Consumer Compliance Supervisory HIGHLIGHTS

Federal Deposit Insurance Corporation

FEDERAL DEPOSIT INSURANCE CORPORATION

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Contents

Introduction

The global COVID-19 pandemic continues to impact financial institutions, consumers, and communities. This unique, challenging, and evolving situation resulted in financial institutions continuing to make adjustments to their operations to ensure consumers have access to the essential products and services they rely on. Similarly, the FDIC continued to conduct its consumer compliance examinations entirely offsite. Remote examinations leveraged technology and file-sharing tools to allow us to conduct our examinations in a virtual environment. The FDIC maintains appropriate resources to assist financial institutions, customers, and communities affected by COVID-19. Information about the FDIC's response to the pandemic and guidance for bankers and consumers is available on the FDIC's Coronavirus website.

This publication provides an overview of the consumer compliance activities and issues identified through the FDIC's supervision of state non-member banks and thrifts in 2021.

This issue of the FDIC Consumer Compliance Supervisory Highlights includes:

- A summary of the FDIC's overall consumer compliance performance in 2021;
- A description of the most frequently cited violations and other consumer compliance examination observations;[1]
- Information on regulatory developments;
- A summary of consumer compliance resources and information available to financial institutions; and
- An overview of trends in consumer complaints that were processed by the FDIC in 2021.

1 The legal violations discussed in this issue of the FDIC Consumer Compliance Supervisory Highlights are based on the particular facts and circumstances observed by the FDIC in the course of its examinations. A conclusion that a legal violation exists may not lead to such a finding under different facts and circumstances. The finding of a violation requires an analysis of both the applicable law, and the particular facts and circumstances of the act or practice found at a particular institution.

Summary of Overall Consumer Compliance Performance in 2021

The FDIC supervises approximately 3,200 state-chartered banks and thrifts that are not members of the Federal Reserve System (supervised institutions). Most of these institutions are community banks that provide credit and services locally. The FDIC is responsible for evaluating supervised institutions for compliance with consumer protection, anti-discrimination, and community reinvestment laws.

The FDIC's consumer compliance examination program focuses on identifying, addressing, and mitigating the greatest potential risks to consumers, based on the business model and products offered by a particular institution. The FDIC conducts periodic risk-based examinations of supervised institutions for compliance with over 30 Federal consumer protection laws and regulations. In 2021, the FDIC conducted approximately 1,000 consumer compliance examinations. Overall, supervised institutions demonstrated effective management of their consumer compliance responsibilities.

The FDIC uses the Federal Financial Institutions Examination Council's (FFIEC) Uniform Interagency Consumer Compliance Rating System to evaluate supervised institutions' adherence to consumer protection laws and regulations. As of December 31, 2021, 99 percent of all FDIC-supervised institutions were rated satisfactory or better for consumer compliance (i.e., ratings of "1" or "2"), as well as for the Community Reinvestment Act (CRA) (i.e., CRA ratings of "Outstanding" or "Satisfactory").

Institutions rated less than satisfactory for consumer compliance (i.e., ratings of "3," "4," or "5") had overall compliance management system (CMS) weaknesses, which often resulted in violations of law and the risk of consumer harm. Institutions rated "needs to improve" or "substantial noncompliance" for CRA represent a weak performance under the lending, investment and service tests, the community development test, the small bank performance standards, or an approved strategic plan, as applicable.

Most Frequently Cited Violations

During 2021, FDIC consumer compliance examiners identified regulatory violations that ranged in severity from highest to lowest level of concern (i.e., Levels 3, 2 and 1, with Level 1 representing the lowest level of concern).[2] This publication focuses on the five most frequently cited instances of Level 3 or Level 2 violations.

The most frequently cited violations (representing approximately 78 percent of the total violations cited in 2021) remain the same as 2020 and involve the Truth in Lending Act (TILA), Flood Disaster Protection Act (FDPA), Electronic Fund Transfers Act (EFTA), Truth in Savings Act (TISA), and the Real Estate Settlement Procedures Act (RESPA).

Because the FDIC conducts consumer compliance examinations using a risk-focused methodology, the most frequently cited violations generally involve regulations that represent the greatest potential for consumer harm. For example, TILA requires disclosures about mortgage costs and calculation errors could result in reimbursements to consumers. Moreover, the flood insurance provisions included in the FDPA could result in penalties if the supervised institution does not take appropriate steps to ensure compliance. Given the heightened risk for potential consumer harm, these five areas of the law generally represent a center of focus for consumer compliance examiners.

Of the top regulatory areas cited for violations, the following list describes the most frequently cited violation in each area:

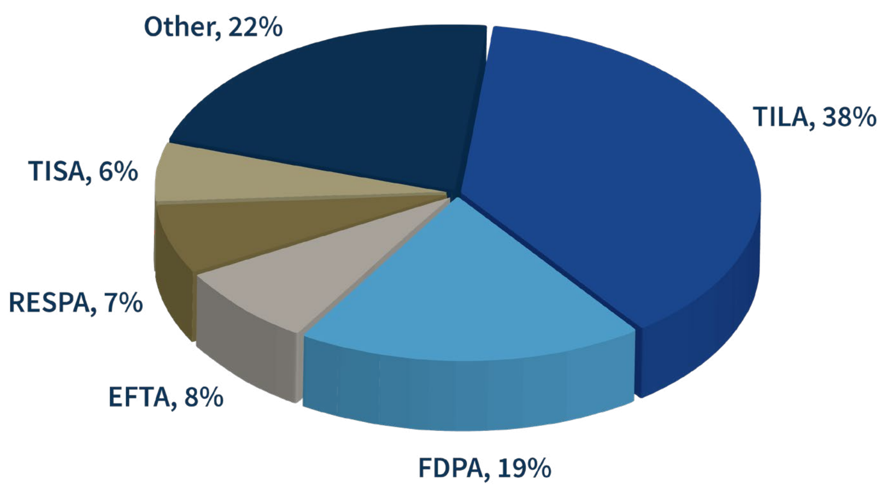
- **TILA**: Section 1026.19(e) of Regulation Z, which implements TILA, requires the lender to provide a loan estimate with the information required under section 1026.37. This section provides for timing requirements of the loan estimate and requirements for the disclosure of certain settlement providers. This section also includes requirements for pre-disclosure activity, the good faith determination for estimates of closing costs, and the provision and receipt of revised disclosure.
- **FDPA**: Section 339.3(a) of Part 339 of the FDIC Rules and Regulations, which implements the FDPA, requires adequate flood insurance be in place at the time a covered loan is made, increased, extended, or renewed.
- **EFTA**: Section 1005.11(c) of Regulation E, which implements the EFTA, requires a financial institution to investigate allegations of electronic fund transfer errors, determine whether an error occurred, report the results to the consumer, and correct the error within certain timeframes.
- **RESPA**: Section 1024.37(c) of Regulation X, which implements RESPA, prohibits a loan servicer from assessing the borrower any premium charge or fee related to force-placed hazard insurance until certain disclosure requirements have been met. The disclosures must comply with formatting requirements set forth in this section.
- **TISA**: Sections 1030.4(a) and (b) of Regulation DD, which implements TISA, set forth timing and content requirements for deposit account disclosures.

In 2021, the FDIC initiated 20 formal enforcement actions and 24 informal enforcement actions to address consumer compliance examination findings. During this period, the FDIC issued Civil Money Penalty (CMP) orders against institutions to address violations of the FDPA and Section 5 of the Federal Trade Commission Act (FTC Act)[3], totaling $2.7 million. Voluntary restitution payments to more than 49,000 consumers for violations of various laws and regulations totaled approximately $4.5 million.

2 See FDIC Consumer Compliance Examination Manual, Section II-6.1 (Communicating Findings).

3 Violations of Section 5 of the FTC Act prohibits unfair and deceptive acts or practices. While these violations are cited infrequently, they often give rise to formal or informal enforcement actions.

MOST FREQUENTLY CITED STATUTES AND REGULATIONS IN 2021						
Statute/Regulation	Level 3 Violations		Level 2 Violations		Total Violations[4]	
	#	%	#	%	#	%
TILA	15	1%	573	37%	588	38%
FDPA	7	<1%	281	18%	288	19%
EFTA	2	<1%	126	8%	128	8%
RESPA	2	<1%	97	6%	99	7%
TISA	1	<1%	95	6%	96	6%
Total 5 Most Commonly Cited Statutes	27	2%	1172	76%	1199	78%
All Cited Statutes in 2021	36	2%	1504	98%	1540	100%



4 Level 1 violations are isolated or sporadic in nature or systemic violations that are unlikely to impact consumers or the underlying purposes of the regulation or statute. Thus, Level 1 violations are not included in this table.

Consumer Compliance Examination Observations

The following describes some of the more significant consumer compliance issues identified by FDIC examiners during the consumer compliance examinations conducted in 2021. The issues include matters involving liability protections, automated overdraft programs, re-presentment of unpaid transactions, and fair lending compliance.

Regulation E – Liability Protections for a Consumer Deceived into Giving Authorization Credentials

Background
Regulation E implements EFTA, which gives consumers certain rights when engaging in electronic fund transfers (EFTs). EFTs include transfers through automated teller machines, point of sale terminals, and automated clearinghouse systems. Regulation E outlines procedures financial institutions must follow for investigating and resolving EFT errors alleged by consumers. Regulation E limits consumer liability for unauthorized transfers that are reported within regulatory timeframes, and outlines procedures for resolving errors that are reported within regulatory timeframes.

Findings
In 2021, the FDIC noted issues involving consumers being targeted for fraud. In one instance, a third-party service provider (TPSP) managed a financial institution's deposit accounts. The consumers stated someone posing as a representative of the financial institution's fraud department contacted them seeking account verification codes. Believing they were communicating with the TPSP (working on behalf of the financial institution) about unauthorized activity, the consumers provided the two-factor authentication code, and it turned out the person to whom they gave the code was a scammer. The scammer then used the account credentials to steal money from the consumers' accounts.

In an attempt to limit its liability, the financial institution disclosed in the account agreements that neither the institution nor the TPSP would ever request the two-factor authentication code. However, the FDIC concluded that Regulation E's liability protections for unauthorized transfers apply even if a consumer is deceived into giving someone their authorization credentials. Consumer account disclosures cannot limit the protections provided for in the regulation.

The regulation's Official Interpretations expressly state that an unauthorized EFT includes a transfer initiated by a person who obtained the access device from the consumer through fraud or robbery, and that consumer negligence cannot be used as the basis for imposing greater liability than is permitted under Regulation E. On June 4, 2021, the Consumer Financial Protection Bureau (CFPB) Frequently Asked Questions issued (FAQs) on Unauthorized Electronic Fund Transfers and Error Resolution under Regulation E. The FAQs reference issues involving fraudulent account access and explain that when a consumer is fraudulently induced into sharing account access information with a third party, and a third party uses that information to make an EFT from the consumer's account, the transfer is an unauthorized EFT under Regulation E. The FAQs further explain that consumer behavior that may constitute negligence under state law does not affect the consumer's liability for unauthorized transfers under Regulation E. Further, the FAQs indicate subsequent transfers initiated with the fraudulently obtained account information (the access code) would also be considered unauthorized transfers and subject to Regulation E liability protections.

The FDIC also noted instances where deceived consumers provided their account credentials for fraudulent EFTs conducted through a money payment platform (MPP) such as Cash App, Zelle, or Venmo. When an MPP entered into an agreement with a consumer, that agreement extended to the financial institution holding the consumer's account. The financial institution, as the account holding institution, was held responsible under Regulation E. In addition, the MPP, through whose platform the EFT was made, was also held responsible, as it was considered a "financial institution" under Regulation E. Both the financial institution and MPP have investigative and error resolution obligations under Regulation E and must comply with those obligations provided the consumer gives timely notice of an alleged error under section 1005.11(b).

Regulation E also applies to peer-to-peer or "P2P" payments made through MPPs, even when the MPP has no specific agreement regarding the MPP with the financial institution holding the consumer's account, provided the transmitter issues an "access device" and agrees with the consumer to provide EFT services that enable the consumer to access the account. A consumer's mobile phone and an MPP EFT application fall under Regulation E's definition of "access device." Consequently, an MPP must comply with Regulation E for transactions connected to a consumer's debit card or account. Both the financial institution and MPP are obligated under Regulation E to investigate EFT disputes and to limit consumer liability if, after investigation, the consumer's allegations are confirmed.

Mitigating Risk

Through our examination and supervisory experience, we have observed that financial institutions, including MPPs, can take a number of steps to mitigate the risk of not complying with Regulation E. These include:

- Reviewing account agreements and disclosures (including those with MPPs) to ensure they do not attempt to diminish or limit consumers' rights under Regulation E.
- Conducting thorough investigations of any fraud-related EFT disputes and documenting the findings. Under section 1005.11(d)(1), consumers have a right to request the documents the financial institution relied upon in making its determination.
- Educating consumers about scams and providing tips on avoiding scams.
- Reminding consumers to notify their financial institution if they fall victim to a scam. Prompt notification (and financial institution response) can expedite the recovery of funds.
- Implementing effective fraud detection and prevention measures, such as monitoring geographic data, spending patterns, merchant data, and IP addresses, to help detect potential fraudulent activity.[5]
- Training staff on Regulation E's requirements and assisting consumers alleging unauthorized transactions.

Automated Overdraft Programs: Conversion from Static Limit to Dynamic Limit

Background

Automated overdraft programs authorize or decline transactions presented against insufficient funds through a computerized process. The limits used by these automated overdraft programs are either static or dynamic.[6] Static limits are typically determined at account opening and seldom change. Some institutions employ fixed amounts that may range from $100 to over $1,000 and vary based on the type of account, while others assign the same amount to all customers. Institutions may communicate the static overdraft limit to customers at account opening, in subsequent disclosures, or through other communications,

5 The Red Flags Rule requires many businesses and organizations to implement a written Identity Theft Prevention Program designed to detect the warning signs – or red flags – of identity theft in their day-to-day operations.

6 In 2013, the CFPB issued a publication "CFPB Study of Overdraft Programs: A white paper of initial data findings" a publication that explains how automated overdraft programs work and how institutions generally set overdraft coverage limits.

including online or mobile banking systems. Dynamic limits, in contrast, vary for each customer and may change periodically (e.g., daily, weekly, monthly) as a customer's usage or relationship with the institution changes. For instance, a customer's assigned overdraft limit may be $500 one day and reduced to zero (i.e., no assigned overdraft limit) a few days later. The dynamic limits are typically based on algorithms, or a set of rules, that weigh numerous variables and customer behaviors in an attempt to manage risk. For example, some common variables used to calculate the dynamic limit might include the age of the account, average balance, overdraft history, deposit amounts, deposit frequency, and other relationships the customer may have with the institution. Financial institutions will periodically evaluate and adjust the algorithms based on changes in policy, market conditions, customer behavior, and other factors. Institutions that use dynamic limits do not always communicate these limits to customers.

Overdraft programs must comply with all applicable Federal law and regulations, including Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices. An act or practice is unfair if it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. An act or practice is deceptive if, in general, it is a representation, omission, or practice that is likely to mislead a consumer acting reasonably under the circumstances, and the representation, omission, or practice is material.

Findings

FDIC consumer compliance examinations conducted during 2021 identified several financial institutions that converted their programs from a static limit to a dynamic limit. In some instances, examiners identified concerns with how these conversions were implemented and cited violations of Section 5 of the FTC Act for deceptive acts or practices. The institutions failed to disclose sufficient information about the change from a static limit to a dynamic limit. In fact, some institutions did not provide any information to customers about the change. Specifically, institutions failed to disclose key changes such as:

- Replacement of the fixed amount with an overdraft limit that may change and could change as frequently as daily.
- Use of a new overdraft limit that may be lower or higher, at times, than the fixed amount to which the customer had become accustomed.
- Suspension of the overdraft limit when it falls to zero and how such a change may result in transactions being returned unpaid to merchants/third parties due to insufficient funds.

The FDIC deemed the above omissions material. The financial institutions' disclosures omitted necessary information that customers needed to make an informed decision about how the new dynamic limit overdraft program operated. The customers did not have sufficient information about the new program to understand how to avoid fees associated with an overdraft or for transactions declined for payment. Changes in overdraft coverage without adequate disclosure resulted in consumer harm.

Mitigating Risk

The FDIC has observed certain risk-mitigating activities institutions may consider to mitigate the risk when implementing automated overdraft programs with a dynamic limit. These include:

- Providing clear and conspicuous information to existing customers so they have advance notice of how the change from a fixed overdraft limit to a dynamic limit will affect them. This is especially important when the bank previously disclosed the amount of the fixed overdraft limit to customers.

- Disclosing changes to overdraft limits in real time to consumers, as these vary, with the opportunity for consumers to adjust their behavior.
- Reviewing and revising account opening disclosures or other communications used to inform new customers about the automated overdraft program to avoid engaging in deceptive practices.
- Explaining that the dynamic limit is established based on algorithms, or a set of rules, that weigh numerous variables and customer behaviors, how the limit may change (including the frequency of change), and how the limit may be suspended or reduced to zero when eligibility criteria are no longer met.
- Training customer service and complaint processing staff to explain the features and terms of the automated overdraft program's dynamic features. This training should be provided to staff who work with new customers as well as those who work with existing customers.

Re-presentment of Unpaid Transactions: Heightened Risk for Section 5 Violations

Background

Financial institutions commonly charge a non-sufficient funds (NSF) fee when a charge is presented for payment but cannot be covered by the balance in the account. Some financial institutions charged additional NSF fees for the same transaction when a merchant re-presented an automated clearinghouse (ACH) payment or check on more than one occasion after the transaction was declined. Disclosure and fee practices for re-presentments may result in heightened risk of violations of Section 5 of the FTC Act, which covers both business and consumer accounts. Re-presentment practices have recently been spotlighted in public statements by other Federal and state regulators, and announcements by financial institutions including those regulated by the FDIC. Re-presented transactions have also been the subject of a number of recent class action lawsuits involving financial institutions, including some supervised by the FDIC. These lawsuits generally allege breach of contract due to the omission of key terms related to the assessment of representment fees. Lawsuit settlements have resulted in customer restitution and legal fee reimbursements.

Findings

During 2021, the FDIC identified consumer harm when financial institutions charged multiple NSF fees for the re-presentment of unpaid transactions. Some disclosures and account agreements explained that one NSF fee would be charged "per item" or "per transaction." These terms were not clearly defined and disclosure forms did not explain that the same transaction might result in multiple NSF fees if re-presented.

While case-specific facts would determine whether a practice is in violation of a law or regulation, the failure to disclose material information to customers about re-presentment practices and fees may be deceptive. This practice may also be unfair if there is the likelihood of substantial injury for customers, if the injury is not reasonably avoidable, and if there is no countervailing benefit to customers or competition. For example, there is risk of unfairness if multiple fees are assessed for the same transaction in a short period of time without sufficient notice or opportunity for consumers to bring their account to a positive balance.

Additionally, although class action settlements may result in banks providing some restitution to its customers, the FDIC has determined that, in some instances, the restitution provided did not fully redress the harm caused by the practice. As such, the FDIC required such institution to provide additional restitution.

Mitigating Risk
The FDIC has observed various risk-mitigating activities that financial institutions have taken to reduce potential risk of consumer harm and avoid potential violations of Section 5 of the FTC Act. These include:

- Eliminating NSF fees.
- Declining to charge more than one NSF fee for the same transaction, regardless of whether the item is represented.
- Disclosing the amount of NSF fees and how such fees will be imposed, including:
  - Information on whether multiple fees may be assessed in connection with a single transaction;
  - The frequency with which such fees can be assessed; and
  - The maximum number of fees that can be assessed in connection with a single transaction.
- Reviewing customer notification practices related to NSF transactions and the timing of fees to provide the customer with an ability to avoid multiple fees for re-presented items.
- Conducting a comprehensive review of policies, practices, and disclosures related to re-presentments to ensure the manner in which NSF fees are charged is communicated clearly and consistently.
- Working with service providers to retain comprehensive records so that re-presented items can be identified.

Fair Lending

Background
The FDIC conducts a fair lending review as part of every consumer compliance examination. The fair lending review evaluates a supervised institution's compliance with the anti-discrimination laws and regulations, including the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA). While the vast majority of supervised institutions maintain effective compliance programs, the FDIC does occasionally identify violations. In the rare instance when the FDIC has reason to believe a creditor is engaged in a pattern or practice of discrimination in violation of ECOA, the FDIC is required, by law, to refer the matter to the Department of Justice (DOJ). In 2021, the FDIC referred two fair lending matters to the DOJ.

Findings
For one fair lending matter referred to the DOJ in 2021, the institution had a policy of using the Cohort Default Rate (CDR) to determine who could apply for private student loan debt consolidation and refinance loans. In general, the CDR is published by the U.S. Department of Education to show the percentage of a school's borrowers who default on certain loans. In addition to other criteria, the institution used the CDR as an eligibility threshold to determine which students could apply for credit. In general, the CDR cutoffs resulted in the disproportionate exclusion of people who attended Historically Black Colleges and Universities (HBCUs) from applying for credit, as certain HBCUs had CDRs that exceeded the cutoff chosen by the institution. While the institution's use of the CDR to determine school-specific eligibility requirements constituted a neutral policy, the policy had a disparate impact on the prohibited basis of race, given that the graduates of HBCUs were disproportionately Black.

For the other fair lending matter referred to the DOJ in 2021, the FDIC concluded there was reason to believe that an institution engaged in a pattern or practice of illegal credit discrimination on the prohibited basis of race by redlining in certain markets in the institution's lending area. Specifically, the FDIC evaluated the institution's reported Home Mortgage Disclosure Act data and lending activity in majority-Black census tracts. The FDIC also analyzed the institution's branching, as well as its marketing and outreach in those areas. As a result, the FDIC concluded that the institution was not making credit available to certain geographic areas based on the racial composition of those areas.

Mitigating Risks

A strong compliance management system helps ensure financial institutions treat consumers fairly by operating in compliance with fair lending laws. The FDIC's Banker Resource Center provides information to help support fair lending compliance. In addition, banks may consider the following to mitigate fair lending risks:

- Maintaining written policies and procedures that include information for lending staff to reference when applying credit decision criteria and determining whether borrowers are creditworthy.
- Reviewing any requirements or other criteria used to screen potential applicants to ensure there is no discriminatory impact.
- Understanding the bank's reasonably expected market area, and the demographics of the geographies within that area.
- Evaluating the methods by which the bank obtains loan applications, including any marketing or outreach efforts and branches.
- Assessing the bank's lending performance within its reasonably expected market area.

Regulatory and Other Developments

The following provides information on matters relevant to consumer compliance laws and regulations that were issued or finalized in 2021 or scheduled to become effective in 2022. Additionally, this section includes information on efforts to modernize CRA.

Community Reinvestment Act Rulemaking

On July 20, 2021, the FDIC announced its commitment to working with the Board of Governors of the Federal Reserve System (Federal Reserve Board) and the Office of the Comptroller of the Currency (OCC) to jointly strengthen and modernize the regulations implementing the CRA. Since this announcement, the agencies have continued to work together to develop a joint notice of proposed rulemaking building on the Federal Reserve Board's September 2020 Advance Notice of Proposed Rulemaking. The FDIC is committed to working toward a uniform application of the CRA framework to ensure banks meet the credit needs of their communities while clarifying the types of activities for which banks can obtain credit under the CRA, the locations for which banks can obtain such credit, and the amount of credit banks will receive.

Conducting Due Diligence on Financial Technology Companies

On August 27, 2021, the FDIC, the Federal Reserve Board, and the OCC issued the Conducting Due Diligence on Financial Technology Companies: A Guide for Community Banks (Guide), which is intended to help community banks conduct due diligence when considering relationships with financial technology (fintech) companies. While the Guide is written from a community bank perspective, the fundamental concepts may be useful for banks of varying sizes and for other third-party relationships. Community banks can tailor how to use the Guide depending on their specific circumstances, the risks posed by each third-party relationship, and the related product, service, or activity offered by the fintech company.

The Guide focuses on six key due diligence topics, including relevant considerations, potential sources of information and illustrative examples. Banks should consider, as appropriate, other risk factors, considerations, and sources of information, depending on the unique relationship and the role of the fintech company. Use of the Guide is voluntary and does not anticipate every type of third-party relationship and risk.

Financial Institutions' Use of Artificial Intelligence, including Machine Learning

On March 29, 2021, the FDIC, the Federal Reserve Board, the OCC, the CFPB, and the National Credit Union Administration (the agencies) issued a Request for Information (FDIC Financial Institution Letter (FIL) 20-2021) seeking information and comments on the use of artificial intelligence (AI), including machine learning, by financial institutions. The agencies support responsible innovation by financial institutions and recognize AI has the potential to offer improved efficiency, enhanced performance, and cost reduction for financial institutions, as well as benefits to consumers and businesses. Likewise, as with any activity or process in which a bank engages, identifying and managing risks are key. The request sought information on financial institutions' risk management practices related to the use of AI; challenges facing financial institutions when developing, adopting, and managing AI and its risks; and benefits to financial institutions and their customers from the use of AI. The request also sought views on the use of AI in financial services, which will help the agencies determine whether any clarification would be helpful for financial institutions' use of AI in a safe and sound manner and in compliance with applicable laws and regulations, including those related to consumer protection. The comment period ended on July 1, 2021, and the agencies are considering the comments received. Refer to FDIC FIL-20-2021 for additional details.

Proposed Interagency Guidance on Third-Party Relationships: Risk Management

On July 13, 2021, FIL-50-2021 announced that the FDIC, along with other Federal banking agencies, sought comment on proposed guidance on managing risks associated with third-party relationships. The proposed guidance offers a framework of sound risk management principles to assist banking organizations in managing third-party relationships, and promotes compliance with all applicable laws and regulations, including those related to consumer protection. The proposed guidance takes into account the level of risk, complexity, and size of the banking organization and the nature of the third-party relationship. If finalized, the proposed guidance would replace each agency's existing guidance on this topic. A copy of the proposed guidance is on the FDIC's website. The comment period ended on October 18, 2021, and the agencies are considering the comments received.

Rule on the Role of Supervisory Guidance

On January 19, 2021, the FDIC issued FIL 03-2021 to announce that the FDIC Board of Directors adopted a final rule to clarify and codify the role of supervisory guidance. The FDIC, OCC, the Federal Reserve Board, CFPB, and the National Credit Union Administration had previously published a joint proposed rule to codify the Interagency Statement on the Role of Supervisory Guidance (FIL-49-2018), with clarifying changes, as an appendix to proposed rule text. On January 19, 2021, the FDIC adopted the proposed rule without substantive change. In general, the final rule reiterates the distinction between regulation and supervisory guidance and clarifies the FDIC's policies and practices to:

- Limit the use of numerical thresholds in guidance;
- Reiterate that examiners will not base supervisory criticisms on a "violation" of or "non-compliance" with supervisory guidance;
- Reduce the issuance of multiple supervisory guidance on the same topic;
- Make the role of supervisory guidance clear in communications to examiners and supervised financial institutions; and
- Encourage supervised institutions to discuss questions about supervisory guidance with their appropriate agency contact.

National Flood Insurance Program – Risk Rating 2.0

On October 1, 2021, the Federal Emergency Management Agency (FEMA) began implementing its new pricing methodology, called Risk Rating 2.0, to calculate flood insurance premiums. This new methodology moves away from a reliance on flood zone mapping to leverage industry best practices and technology, thus enabling FEMA to deliver rates that are actuarially sound, equitable, easier to understand, and more reflective of a property's flood risk. Risk Rating 2.0 does not affect the mandatory purchase requirements.

FEMA is implementing Risk Rating 2.0 in two phases: 1) as of October 1, 2021, new policies are subject to the new methodology; and 2) all the remaining policies renewing on or after April 1, 2022, will be subject to the new rating methodology.

Although flood zones on a Flood Insurance Rate Map (FIRM) will not be used to calculate a property's flood insurance premium, flood zones will still be used for floodplain management purposes (i.e., all new construction and substantial improvements to buildings in Zone V must be elevated on pilings, posts, piers, or columns). Further, lenders will continue to use FIRMs to determine if a building is located within a special flood hazard area (SFHA) and must continue to complete the Standard Flood Hazard Determination (SFHD) form for each covered loan as required by 12 C.F.R. 339.6(a). If a building securing a covered loan is located in an SHFA, the lender must require the borrower to obtain the appropriate amount of flood insurance coverage in accordance with the mandatory purchase requirements as defined under 42 U.S.C. § 4012a(b), as implemented by 12 C.F.R. 339.3(a).

If there is a discrepancy regarding whether a property is located in a SFHA, the borrower may use FEMA's Letter of Map Amendment process to review the determination. Pricing for flood insurance policies issued by a private flood insurer and National Flood Insurance Program (NFIP) policies that have not yet been issued under Risk Rating 2.0 may still include the flood zone on a declarations page. In these cases, lenders need not reconcile a flood zone discrepancy.

Notice of Proposed Rulemaking on False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo

The FDIC observed an increasing number of instances where financial service providers or other entities or individuals misused the FDIC's name or logo, or made false or misleading representations that would suggest to the public that these providers' products are FDIC-insured.

On May 10, 2021, the FDIC issued a notice of proposed rulemaking under its statutory authority under the Federal Deposit Insurance Act section 18(a)(4), which prohibits any person from making false or misleading representations about deposit insurance or misusing the FDIC's name or logo. The proposed rule would establish a more transparent process that will promote stability and public confidence in FDIC deposit insurance and the nation's financial system. Specifically, the proposed rule would describe the: (1) process by which the FDIC will identify and investigate conduct that may violate section 18(a)(4); (2) standards under which such conduct will be evaluated; and (3) procedures which the FDIC will follow when formally and informally enforcing section 18(a)(4). The comment period ended on July 9, 2021, and the FDIC is reviewing the comments received and expects to issue the final rule in 2022. Separately, on April 9, 2021, the FDIC re-issued a request for information (RFI) regarding the FDIC Sign and Official Advertising Requirements, which overlaps to a degree with this proposed rule. For example, the RFI asks about how to deal with parties that may be fraudulently impersonating insured depository institutions, which necessarily relates to the proposed rule.

Simplification of Deposit Insurance Rules for Trust and Mortgage Servicing Accounts

On July 20, 2021, the FDIC published a proposed rule to amend the deposit insurance regulations for trust accounts and mortgage servicing accounts. The final rule, issued on January 21, 2022, is intended to make the deposit insurance rules easier to understand for depositors and bankers, facilitate more timely insurance determinations for trust accounts in the event of a bank failure, and enhance consistency of insurance coverage for mortgage servicing account deposits. Under the final rule, the revocable and irrevocable trust deposit insurance categories are merged into a new "trust accounts" category. In addition, the rule establishes a simpler, common formula for calculating coverage for both revocable and irrevocable trusts. Furthermore, under the final rule, an owner's trust deposits would be insured in an amount up to $250,000 for each of the trust beneficiaries, not to exceed five, regardless of whether a trust is revocable or irrevocable; this would provide for a maximum amount of deposit insurance coverage of $1,250,000 for trust deposits, per owner, per insured depository institution. Finally, mortgage servicers' advances of principal and interest funds on behalf of mortgagors in a mortgage servicing account would be insured up to $250,000 per mortgagor, consistent with the coverage for payments of principal and interest collected directly from mortgagors. The rule will take effect on April 1, 2024.

Transitioning from the London Interbank Offered Rate (LIBOR)

On December 7, 2021, the CFPB finalized a rule facilitating the transition away from the LIBOR interest rate index for consumer financial products. The rule establishes requirements for how creditors must select replacement indices for existing LIBOR-linked loans after April 1, 2022. No new financial contracts may reference LIBOR as the relevant index after the end of 2021. Starting in June 2023, LIBOR can no longer be used for existing financial contracts.

Effective April 1, 2022, the final rule includes closed-end credit provisions that require creditors to choose an index comparable to LIBOR when changing the index of a variable rate loan, or consider it a refinancing for purposes of Regulation Z. For open-end loans, the rule adds LIBOR-specific provisions to permit creditors or card issuers for home equity lines of credit (HELOC) and credit card accounts to replace the LIBOR index and adjust the margin used to set a variable rate on or after April 1, 2022, if certain conditions are met. The rule also finalizes change-in-terms notice requirements proposed by the CFPB for disclosing margin reductions for HELOCs and credit card accounts when LIBOR is replaced. These disclosure requirements are effective April 1, 2022, with a mandatory compliance date of October 1, 2022. The rule also amends Regulation Z to address how to re-evaluate rate increases on credit card accounts when transitioning from using a LIBOR index to a replacement index.

In addition, on July 29, 2021, the FDIC issued FIL-54-2021 to provide answers to FAQs about the impact of LIBOR transitions on regulatory capital instruments. Among other things, the FAQs address the issue of changing a reference rate from LIBOR to an alternative rate and clarify that such a transition would not change the capital treatment of the instrument, provided the alternative rate is economically equivalent with the LIBOR-based rate. The FAQs can be found on the FDIC's website.

FDIC Risk Assessments Relating to the CARES Act and Mortgage Servicing

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law to provide relief to those who are impacted by the COVID-19 emergency. The CARES Act includes various provisions that affect financial institutions and their customers. In addition to CARES Act-mandated forbearance, mortgage servicers offered debt relief options to borrowers facing hardships related to the COVID-19 pandemic. In 2020, the FDIC conducted targeted risk assessments of certain financial institutions to assess any challenges, issues, or concerns related to the CARES Act, and to determine the extent to which the institutions implemented relevant CARES Act provisions. Although there were challenges with the high volume of COVID-19-related mortgage requests and questions from customers, as well as internal efforts to maintain a healthy workforce, the FDIC found supervised institutions had compliance management systems that identified, mitigated, and responded to consumer compliance risks in the institution's operations, and associated products and services.

In 2021, the FDIC conducted follow-up risk assessments of FDIC-supervised institutions with significant mortgage servicing portfolios. This included institutions that participated in the 2020 risk assessment, as well as others with significant mortgage servicing portfolios. Overall, the FDIC's 2021 risk assessments found supervised institutions reported relatively low volumes of loans in forbearance, particularly when compared to the total volume of loans in forbearance at the peak of the pandemic, and to total loans serviced. The institutions also reported they do not anticipate elevated levels of borrowers seeking additional debt relief assistance. The institutions noted they had adjusted resources and implemented programs, processes, and monitoring throughout the pandemic that have allowed for successful management of forbearance plans and all loss mitigation efforts. Though COVID-19 presented serious challenges, supervised institutions created or revised policies and procedures, provided ongoing training, and exhibited effective oversight to support compliance with the CARES Act and mortgage servicing rules.

Resources for Financial Institutions

The FDIC provides resources for financial institutions to support their efforts to serve and meet the needs of their communities. In addition, these resources may provide information that can help institutions stay current with regulatory developments and provide guidance on consumer compliance topics.

Banker Resource Center

The FDIC's Banker Resource Center provides supervisory resources for banking professionals. The site includes links to applicable laws and regulations, frequently asked questions, archived webcasts and teleconferences, statements of policy, and other information issued either on an interagency basis or individually by the FDIC. It also contains links to published materials from other agencies.

On December 23, 2021, the FDIC released five mortgage-servicing videos for the Technical Assistance Video Program. The videos provide a high-level overview to help FDIC-supervised institutions understand and comply with the mortgage servicing rules. The first video provides an overview of mortgage servicing and describes how to determine whether a servicer meets the definition of a small servicer under Regulation Z. The second video discusses key provisions for which small servicers do not have an exception. These are the provisions with which all servicers, small and large, must comply. The third video provides an overview of some of the requirements from which small servicers are exempt. The fourth video discusses successors in interest, including the definition of successor in interest and a general overview of what to be aware of when working with successors in interest. Finally, the fifth video provides information and examples related to developing a compliance management system that considers the mortgage servicing rules. The videos range in duration from around 8 to 27 minutes.

On February 23, 2021, the FDIC released nine technical assistance videos on fair lending. These videos provide a high-level overview to help FDIC-supervised institutions understand how FDIC examiners evaluate fair lending compliance and provide information to institutions on assessing and mitigating different types of fair lending risks. The first video provides an overview of the Federal fair lending laws and regulations. The second video focuses on how a bank's CMS can mitigate fair lending risk. The third video discusses the FDIC's fair lending examination approach. The remaining six videos provide overviews of overt discrimination, as well as risks relating to underwriting, pricing, steering, redlining, and marketing. The videos range in length from approximately 10 to 28 minutes.

An Overview of Consumer Complaint Trends

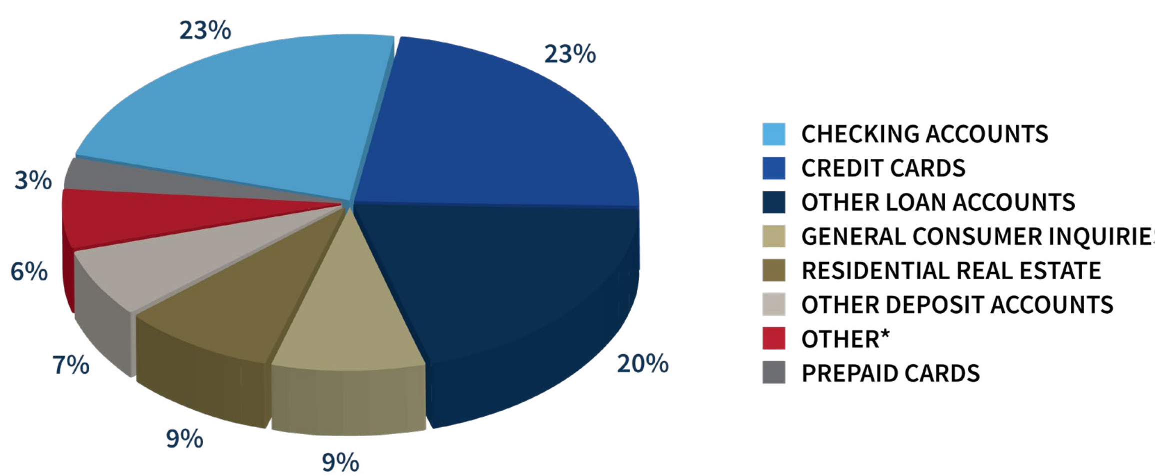
The National Center for Consumer and Depositor Assistance's (NCDA) Consumer Response Unit (CRU) closed and responded to 17,714 written complaints and telephone calls from consumers in 2021, which represents a 16 percent increase from the 15,217 case records in 2020. The CRU closed and responded to 14,236 written consumer complaints in 2021 by investigating the complaint or referring the complaint to the appropriate FDIC division/office or other agency. The CRU acknowledged 100 percent of written complaints within 14 days and investigated and responded to 99 percent of non-fair lending complaints within established timeframes.

Of the 14,236 written complaints, the CRU investigated 8,529 of the written complaints or inquiries. The completed investigations of the noted products, issues, and applicable regulations found 429 apparent bank errors and 201 apparent violations. Fair Lending complaints investigated by the CRU increased from 48 in 2020 to 63 in 2021, a 31 percent increase.

The volume of third-party providers (TPPs) associated with complaints increased to 4,100 from 3,298, or 24 percent. These relationships generally involve contractual agreements between banks and entities that perform a variety of services, such as credit card servicing and processing deposit account transactions and error disputes. The CRU tagged a case involving a TPP in 3,846 instances. TPPs were associated with 97 cases reflecting an apparent violation of a federal consumer protection regulation.

The CRU's interaction with consumers and banks resulted in consumers receiving $1,292,695 in total voluntary restitution and compensation through December 2021, compared to $949,925 received for the same period in 2020, a 36 percent increase. In addition to monetary compensation, the CRU's interaction also resulted in 871 cases reflecting non-monetary compensation. The types of non-monetary compensation provided included: updating bank records, reinstating an account or releasing a block on a card, ceasing collection calls or actions, loan modifications, and forgiving debt.

The CRU coded each complaint within the Enterprise Public Inquiries and Complaints (EPIC) system with at least one product, issue, regulation, and finding. In 2021, the CRU determined the top five products to include: *checking accounts* (3,160), *credit cards* (3,032), *installment loans* (1,169), *residential real estate* (1,029), and *consumer line of credit* (950). The following chart provides the breakdown of the top products in 2021.



*Other represents topics such as bank operations and scams.

The following table provides a five-year analysis of the top products and the associated top issues for those products.

MOST COMMON PRODUCT COMPLAINTS REVIEWED BY THE CRU IN 2021	% OF PRODUCTS COMPARED TO TOTAL VOLUME					MOST COMMON ISSUES (2021) (% OF PRODUCT TOTALS)
	2017	2018	2019	2020	2021	
Checking Accounts	17%	23%	29%	25%	23%	1. Error Resolution (25%) 2. Customer Identification Policy (15%) 3. Account Closure (15%)
Credit Cards	16%	17%	20%	18%	23%	1. Credit Reporting Errors (35%) 2. Loan Forgery/ID Theft (13%) 3. Billing Disputes (8%)
Residential Real Estate	15%	14%	10%	8%	9%	1. Disclosures (12%) 2. Credit Reporting Errors (10%) 3. Loan Modification (8%)
Installment Loans	9%	8%	9%	7%	9%	1. Credit Reporting Errors (30%) 2. Disclosures (13%) 3. Loan Forgery/ID Theft (8%)
Lines of Credit	11%	11%	8%	7%	7%	1. Credit Reporting Errors (45%) 2. Loan Forgery/ID Theft (15%) 3. Collection Practices (10%)

While *checking account* complaints remained the top product in 2021, it is reflecting a decrease since it peaked in 2019. The CRU will monitor this decrease to see if the availability of alternative banking products may be responsible for the decline. The issue *customer identification policy* increased to 416 complaints in 2021, or 120 percent. Complaints regarding this issue involve concerns a bank has blocked or closed an account until the consumer provides the requested identification documents.

Credit card complaints increased to 3,302, or 55 percent after decreasing in 2020. Complaints regarding *credit reporting error* involve concerns regarding the reporting of inaccurate information and fraudulent accounts. *Loan forgery/ID theft* concerns increased 629 percent through December 31, 2021. The CRU has noted an increase of *loan forgery/ID theft* concerns for several loan products in 2021.

Residential real estate complaints increased slightly in 2021. In 2022, the CRU will be watching to see if it receives an increase in complaints regarding COVID-19 forbearance exit plans as banks servicing Fannie Mae loans must follow Fannie Mae guidance.

The CRU also associated 13,409 issues with products. The top 15 issues of 2021 are noted below:

MOST COMMON ISSUES IN CONSUMER COMPLAINTS AND INQUIRES ABOUT FDIC SUPERVISED INSTITUTIONS	
Credit Reporting Disputes	16%
Unable to Provide Requested Service*	7%
Disclosures	7%
Loan Forgery/ID Theft	5%
Error Resolution Procedures	5%
Customer Identification Policy	5%
Account Closures	4%
Deposit Transaction Error	4%
Debt Collection Practices	3%
Fees and Finance Charges (Loans)	3%
Billing Disputes	3%
Account Block	2%
Loan Discrepancies/Crediting of Payments	2%
Fees and Service Charges (Deposits)	2%
Funds Availability/Hold Notifications	2%

*Includes service disruption issues and other service-related concerns when customers cannot immediately access their accounts.

Two top issues reflect connections with three other top issues. *Credit reporting* remains the top issue in 2021, with a 59 percent increase from 2020. Four products comprise 96 percent of the credit reporting concerns: *credit cards, consumer line of credit, installment loans*, and *residential real estate*. Of the complaints noting *credit reporting error* concerns, approximately a third of the complaints also reflected *loan forgery/ID theft* concerns. Overall, *loan forgery/ID theft* concerns increased 423 percent in 2021. Three products reflected 94 percent of the concerns: *credit cards, consumer line of credit*, and *installment loans*. In most instances, consumers voiced concerns that accounts were established in their name without their permission

Concerns regarding customer identification policy increased by 87 percent through December 31, 2021. The CRU did not start tracking this issue until 2019. The products checking accounts and prepaid cards comprised 70 percent of this issue. Of the complaints noting customer identification policy concerns, several also noted concerns about the bank either blocking or closing their account.