like institutions. The Reserve Bank thus would be able to deny an institution's application because of the collective risks posed by its peer institutions, even if the institution itself poses an acceptable level of risk.