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Banking Regulation To Watch In 2020

By **Jon Hill**

Law360 (January 1, 2020, 12:04 PM EST) -- Banks, lenders, debt collectors and more are in line for significant regulatory developments in 2020 as federal agencies push toward the finish line on rulemaking projects like overhauling the Volcker Rule and rolling back underwriting standards for payday loans.

Regulators are entering the new year having largely concluded their work writing rules to implement the 2018 banking bill, the biggest piece of banking legislation to come out of Congress since the Dodd-Frank Act. The bill tasked the agencies with making a number of revisions to the post-crisis framework of supervision and regulation set up under Dodd-Frank.

But with implementation now in the rearview mirror, regulators can turn their full attention to other long-in-the-works initiatives. Here's what will be on financial services attorneys' radar in 2020.

Rolling Back the Payday Rule

On the small-dollar loan front, the Consumer Financial Protection Bureau has targeted April for completing its controversial effort to unwind the underwriting standards included in its 2017 payday lending regulations. The standards, which the payday loan industry has fought hard against, were slated for elimination in a proposal released nearly a year ago that cited concerns about their evidentiary and legal foundations. This reconsideration, as the agency calls it, has sparked fury among consumer advocates and may yet be challenged in court just as the original rule was.

A payday loan industry trade group’s lawsuit seeking to block the entire rule — not just the underwriting portion — is still on pause in Texas federal court pending the reconsideration. Once that’s over, the suit could become a vehicle for attacking the remaining payments-focused provisions in the rule, which the industry has signaled its continued dissatisfaction with.

But the CFPB doesn’t appear especially eager to revisit the payment provisions in a comprehensive way right now and is instead focusing on its plan to scrap the underwriting provisions, on which it received close to 200,000 comments last year that it is wading through.

And while CFPB Director Kathleen Kraninger stressed in October that no final decisions had yet been made, Eric Mogilnicki, financial services partner at Covington & Burling LLP, said it’s unlikely the agency will back away from that plan now.

“The payday issue is very likely to be resolved one way or another in 2020,” Mogilnicki told Law360. “The Bureau has been clear that it believes the underwriting provisions should be excised from the rule, and I would be surprised if the comments changed their minds.”

“Agencies don't often reverse field on a proposed regulation, even in response to a large number of comments, and so I don't expect the Bureau to do so here,” he added.

Clarifying Debt Collection Standards

Meanwhile, the CFPB will continue developing a package of updated consumer communication and disclosure standards for the debt collection industry after issuing an initial version for comment this past spring.

The closely watched project would modernize decades-old limits on debt collectors to better reflect technologies like voicemail and text messaging, and it would codify prohibitions against certain practices like threatening to sue over time-barred debt, which is debt that’s too old to file a lawsuit to collect but still is technically owed.

“It’s unclear if we will see a final rule in 2020,” Nanci Weissgold, co-leader of Alston & Bird LLP’s consumer financial services team, said. “I hope so, but what the [CFPB] has indicated is they’re focusing on collection of time-barred debt and we expect to see a new proposed rule in 2020 with regard to better disclosures around time-barred debt collection.”

Tying Up a Loose End on Volcker

Federal financial regulators are heading into 2020 with their overhaul of the Volcker Rule half-done.

Named for former Federal Reserve Chairman Paul Volcker, who died in December, the rule puts limits on banks’ ability to engage in proprietary trading and invest in so-called covered funds, including hedge funds and private equity vehicles. While regulators wrapped up work paring back aspects of the prop-trading part of the rule this past year, they have yet to say exactly how they want to finish tweaking the rule’s covered funds side.

“Most of the action has been on the prop-trading side, and I think the industry is at least relatively satisfied with how that played out,” Morgan Lewis & Bockius LLP partner Charles M. Horn said. “But they need to come out with a proposal on the covered funds side.”

The five agencies that share responsibility for the rule — the Fed, Federal Deposit Insurance Corp., Office of the Comptroller of the Currency, U.S. Securities and Exchange Commission and Commodity Futures Trading Commission — have already done one round of formal public consultation on the covered funds provisions and made some small changes to them when finalizing the prop-trading revisions.

But there are still a host of other adjustments that the financial services industry is eager to see made to rein in the scope and territorial reach of the rule’s covered funds side, such as clearly exempting bank investments in venture capital funds and resolving definitional quirks that can cause some exclusively foreign funds to get swept up inadvertently in the rule’s restrictions.

“I think there's a solution to that, but they are taking their time getting to that solution,” Horn said.

Getting to Yes on Community Reinvestment Act Overhaul

After months of will-they-or-won’t-they speculation, federal banking regulators finally lifted the lid in December on a proposal to give a major refresh to the regulations implementing the Community Reinvestment Act, a 1977 law intended to encourage bank lending and investment in low-income and underserved areas.

The project could alter the flow of tens of billions of dollars in bank financing every year and make it easier for banks to earn the compliance scores they need to win regulatory permission to grow. As such, it’s shaping up to be one of the most consequential and contentious items on federal regulators’ agenda in the coming year.

“One of the most significant issues will be how the agencies decide to delineate a bank’s assessment area,” said Karen Solomon, a former top lawyer at the OCC and now senior of counsel at Covington.

Assessment areas are the geographic territories in which banks are judged on their CRA compliance. Under existing CRA rules, those territories are drawn around the locations where banks have physical presences, but with the rise of digital banking services that allow banks to reach customers who might be hundreds of miles from the nearest branch, those rules are widely viewed as due for an update.

“Where your branches are located isn’t the same kind of indicator as it was in the 1970s of where the communities are that you’re actually serving,“ Solomon said.

Among the changes included in the proposal released Dec. 12 is the creation of additional assessment areas for banks that get as much as half or more of their deposits from outside their home territories. These areas would be drawn around locations where these banks get “significant concentrations” of deposits and would allow them to get credit for loans and investments made there.

But one of the biggest hurdles the regulators still have to clear is coming to agreement among themselves. Despite a year and a half of study and negotiation, the three agencies that implement the CRA — the Fed, FDIC and OCC — didn’t join together in issuing the proposal released Dec. 12. Instead, the Fed sat it out, leaving the FDIC and OCC to forge ahead.

The Fed’s absence at least partly reflects internal process differences between the agencies and doesn’t necessarily signal an insurmountable divide, Solomon said. And the Fed has indicated that it still wants to participate as the overhaul moves forward and isn’t ruling out joining in on the final product.

But some in the industry are worried that the overhaul needs to be done by the spring or else Democrats could try to repeal it using the Congressional Review Act if they take back the Senate and White House in the fall.

A repeal effort is not a far-fetched possibility, given the harsh criticism that community groups and progressive lawmakers have lobbed at the proposal since its release. Among other criticisms, opponents have said compliance metrics included in the proposal are too clinical in their approach to measuring banks' performance and will incentivize a shift away from making home and small-business loans that have greater community impact but are lower-value and potentially riskier.

The industry's sense of urgency seems to be shared by the OCC and FDIC, which put out their proposal for a shorter comment period than was provided for the roughly two-dozen-page public consultation on CRA changes issued by the OCC in 2018.

“I'm certain there will be a lot of comment, so evaluating the comments and then resolving the issues could be a time-consuming process,” Solomon said. “It’s theoretically possible that you could get a final rule in April or May, but it's also possible that it will take longer just because of the complexity of the issues or perhaps the volume of comments that the agencies get.”

Mending the GSE Patch

It will also be crunch time this year for replacing what’s been called the GSE patch, referring to a regulatory safe harbor given to mortgages underwritten according to the standards of the government-sponsored enterprises Fannie Mae and Freddie Mac. This safe harbor is found in the CFPB’s mortgage underwriting rules and affords those loans with special legal protections that are highly valued by lenders, but the patch is set to expire in almost exactly a year.

“The way it works now, it’s really, really easy to figure out whether something is a qualified mortgage,” said Dorsey & Whitney LLP partner Joseph Lynyak, who is a member of his firm’s banking industry group. “All you need to do is run it through the [GSE underwriting] engines. You get a certificate saying yes, they will buy the mortgage, and now you’ve got a qualified mortgage.”

The CFPB confirmed over the summer that it doesn’t want to keep the patch around much, if at all, past its current expiration date, but what the agency might seek to put in its place is still up in the air. Given that billions of dollars in mortgage lending every year takes advantage of the patch, the mortgage industry is keen for the agency to not rock the boat and to put a concrete replacement plan on the table soon so lenders can begin getting ready for any changes.

Yet the CFPB’s timeline for doing that remains hazy, and Lynyak said he doubts a proposal will arrive in the early part of the year. That could give lenders — particularly those that are smaller and have fewer resources to throw at transition preparations — some heartburn if they’re left to watch the clock tick down on the patch without a clear idea of what comes next.

“You can’t exactly start charging down the hill saying, ‘This is what we need to do,’” Lynyak said. “All of a sudden, what has been a very easy aspect of processing is going to go away and in its place is something that has to be built…This is a big, big deal in terms of the way that mortgage loan processing is going to have to be modified.”

Delivering Some AML Reform at Last?

With impeachment roiling Capitol Hill and the 2020 campaign season entering full tilt, the prospect of major financial services bills emerging from Washington this year are slim. But if anything has a chance of slipping through both houses of Congress and past the president’s pen, it’s legislation that could deliver the first substantial anti-money laundering reforms in nearly two decades.

Bipartisan bills introduced in the House and Senate this past year call for requiring newly formed corporations to disclose who their ultimate human owners are to the U.S. Treasury’s Financial Crimes Enforcement Network and update that information on a periodic basis. FinCEN would then maintain a registry of this data for use in law enforcement and for helping banks comply with customer due diligence standards.

The House bill, dubbed the Corporate Transparency Act, easily passed the full chamber in the fall, while a comparable Senate bill known as the Illicit Cash Act received a hearing before the Senate Banking Committee in December.

Significantly, both bills also include an array of other reform provisions that, among other things, seek to strengthen FinCEN's resources, toughen potential penalties, improve information sharing with financial institutions and open the door to further modifications to the anti-money laundering framework, such as by studying possible adjustments to suspicious activity reporting requirements.

Although previous beneficial ownership disclosure and anti-money laundering reform efforts have struggled to attract interest in Congress, Jeff Alberts of Pryor Cashman LLP said this time could be different.

"I think it's very likely that some form of legislation will be passed," said Alberts, who co-heads his firm's financial institutions group and leads its white-collar defense and investigations practice. "There is a lot of support on the law enforcement side and the bank side to make some fundamental modifications to the way the Bank Secrecy Act currently functions."

"And particularly with the rise of financial technology companies and decentralization in banking, it's both helpful to the government and helpful to the financial sector to update the BSA," Alberts added.

--Editing by Aaron Pelc and Alanna Weissman.