UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING, *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Case No. 1:12-cv-01032 (ESH)
NEIL S. WOLIN, in his official capacity as Acting United States Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council 1500 Pennsylvania Avenue, NW Washington, DC 20220, *et al.*,	)	Judge: Hon. Ellen S. Huvelle
Defendants.	)	

PRIVATE PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS
THE SECOND AMENDED COMPLAINT PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

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INTRODUCTION

Plaintiffs have pled *concrete* and *present* injuries caused by the challenged titles of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Act"), which are described at length in the Second Amended Complaint ("SAC" or "Complaint"). The formation and operation of the Consumer Financial Protection Bureau ("CFPB" or "Bureau") has substantially increased Plaintiff State National Bank's ("SNB" or the "Bank") compliance costs, imposed new costs on the management of its outstanding mortgages, and forced it to exit from two profitable lines of business. The authority of the Financial Stability Oversight Council ("FSOC" or "Council") to designate non-bank financial institutions with which SNB competes for scare capital as "systemically important"—and thus Government-backed—imminently threatens SNB with competitive harm. And as consumers of services offered by financial institutions that are subject to the Act, the Competitive Enterprise Institute ("CEI" or the "Institute") and the members of the 60 Plus Association have experienced increased service costs and decreased services as a direct result of the regulatory burdens imposed by the Act. Each of these injuries is cognizable under Article III and independently confers on Plaintiffs standing to bring this suit.[1]

Although the allegations contained in the Complaint make Plaintiffs' standing plain, the Government has manufactured a jurisdictional challenge by mischaracterizing, fabricating, and ignoring Plaintiffs' pleadings and attacking a suit entirely of its own making. And just as the Government attacks a warped version of the Complaint, it has distorted and disregarded governing case law that disposes of the Government's argument on its own terms. Binding precedent dictates that the Plaintiffs have standing to sue:

[1] This opposition addresses the Private Plaintiffs' claims under Title I and Title X of the Act (the FSOC and the CFPB), and uses 40 of the 70 pages allocated to Plaintiffs. (Minute Order, Feb. 23, 2013.) The State Plaintiffs, which are separately represented, are filing their own opposition to the motion to dismiss the Title II claims, using the remaining 30 pages.

1) to assert "a present injurious effect on [their] business decisions," *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 20 (D.C. Cir. 2006) (internal quotation marks omitted);

2) to "secure review before enforcement so long as the issues are fit for judicial review without further factual development and denial of immediate review would inflict a hardship," *Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005);

3) to raise a separation of powers challenge to an agency whenever "they have been directly subject to the authority of the agency," *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993) (internal quotation marks omitted); and

4) to assert "'probable economic injury resulting from [governmental actions] that alter competitive conditions,"' *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (quoting 3 K. Davis & R. Pierce, *Administrative Law Treatise* 13–14 (3d ed. 1994) (alteration in original)).

Contrary to the Government's claims, this suit does not turn on speculation, but rather focuses on the concrete injuries that have already been inflicted on Plaintiffs by the unchecked and unprecedented powers conferred on defendants by the Dodd-Frank Act.

STATUTORY AND REGULATORY BACKGROUND

In the Dodd-Frank Act, Congress and the President adopted a set of sweeping financial reforms, fundamentally restructuring the legal framework that governs the Nation's financial institutions, markets, and consumers. But the elected Branches did not themselves adopt the rules under which those entities and individuals must now do business. Instead, the Act creates a variety of new federal agencies and bestows on them unparalleled power to regulate the country's financial system, with an unprecedented lack of oversight from the Legislative, Executive, and Judicial Branches. This lawsuit challenges three separate Titles of the Act, each of which violates the separation of powers demanded by the U.S. Constitution, and also seeks to correct the President's unconstitutional appointment of Mr. Richard Cordray to serve as Director of one of the new agencies created by the Act.

A. TITLE X: THE CFPB

Title X of the Dodd-Frank Act establishes the CFPB, a new "Executive agency" that the Act declares to be an "independent bureau" "established in the Federal Reserve System." 12 U.S.C. § 5491(a). With minimal oversight by any branch of government, the CFPB "regulate[s] the offering and provision of consumer financial products or services under the Federal consumer financial laws," *id.*, by exercising two principal authorities.

1. Pre-Existing Federal Law

First, the CFPB bears the responsibility (previously held by other agencies) for enforcing many pre-existing federal financial statutes—laws covering everything from mortgages to debt collection to international remittance transfers. *See* SAC ¶¶ 98-101 (citing statutes); 15 U.S.C. § 1693 (Electronic Funds Transfer Act ("EFTA")). The Dodd-Frank Act authorizes the Bureau to promulgate any rule it deems "necessary or appropriate to enable the [CFPB] to administer and carry out the purposes and objectives of th[ose] Federal consumer financial laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1). The Bureau is also authorized to directly enforce those laws, including through civil enforcement actions. *Id.* § 5564.

The CFPB has already exercised its authority to administer one such law, the EFTA, by promulgating a "Remittance Rule" that imposes substantial disclosure and compliance requirements on institutions wishing to offer international remittance transfers. 77 Fed. Reg. 6194 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005). As published, the Rule applied to "any person that provides remittance transfers for a consumer in the normal course of its business," *id.* at 6285, which includes the Bank. *See* SAC ¶¶ 15, 102.

2. The "UDAAP" Authority

Second, the Dodd-Frank Act authorizes the CFPB to take action, including direct

enforcement action, to prevent a covered provider from engaging in "unfair," "deceptive," or "abusive act[s] or practice[s]"—a power the Government describes as the Bureau's "UDAAP" authority. 12 U.S.C. § 5531(a); *see* Memorandum in Support of Defts' Motion to Dismiss the Amended Complaint ("Mem.") at 2. As part of this authority, the CFPB may require depository institutions like the Bank to provide the Bureau reports concerning the institution's activities and services. 12 U.S.C. § 5516(b). In addition, "[t]he Bureau may, at its discretion, include [its own] examiners on a sampling basis" on examinations performed by an institution's prudential regulator—in the case of SNB, the Office of the Comptroller of the Currency ("OCC")—"to assess compliance with the requirements of Federal consumer financial law." *Id.* § 5516(c)(1). The CFPB is also required to refer to prudential regulators reports of any activity the Bureau deems to be "a material violation of a Federal consumer financial law" and "recommend appropriate action to respond." *Id.* § 5516(d)(2)(A). The prudential regulator is required to "provide a written response to the Bureau not later than 60 days thereafter." *Id.* § 5516(d)(2)(B).

The CFPB has already taken actions to enforce its UDAAP authority. For example, after concluding that Capital One Bank (U.S.A.), N.A. engaged in deceptive practices, the Bureau secured a consent order under which Capital One is required to refund approximately $140 million to customers and to pay an additional $25 million penalty. *See* Stipulation and Consent Order, *In re Capital One Bank (USA) N.A.*, No. 2012-CFPB-0001 (July 16, 2012).[2]

In addition, Bureau officials, including Mr. Cordray, have advised financial institutions that "complaints about … mortgages" will be an enforcement priority—particularly "the

[2] The Bureau has charged other companies with UDAAP violations, as well. *See, e.g.*, Joint Consent Order, Joint Order for Restitution, and Joint Order to Pay Civil Money Penalty Complaint for Injunctive Relief and Damages, *In re American Express Centurion Bank Salt Lake City, Utah*, No. 2012-CFPB-0002 (Oct. 1, 2012) ("American Express Order"); Complaint for Injunctive Relief and Damages, *CFPB v. Payday Loan Debt Solution, Inc.*, No. 12-24410 (S.D. Fla. Dec. 14, 2012) ("*Payday Loan* Complaint").

origination of high-priced mortgages." SAC ¶¶ 89-91. Mr. Cordray has further stated that the Bureau will not define in advance what "abusive" mortgage lending practices are, but rather will apply an *ad hoc* "facts and circumstances" test as "situations may arise," providing financial institutions such as SNB no advance notice as to what conduct may later be deemed by the Bureau to be unlawful and subject to enforcement action. SAC ¶ 75.

3. Lack of Oversight and Accountability

In addition to granting unparalleled powers, the Dodd-Frank Act strips Congress, the President, and the Judiciary of the power to oversee the Bureau's activities. Congress retains no "power of the purse" control over the CFPB: the Act authorizes the Bureau's Director to determine for himself the amount of funding the agency should receive, up to 12 percent of the Federal Reserve Board's operating expenses. 12 U.S.C. § 5497(a)(1)-(2). The President also lacks the power to oversee the Bureau; the Act allows him to remove the Director only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(2), (3). The Judiciary, too, is required to accord unusual deference to the CFPB's interpretation of Federal consumer financial laws, treating the Bureau as if it "were the only agency authorized to apply, enforce, interpret, or administer the provisions of such" law. *Id.* § 5512(b)(4)(B). Finally, there are no internal constraints within the CFPB. All of the powers of the Bureau are vested solely in a single Director, without the moderating influence of other commissioners or officials as are present in other agencies vested with quasi-legislative and quasi-judicial powers. SAC ¶ 120.

Thus, the Dodd-Frank Act grants the CFPB virtually unbounded power without any meaningful accountability to the elected branches or judicial scrutiny. And to make matters worse, the President took it upon himself to entirely bypass the one check Congress retained over the Bureau—the constitutional right and duty of the Senate to advise and consent to the Bureau

director's appointment. On January 4, 2012, President Obama announced that he was using his "recess appointment" power to appoint Mr. Cordray Director of the CFPB, despite the fact that the Senate was not in recess. *See* SAC ¶¶ 124-134; *Noel Canning v. NLRB*, --- F.3d ----, 2013 WL 276024, at *16 (D.C. Cir. Jan. 25, 2013) (holding constitutionally infirm other appointments the President made on January 4, 2012 to NLRB because Senate was not in recess).

B. TITLE I: THE FSOC

Title I of the Dodd-Frank Act establishes the FSOC, an interagency "council" with broad executive powers. The Council is comprised of ten voting members appointed by the Executive Branch and five nonvoting members "designated" for two-year terms by a selection process determined by State officials. 12 U.S.C. § 5321. By a two-thirds vote of the voting members, the Council may determine that a nonbank financial company—generally, a financial institution that provides banking services but does not hold a banking license or take deposits—presents a "threat to the financial stability of the United States," *id.* § 5323, which in effect labels the company as "systemically important." 76 Fed. Reg. 64,264, 64,267 (Oct. 18, 2011). Companies determined to be systemically important financial institutions (known as "SIFIs") may be subject to additional federal oversight, *see* 12 U.S.C. § 5325, but also receive a competitive advantage over non-SIFI financial institutions, such as SNB, because they are seen by the public and public markets as backed by the Government and thus a less risky investment. *See* SAC ¶ 142-149. Despite the serious consequences of a SIFI designation, the Dodd-Frank Act gives the FSOC virtually unlimited discretion in deciding what companies should be declared SIFIs, by allowing it to consider any "risk-related factors that [the Council] deems appropriate" (in addition to other enumerated factors) when making SIFI designations. 12 U.S.C. § 5323(a)(2)(K). Furthermore, the Act insulates SIFI designations from meaningful judicial review—indeed, from all judicial

review brought by third parties injured by an FSOC designation. SAC ¶¶ 8, 154-157.

PROCEDURAL HISTORY

The Bank, CEI, and the 60 Plus Association filed the initial Complaint in this case on June 21, 2012. *See* Compl. for Decl. & Inj. Relief. The original Complaint challenged as unconstitutional: (1) the formation and operation of the CFPB (Compl. ¶ 1); (2) the appointment of Bureau Director Cordray without the Senate's advice and consent, when the Senate was not in recess (Compl. ¶ 2); and (3) the creation and operation of the FSOC (Compl. ¶ 3). The initial Complaint alleged that each of these actions and aspects of the Dodd-Frank Act violates the separation of powers mandated by the Constitution.

On September 20, 2012, the States of Michigan, Oklahoma, and South Carolina joined the original Plaintiffs in filing a First Amended Complaint. In addition to asserting the three original constitutional challenges (which the States did not join), all six Plaintiffs in that Complaint challenged "the unconstitutional creation and operation" of the Orderly Liquidation Authority ("OLA") under Title II of the Dodd-Frank Act. SAC ¶¶ 4, 9-11. On February 20, 2013, the States of Alabama, Georgia, Kansas, Montana, Nebraska, Ohio, Texas, and West Virginia joined the constitutional challenges to the OLA in a Second Amended Complaint.

Throughout the Complaint, the Plaintiffs alleged several concrete ways in which they had been injured as a result of the constitutional violations alleged:

A. STATE NATIONAL BANK

1. The CFPB

To begin, SNB averred in the Complaint that the unconstitutional formation and operation of the CFPB, and the illegal appointment of Director Cordray, caused it to suffer three distinct financial injuries. First, the Bank has been injured by "the burdens of substantially increased compliance costs" caused by the Bureau's vast regulatory and enforcement authority.

SAC ¶ 95. SNB alleged that, to avoid transgressing whatever the Bureau might next deem Federal consumer financial law to prohibit, the Bank "would be forced to constantly monitor and predict the CFPB's regulatory priorities and legal interpretations." SAC ¶ 95. And the Bureau has, in fact, already caused the Bank to incur significant compliance costs. In the year 2012 alone, the Bank spent over $230,000 on legal compliance, including over $2,500 to send a representative to "Compliance School" that offered classes on, among other things, CFPB regulations. Ex. A, Declaration of Jim R. Purcell ¶ 5-6 ("Ex. A.").[3] In addition, the Bank responded to the creation of the CFPB by purchasing a subscription to a new service known as the "Compliance Alliance" created by the Texas Bankers Association in response to the passage of the Dodd-Frank Act. That Service provides notification and counsel regarding new and proposed regulations, interpretations, and enforcement actions that would affect the Bank's business, and was specifically marketed to SNB and other banks as necessary to stay up-to-date with (among other things) the activities of the CFPB. *Id.* ¶ 7. The Bank continues to subscribe to the service at a cost of $9,900 per year—down from the initial fee of $12,000 per year because such a large volume of banks saw the need to subscribe.[4] *Id.* ¶ 9. In 2011, the Bank also subscribed to another compliance service, TriNovus, at a cost of over $2,300. *Id.* ¶ 10.

[3] *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) (court may, on motion to dismiss for want of standing, "allow . . . the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed support of plaintiff's standing").

[4] That the Bank would be forced to incur such costs is hardly surprising: the U.S. House of Representatives Committee on Financial Services estimates that compliance with the 224 rules issued pursuant to Dodd-Frank to date will require 24,180,856 man hours every year. Dodd-Frank Burden Tracker, financialservices.house.gov, http://financialservices.house.gov/uploaded files/dodd-frank_pra_ spreadsheet_7-9-2012.pdf. Such costs are particularly problematic for small institutions like SNB. Indeed, the current chairman, president, and chief executive officer of JPMorgan Chase, one of the largest banks in the country, has referred to the newly imposed costs as a "moat" that makes it more difficult for smaller institutions to enter the market and compete with JPMorgan. *See* John Carney, *Surprise! Dodd-Frank Helps JPMorgan Chase,* CNBC.com (Feb. 4, 2011) (http://www.cnbc.com/id/100431660).

Next, SNB explained that it had "instituted a policy to cease providing … remittance transfer services" because the CFPB's "promulgation of a Final Rule regulating international remittance transfers" "increase[d] the cost of providing th[o]se services to the Bank's customers to an unsustainable level." SAC ¶¶ 15, 102. As a result of the CFPB's Rule, the Bank lost the profits it previously earned in providing remittance services, lost the competitive benefit of being able to make those services available without restriction to current and prospective customers, and has been required to forego the opportunity to expand that business in the future. Ex. A ¶ 20.

SNB also averred that it has been "injured because Title X requires the Bank to conduct its business, and make decisions about what kinds of business to conduct, without knowing whether the CFPB will retroactively announce that one or more of the Bank's consumer lending practices" is "unfair," "deceptive," or "abusive," and thus subject to enforcement proceedings and penalties under the Act. SAC ¶ 16. In particular, the CFPB's UDAAP authority caused the Bank to cease offering previously profitable consumer mortgages. SAC ¶ 94. SNB explained that prior to the Dodd-Frank Act it offered (1) mortgages that included balloon payments and (2) "character loans"—loans based not only on the borrower's ability to repay but also his known credibility and character. SAC ¶ 94. Given the CFPB's avowed enforcement focus on "the origination of mortgages, including … high-priced mortgages"—which include many mortgages previously offered by SNB (SAC ¶ 94; Ex. A ¶¶ 25, 32)—SNB was forced to "exit the consumer mortgage business" for fear that the Bureau would deem its practices unlawful and have that decision enforced through "*ex post facto* enforcement activities." SAC ¶¶ 16-17, 77, 91.[5]

2. The FSOC

Addressing Title I, SNB asserted that it faces imminent competitive injury as a result of

[5] As explained below, the Bureau's recent issuance of a rule governing foreclosures also has impacted the Bank's mortgage practices and increased the Bank's costs of doing business.

"the FSOC's official designation of 'systemically important' nonbank financial companies." SAC ¶ 149. The Council's designations give named SIFIs "a direct cost-of-capital subsidy not enjoyed by … other companies," including SNB, which also "compet[e] for scarce, fungible capital." SAC ¶ 148. Thus, "each additional [SIFI] designation will require the Bank to compete with yet another … newly designated nonbank financial company … able to attract scarce, fungible investment capital at artificially low cost." SAC ¶ 149.

B. THE COMPETITIVE ENTERPRISE INSTITUTE AND 60 PLUS ASSOCIATION

Plaintiff CEI is a public interest organization that engages in research and advocacy efforts involving a broad range of legal issues. SAC ¶ 21. The Institute alleged that it relies on the services of banks regulated by the CFPB, including checking accounts at Wells Fargo. SAC ¶ 22. "The nature and cost of these accounts are jeopardized by the CFPB's sweeping regulatory authority over them and over the institutions in which they are based." SAC ¶ 22.

Plaintiff 60 Plus Association is a seven-million-member, non-profit advocacy group. One of the Association's "goals is to preserve access to credit and financial products for seniors." SAC ¶ 18. As the Complaint explains, "the Dodd-Frank Act harms the members of the 60 Plus Association in that it has reduced, and will further reduce, the range and affordability of banking, credit, investment, and savings options available to them." SAC ¶ 19. In particular, "[p]rovisions enforced by the CFPB have reduced the availability of free checking." SAC ¶ 19.

STANDARD OF REVIEW

On a motion to dismiss for lack of standing under Rule 12(b)(1), this Court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Ord v. District of Columbia*, 587 F.3d 1136, 1140 (D.C. Cir. 2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The Court "must make all reasonable inferences in

[the Plaintiffs'] favor," *id.* at 1143, "presum[ing] that general allegations [in the complaint] embrace those specific facts that are necessary to support the claim." *LaRoque v. Holder*, 650 F.3d 777, 785 (D.C. Cir. 2011) (internal quotation marks omitted). In addition, the Court must "assume that plaintiffs will prevail on the merits of their claims." *City of Jersey City v. Cons. Rail Corp.*, 668 F.3d 741, 744 (D.C. Cir. 2012).

To proceed with the litigation, the Court need identify only one plaintiff who has standing to assert each claim. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012).

ARGUMENT

As the Supreme Court has explained, "the gist of the question of standing" is, "at bottom," whether plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness" that "sharpens" the presentation of issues to the Court. *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). To assure such "adverseness," a plaintiff must demonstrate that "it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts*, 549 U.S. at 517 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

In addition, "it does not matter how many persons have been injured by [a] challenged action" so long as the plaintiff has been injured in a concrete and personal way. *Id.* (internal quotation marks omitted). Even the "threat of relatively small financial injury [is] sufficient to confer Article III standing." *Raytheon Co. v. Ashborn Agencies, Ltd.*, 372 F.3d 451, 454 (D.C. Cir. 2004) (describing holding of *Franchise Tax Bd. of Ca. v. Alcan Aluminum Ltd.*, 493 U.S. 331 (1990)). And where plaintiffs have already been injured, although the risk of significant future harm they allege may be "remote," if it is "nevertheless real," and "would be reduced to

some extent if [plaintiffs] received the relief they seek," then they "have standing to challenge" the Government act contributing to the harm. *Massachusetts*, 549 U.S. at 526.

As explained below, each of the Plaintiffs' allegations, properly understood, satisfies the requirements for suit. Indeed, even under the Government's mischaracterization of the allegations of the Complaint, Plaintiffs would still have standing to sue.

I. THE BANK HAS STANDING TO CHALLENGE THE UNCONSTITUTIONAL FORMATION AND OPERATION OF THE BUREAU

The Bank has experienced four here-and-now financial injuries directly caused by the unconstitutional formation and operation of the Bureau, each of which independently confers standing. First, SNB has incurred and will continue to incur substantial compliance costs to ensure it acts consistently with the Bureau's regulations and interpretations of Federal consumer financial law. Second, the Bureau's new rules governing mortgage foreclosure increase the Bank's costs of doing business with respect to mortgage loans it has already made. Third, as a result of the Bureau's Remittance Rule, SNB ceased offering profitable remittance transfers and is now strictly limited in its development of this business. Fourth, the Bank has discontinued a profitable mortgage practice to avoid prosecution pursuant to the Bureau's UDAAP authority.

A. The Bank Is Injured by Compliance Costs that Have Increased as a Result of the Bureau's Acts

In the 40-plus pages the Government spends attacking Plaintiffs' standing, it devotes but a footnote to the significant compliance costs the Bank has incurred and will continue to incur as a result of the Bureau's exercise of its authority under Dodd-Frank (SAC ¶ 95). *See* Mem. 28 n.14. But the law is clear that plaintiffs "harmed because they will face even greater compliance costs" as a result of agency action have standing to sue. *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 458 (D.C. Cir. 2012) (internal quotation marks omitted); *accord*, *e.g.*,

Cellco P'ship v. FCC, 357 F.3d 88, 100 (D.C. Cir. 2004) ("As an entity continuously burdened by the costs of complying . . . with what it contends are 'unnecessary' regulations[,] … [plaintiff's] injuries are concrete and actual"); *Inv. Co. Inst. v. CFTC*, --- F. Supp. 2d ----, No. 12–00612, 2012 WL 6185735, at *16 (D.D.C. Dec. 12, 2012) (finding standing due to "relative increased [Dodd-Frank] regulatory burden and … associated costs").

In particular, courts have recognized that plaintiffs have standing to assert injury due to the "increased time and expense necessary for" an organization "to monitor [an agency's] activities under new agency regulation." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 28 (D.C. Cir. 1990) (describing holding of *Pac. Legal Found. v. Goyan*, 664 F.2d 1221 (4th Cir. 1981)). In *Chambers Medical Technologies of South Carolina, Inc. v. Bryant*, for example, the Fourth Circuit considered whether a company that incinerated waste had standing to challenge a law prohibiting it from accepting waste from any State that prohibited incineration in that State. 52 F.3d 1252, 1265 (4th Cir. 1995). The defendant argued that the incinerator lacked standing because no other State had enacted such a law. The Court of Appeals held, however, that the incinerator had standing because it had alleged it would "incur costs in monitoring the laws of other states so that it may avoid violation of the provision." *Id.* at 1266.

Here, too, the CFPB has imposed significant compliance costs on the Bank. In the year 2012 alone, the Bank spent thousands of dollars to ensure it was aware of and complied with the hundreds of pages of regulations the Bureau has promulgated, the interpretive positions the Bureau has taken, and the enforcement actions it has brought. Ex. A ¶¶ 5-9. Indeed, given the CFPB's refusal to define the term "abusive," it is only through such constant monitoring that the Bank can ensure it does not violate the CFPB's understanding of what the law requires. Furthermore, in the last six months alone, the CFPB has issued over a thousand pages of

interpretations and rules—including one rule over 800 pages long. *See* Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6407, 6586 (Jan. 30, 2013) ("Regulation Z") (to be codified at 12 C.F.R. § 1026.43(e)(1)), *available at* http://files.consumerfinance.gov/f/201301_cfpb_final-rule_ability-to-repay.pdf.[6]

The Government's only response to that injury is to discount it as a "generalized grievance" not cognizable under Article III, supposedly because the Bureau has imposed compliance costs on other institutions. Mem. 28 n.14. But an injury is not "generalized" simply because it has been inflicted upon a number of parties. *FEC v. Akins*, 524 U.S. 11, 23-24 (1998). Rather, that "term … refers to the diffuse and abstract nature of the injury." *Akins v. FEC*, 101 F.3d 731, 737 (D.C. Cir. 1997), *vacated and remanded on other grounds*, *Akins*, 524 U.S. 11; *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006). It is hard to see how the over $10,000 in costs absorbed by SNB could be deemed either diffuse or abstract; the costs are a significant, concrete burden directly attributable to the Bureau. And even if the costs were instead minimal, the "threat of relatively small financial injury [is] sufficient to confer Article III standing." *Raytheon*, 372 F.3d at 454; *accord Neighborhood Assistance Corp. of Am. v. CFPB*, --- F. Supp. 2d ----, No. 11–cv–1312, 2012 WL 5995739, at *5 (D.D.C. Dec. 3, 2012).

B. The Bank Is Also Injured by the Bureau's Regulation of Mortgage Foreclosures

The Bank also has standing because it is subject to and injured by the Bureau's promulgation of a new rule governing mortgage foreclosures that increases the Bank's costs of

[6] This case therefore bears no resemblance to *Clapper v. Amnesty International USA*, No. 11-1025 (S. Ct. Feb. 26, 2013), where the expenditures on which the plaintiffs' claim to standing was based were made to address a "hypothetical future harm." Slip Op., at 2. Here, the CFPB has already issued several regulations that directly govern the services the Bank currently offers, such as international remittance transfers and mortgage servicing, and the Bank must keep up with these and other CFPB interpretations, rules, and enforcement actions to ensure that it does not violate Federal consumer financial law. *See infra* 15-17.

doing business. *See* Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) 78 Fed. Reg. 10696, 10885 (Feb. 14, 2012). Although the Bank no longer initiates new consumer mortgage loans, it still holds loans from previous years that have yet to be fully satisfied. Ex. A ¶ 36. Under the Bureau's new rule, a small servicer such as the Bank "shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent." 78 Fed. Reg. at 10885 (to be codified at 12 C.F.R. §1024.41(j)). Under previously-applicable law, the Bank could initiate foreclosure sale proceedings on a defaulted loan if the borrower did not cure within 20 days of a letter notifying him of the delinquency. After the 20 days expired, the Bank could post a foreclosure notice at the courthouse, file a notice with the county clerk, and notify the borrower of the foreclosure sale, which could be held as soon as 21 days thereafter. Tex. Prop. Code Ann. § 51.002(a), (b), (d). Even where the Bank does not intend to foreclose on a defaulted borrower, posting a foreclosure notice soon after default is a useful tool to induce borrowers to get current on payments—but the Bank is now prohibited by the Bureau's new rule from doing so for 120 days. Ex. A ¶ 36. The Bureau's rule increases the Bank's costs by drawing out the process by which the Bank can recover on defaulted loans.

The Bureau's direct regulation of the Bank's business, not to mention the financial injury imposed by the new foreclosure regulation, independently confers standing on SNB to challenge the creation and formation of the Bureau as unconstitutional. *See Committee for Monetary Reform v. Board of Governors of the Federal Reserve System*, 766 F.2d 538, 543 (D.C. Cir. 1985) (party "directly subject to the authority of [an] agency" has "standing to challenge the authority of an agency on separation-of-powers grounds"); *Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910, 916 (5th Cir. 1997) ("increased costs of doing

business imposed on contractors by [an applicable] Rule" were an actionable injury).

C. The Bank Is Further Injured by the Bureau's Limitations on Remittance Transfers

In addition, the Bank has standing to challenge the unconstitutional formation and operation of the CFPB because it has been injured by the Bureau's Remittance Rule. The Government does not (and cannot) argue that the loss of remittance profits is not a cognizable injury but would have this Court disregard it because, the Government claims: (1) SNB has not pleaded facts showing that it is subject to the Rule; and (2) the Rule is not traceable to the separation of powers violation the Complaint alleges. The Government is wrong on both counts.

1. *The Bank Is Subject to the Remittance Rule*

It is well established that "standing is assessed as of the time a suit commences." *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009). At the time this suit was filed, the CFPB's remittance rule imposed substantial disclosure and compliance requirements on "any person that provides remittance transfers for a consumer in the normal course of its business," 77 Fed. Reg. at 6285—a definition that included the Bank. *See* SAC ¶ 15 (explaining that, "[a]s a result of the CFPB's promulgation of a Final Rule regulating international remittance transfers … the Bank has stopped offering those services to its customers"); SAC ¶ 102 (before the Rule, "the Bank's customers … could send money to family members overseas" through the covered transfers).[7] Subsequently adopted safe harbors and delayed effective dates do not deprive the Bank of standing to assert and to challenge the injury

[7] Mischaracterizing Mr. Purcell's congressional testimony, the Government fabricates a description of the Bank's remittance practice as a "one-off service" to "a few customers." Mem. 24. That assertion finds no support anywhere in the Complaint, which must be construed in SNB's favor. *LaRoque*, 650 F.3d at 785. The Government's contention is also factually incorrect. Prior to the Rule, the Bank offered international consumer remittance transfers to any customer who requested them. From the period of May 1, 2011 to April 30, 2012, for example, the Bank offered 18 consumer and 8 mixed-use international remittance transfers. Ex. A ¶ 12.

described in the original Complaint (and the SAC).[8]

2. *The Complaint Challenges All Instances of the CFPB's Formation and Operation, Including the Remittance Rule*

Next, the Government argues that SNB cannot rely on the Remittance Rule to establish standing because (the Government contends) the Complaint only challenges the constitutionality of the Bureau's UDAAP authority. Mem. 26, 27. The Government is again mistaken. The allegations of the Complaint include, but are in no way limited to, the Bureau's UDAAP authority. To the contrary, the Complaint challenges *any and all* exercises of authority by the CFPB—including the Bureau's authority to enforce Federal consumer financial laws generally—as an unconstitutional violation of the separation of powers, because of the Bureau's structure and operation. Moreover, even if the Complaint were limited to challenging the UDAAP authority, precedent is clear that: (1) to raise a separation-of-powers challenge to a federal agency's formation and operation, a plaintiff need only show that it has been subject to that agency's authority; and (2) a plaintiff injured by one feature of an act has standing to challenge a

[8] To the extent the Government might argue the challenge to the initial Rule has been mooted by subsequent developments—namely, the CFPB's unilateral decision to create a safe harbor to the Rule, and then to delay the Rule's final effective date to some unspecified time within the CFPB's control (*see* Mem. 8)—it would be mistaken. As an initial matter, the Bank has been harmed by the new version of the Rule, because the Bank's inability to cost-effectively comply with the Rule has caused it to adopt a policy pursuant to which it has limited its business opportunities by mandating that it will never perform more than 99 covered transfers in any given year. Ex. A ¶¶ 18-20. Furthermore, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (internal quotation marks omitted). Given the CFPB's constantly changing positions on remittances, it would be hard-pressed to prove it is "absolutely clear" that it could not reasonably be expected to regulate the Bank's transfers again.

second feature as long as the remedy for the challenged violation will redress the alleged injury.[9]

To begin, the Government wholly misrepresents the allegations of the Complaint in arguing that the Bank "does not allege that the Bureau's authority to implement the EFTA is unconstitutional." Mem. 2. In fact, the Complaint alleges without qualification that "the CFPB's formation and operation violates the Constitution's separation of powers." SAC ¶ 6; *see also* SAC ¶ 1 ("By this action, the Private Plaintiffs challenge the unconstitutional formation and operation of the [CFPB]."). The Bureau's promulgation of the Remittance Rule is unquestionably encompassed by that challenge, as it is the CFPB *formed* by the Act that did the promulgating, and it is the CFPB's *operation* that resulted in the Rule's finalization.

In addition, the specific objections Plaintiffs have raised apply equally to UDAAP and the Bureau's other delegated authorities (including the EFTA). The Complaint's objections that "Congress has no 'power of the purse' over the CFPB," that the Dodd-Frank Act "insulates the CFPB Director from presidential oversight," and that the "judicial branch's oversight power [over the CFPB] is also reduced" all apply to the Bureau's EFTA authority. SAC ¶¶ 112, 118, 121; *see also* SAC ¶ 123. And the Complaint specifically objects to the CFPB's "aggressive investigation and enforcement powers" over all "Federal consumer financial law." SAC p.30 & ¶ 110. Moreover, the Complaint describes in detail the authority pursuant to which the Bureau adopted the Remittance Rule, identifying as constitutionally problematic the CFPB's power to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws" by promulgating any rule it deems "necessary or appropriate" to "carry out the purposes and objectives" of those laws. SAC ¶ 99; *see also* SAC ¶ 100 (listing EFTA as

[9] To the extent the Court agrees with the Government on this issue, Plaintiffs seek leave to amend the Complaint to even more explicitly state that their challenge to the constitutionality of the CFPB includes, but is not limited to, its UDAAP authority.

covered law). In sum, while the Bureau's UDAAP authority may be *particularly* constitutionally infirm, the Complaint plainly challenges the formation and operation of the CFPB *in its entirety*, and objects to structural flaws that necessarily infect everything that it does.

The Government's argument to the contrary rests entirely on a crabbed reading of the Complaint that the Government buries in a footnote, where it contends that Count I of the Complaint should be read as limited to the CFPB's exercise of an "'effectively unlimited' authority" that encompasses only the Bureau's UDAAP power. Mem. 27 n.13 (citing SAC ¶ 199). But the Government offers no support for that assertion. Neither paragraph 199 of the Complaint nor any statement in Count I specifically references, much less limits itself to, the UDAAP authority. And there can be no serious question that paragraphs 97-100 of the Complaint sufficiently allege that the Bureau's separate "necessary and appropriate" authority constitutes an "open-ended" statutory mandate. *See, e.g.*, *Sossamon v. Texas*, 131 S. Ct. 1651, 1659 (2011); *City of Lakewood v. Plain Dealer Publ'n Co.*, 486 U.S. 750, 772 (1988) (holding portions of "ordinance giving the mayor … unbounded authority to condition the permit on any additional terms he deems 'necessary and reasonable[]'" unconstitutional). The Government's argument thus cannot be squared with the text of the Complaint, or the mandate that on a motion to dismiss the Complaint must be construed in the Bank's favor. *Cf. Ord*, 587 F.3d at 1143 ("Ord never alleges in so many words that he intends to enter the District of Columbia while armed. But at this stage of the litigation, we must make all reasonable inferences in Ord's favor.").

3. *Even if the Bank's Constitutional Challenge Were Limited to the UDAAP Authority, the Bank Would Have Standing*

Even if the Bank's challenge were limited to the Bureau's UDAAP authority, D.C. Circuit precedent makes clear that the Remittance Rule injury confers standing on the Bank to

raise that challenge because its success would necessarily have the effect of remedying the injury. *See Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994) (plaintiffs had standing to argue agency lacked authority to promulgate retroactive rule, even where plaintiffs were harmed only prospectively, because if plaintiffs prevailed on their retroactivity claim the rule would be voided in its entirety). The Tenth Circuit likewise has held that plaintiffs harmed by one provision in an act have standing to challenge a separate provision where invalidation of the second provision would necessarily result in invalidation of the first. *Local 514 Transport Workers Union of Am. v. Keating*, 358 F.3d 743, 749-50 (10th Cir. 2004). Here, a decision holding that the CFPB was formed and operates unconstitutionally would prevent the Bureau from applying the Remittance Rule to the Bank, thus remedying the injury it has suffered.

D. The Bank Is Injured by the Bureau's UDAAP Authority

The Government next asserts that SNB's loss of profits from its mortgage business is insufficient to confer standing. Again, the Government does not (and cannot) deny that such a financial injury is generally cognizable under Article III. The Government instead discounts the injury as "self-inflicted," and further argues that the injury is not traceable to the Bureau. The Government misstates the law on both counts.

1. *The CFPB's UDAAP Authority Has Already Caused the Bank Financial Loss and Continues to Affect its Present Economic Behavior*

The Bank's exit from the mortgage market to avoid the likelihood of a Bureau-driven prosecution, and to avoid the *certainty* that it would have been required to alter its mortgage lending practices had it stayed in the market, is a constitutionally cognizable injury that gives the Bank standing to sue, even though the Bureau has not yet taken enforcement action against it. Under D.C. Circuit precedent, a company has standing to challenge a law, even if that law has yet to be enforced, when it is "reasonably certain" that the company's "business decisions will be

affected" by it. *Sabre, Inc. v. Dep't of Transp.*, 429 F.3d 1113, 1119 (D.C. Cir. 2005).[10] In *Sabre*, the court concluded that a plaintiff had standing to challenge a department's interpretation of a statute to cover the plaintiff's industry, despite the fact that "no regulations promulgated by the Department … constrain[ed] [the plaintiff's] business activity and no relevant enforcement actions [we]re pending," because three criteria were met: (1) the Department claimed jurisdiction over the industry; (2) the Department's "statements indicate[d] a very high probability" that the Department would "act against a practice [the plaintiff] would otherwise find financially attractive," and (3) the Department had the authority to impose "civil penalties … without prior warning by rulemaking or [a] cease-and-desist order." 429 F.3d at 1115.

The same is true here. The CFPB has already asserted and exercised jurisdiction over mortgage servicing and foreclosure, and the Dodd-Frank Act renders SNB subject to civil penalties without prior warning if it is found to have engaged in a practice the CFPB ultimately deems unfair, deceptive, or abusive. *See* 12 U.S.C. § 5565(c)(1)-(c)(2) (providing for daily civil

[10] There is no merit to the Government's contention that SNB cannot raise a pre-enforcement challenge unless it "alleg[es] an intention to engage in a course of conduct arguably affected with a constitutional interest" and "demonstrat[es] that it has been singled out or uniquely targeted for enforcement." Mem. 20, 23 (internal quotation marks omitted). That is the standard the D.C. Circuit uniquely applies to plaintiffs asserting a threat of *criminal* prosecution, which the Court of Appeals has explicitly distinguished from the well-established rule that governs pre-enforcement challenges in the civil, administrative context. *See Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005) (noting that the standard argued for by Government in this case, which derives from *Navegar, Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997), applies to "preenforcement challenges to a criminal statute not burdening expressive rights" and explaining that "*Navegar*'s analysis is in sharp tension with standard rules governing preenforcement challenges to agency regulations, where an affected party may generally secure review before enforcement so long as the issues are fit for judicial review without further factual development and denial of immediate review would inflict a hardship on the challenger."). The *Navegar* standard referenced by the Government is also inconsistent with Supreme Court precedent. *See Ord*, 587 F.3d at 1146 (Brown, J., dissenting) (arguing that Court of Appeals should reconsider *Navegar* en banc). To the extent the Court concludes the standard applies, Plaintiffs contend, for preservation purposes, that it should be overruled.

penalty up to $1,000,000 for knowing violation of "any provision of Federal consumer financial law"). Furthermore, as in *Sabre*, the Bureau's "statements, taken as a whole, indicate a very high probability that it will act against a practice that" the Bank "would otherwise find financially attractive"—specifically, offering the higher-priced mortgages the Bank used to offer, and would continue to offer but for the threat of enforcement. *Sabre*, 429 F.3d at 1115, 1117; *see infra* at 23-24. Mr. Cordray has already advised that "complaints about … mortgages" will be an enforcement priority—particularly "the origination of high-priced mortgages." SAC ¶¶ 89-91.

Other precedents confirm that enforcement action need not be "certainly impending" (Mem. 17) before a business acquires standing to challenge an assertedly unconstitutional law, where the threat of enforcement has a present impact on the plaintiff's business decisions. In *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 540 (D.C. Cir. 1999), for example, the Court of Appeals held that a pipeline company had standing to challenge an agency decision approving the company's proposed rate under one regulatory section, but not under another, because the approval that was granted was subject to potential challenge by third parties in future litigation, whereas the approval that was withheld would not have been. The court held that the company had standing to sue, despite the fact that no third party challenge was imminent, because the uncertainty created by the potential for future litigation "affect[ed] both [the company's] present economic behavior—investment plans and creditworthiness—and its future business relationships." Here, too, the potential that the UDAAP enforcement authority will be employed against the Bank has "affect[ed] both [the Bank's] present economic behavior"—in the form of its exit from the consumer mortgage market—"and its future business relationships"—since SNB can no longer offer current or prospective customers the full range of services they expect.

2. *The Bank's Injuries Are Neither Self-Inflicted Nor Speculative*

Although the Government characterizes the Bank's mortgage market injury as self-inflicted, the Bank in fact has no means to escape injury by the Bureau. If the Bank reentered the mortgage market, the Bureau's new rules concerning qualified mortgages would require the Bank to modify its mortgage practices. First, each new mortgage would be subject to the Bureau's new foreclosure limitations, *see section* I(B), *supra*, increasing the Bank's costs. Second, under the CFPB's new rules, lenders who offer first-lien mortgage loans at an interest rate 1.5% higher than the Average Prime Offer Rate—as SNB did when it was in the mortgage market, Ex. A ¶¶ 25, 32—are deemed to have offered "higher priced covered transactions." *See* Regulation Z, 78 Fed. Reg. 6407, 6586 (to be codified at 12 C.F.R. § 1026.43(e)(1)). Like the agency-approved rates at issue in *Rio Grande*, "higher priced" mortgage transactions are subject to future litigation by third parties or by the Government to challenge whether the lender adequately investigated the borrower's ability to repay.[11] The Bureau's new rule accords the Bank a rebuttable presumption of adequacy in such litigation, *id.*, but the Bureau could and should have granted small banks like SNB broader immunity that would spare them litigation and compliance costs. If the Bank resumed offering mortgages today, the additional risks and

[11] *Id.*; *see also* 15 U.S.C. §§ 1607(a) (permitting agency enforcement of Truth In Lending Act ("TILA")), 1639c(a)(1) (TILA's ability-to-repay requirement), 1640(a) (permitting consumer suits to enforce TILA); 12 U.S.C. § 5516 (providing for prudential regulator's enforcement of "Federal consumer financial laws"); 12 U.S.C. § 5481(14) (defining those laws to include "the provisions of this title," which includes 12 U.S.C. § 5536, which prohibits "unfair, deceptive, or abusive act[s] or practice[s]"); Regulation Z, 78 Fed. Reg. at 6420 (it is the purpose of TILA provisions, "as amended by the Dodd-Frank Act, to assure that consumers" receive loan terms "that are understandable and not unfair, deceptive, and abusive"). In previous enforcement actions, the Bureau has cited both pre-existing Federal consumer financial law and its Dodd-Frank Act UDAAP authority. *See* American Express Order at 1-2 (finding that company engaged in deceptive practices as well as violations of TILA and other statutes); *Payday Loan* Complaint ¶ 1 (asserting violations of § 5531(a) and a rule promulgated under the Telemarketing and Consumer Fraud and Abuse Prevention Act).

costs would necessarily impact the pricing, structure, and profitability of the mortgages it could offer. These injuries are inflicted by the Bureau—the Bank did not inflict them on itself.[12]

The Government errs in asserting that SNB lacks standing because "'[a]llegations of injury based on predictions regarding future legal proceedings are too speculative to invoke the jurisdiction of an Article III Court,'" and because "[a]llegations of chilling injury are not sufficient … for standing." Mem. 20, 22 (quoting *Wheaton Coll. v. Sebelius*, -- F. Supp. 2d ----, Civ. No. 12-1169 (ESH), 2012 WL 3637162, at *4 (D.D.C. Aug. 24, 2012)). In *Wheaton*, the Government firmly committed to take no enforcement action against the plaintiff, *id.* at *6; the Bank, by contrast, enjoys no such assurance. Moreover, whereas the Court determined in *Wheaton* that the private litigation the plaintiff purported to fear was highly unlikely to occur because of the professed beliefs of the hypothetical plaintiffs, *id.* at *5, the Bureau has made clear that higher-priced mortgages such as the Bank's are among its chief targets. The Bank is unquestionably regulated by the Dodd-Frank Act's prohibition on unfair, deceptive, and abusive practices—as well as the CFPB's interpretation of whatever that law might mean—and the Bureau has already acted to regulate activities in which the Bank has engaged.

[12] The cases on which the Government relies to argue that SNB's injury is voluntary are entirely inapposite: none involves a situation in which a plaintiff ceased profitable economic activity in response to threatened agency enforcement of the law. *See Grocery Mfrs. Ass'n*, 693 F.3d at 177 (plaintiffs challenged EPA rule providing option of introducing new fuel they did not wish to produce); *Bhd. of Locomotive Eng'rs & Trainmen v. Surface Transp. Bd.*, 457 F.3d 24, 28 (D.C. Cir. 2006) (union negotiated term that limited bargaining rights with respect to "exempted" track and then challenged agency decision exempting part of track); *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (union failed to show expenditure of extra funds to lobby President following passage of line-item veto was necessary to organizational mission). Notably, the Court of Appeals has confirmed that a party may raise a separation-of-powers challenge to a governing statute where it "exposes [the party] to a risk" of financial loss from which the party would otherwise be protected. *United States ex rel. Schweizer v. Oce N.V.*, 677 F.3d 1228, 1235 (D.C. Cir. 2012) (litigant had standing to assert separation-of-powers challenge to statute requiring judicial review of qui tam settlements because it "expose[d] [the litigant, a named defendant in a qui tam suit] to a risk that the agreement will be rejected and a larger sum required to dispose of" claims).

In this case, moreover, the Bank's injury is not based on the predicted outcome of future legal proceedings; rather, it is based on losses SNB has *already* incurred in response to the Bureau's broad authority under the Dodd-Frank Act. Unlike *Wheaton*, therefore, but like the *Chamber of Commerce* plaintiffs that this Court distinguished in *Wheaton*, all "allegations of chilling injury" have been "substantiated by evidence that the government action has a present and concrete effect" in the form of the Bank's specified and objective losses in the mortgage market. *Id.* at *5-*6 (internal quotation marks omitted). The Bureau's UDAAP authority has caused the Bank a cognizable injury "because it affects [SNB's] present behavior and because economic injury flows from it; to find otherwise would ignore the reality of the long-range economic planning involved in the sound management of an enterprise." *Great Lakes Gas Transmission Ltd. Pship v. FERC*, 984 F.2d 426, 430-31 (D.C. Cir. 1993).

3. *The Additional Authority Conferred Upon the OCC Does Not Negate SNB's Standing*

The Government next asserts that SNB's injuries in the mortgage market do not confer standing to challenge the unconstitutional formation and operation of the CFPB because any enforcement action related to SNB's mortgage practices would be taken by the Bank's prudential regulator, the OCC, and thus would not be (1) traceable to the CFPB, or (2) subject to the Court's review at this time. Mem. 17-21 & nn.10-11. Both arguments lack merit.

i. SNB's Injury Is Fairly Traceable to the CFPB

To begin, it is immaterial for standing purposes that the OCC, rather than the Bureau, would initiate an enforcement action against the Bank, as the statutory scheme ensures that OCC enforcement actions will be significantly influenced by the Bureau and will in many instances be taken at its prompting and/or direction. The Supreme Court rejected an analogous attempt to divide and conquer in *Bennett v. Spear*, 520 U.S. 154 (1997), where the Government contended

that the plaintiffs' asserted injury was not fairly traceable to a challenged opinion from the Fish and Wildlife Service because a separate body, the federal Bureau of Reclamation, made the ultimate determination whether to proceed with the project about which the opinion had been issued. The Court explained that the Government's argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Id.* at 168-69. The Court also clarified that Article III "does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Id.* at 169 (holding that plaintiffs had standing where "statutory scheme … presuppose[d]" the challenged opinion "w[ould] play a central role in the action agency's decisionmaking process").

D.C. Circuit precedent is to the same effect: where an injury allegedly "flows not directly from the challenged action" of an agency, "but rather from independent actions of" another party, the Court "require[s] only a showing that the [challenged] agency action is at least a substantial factor motivating the third parties' actions." *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308-09 (D.C. Cir. 2001) (internal quotation marks omitted). In *National Parks Conservation Association v. Manson*, for example, the Court of Appeals rejected an argument that plaintiffs lacked standing to challenge the Department of Interior's withdrawal of an "adverse impact letter" because the state agency that had the final say on the project had "discretionary authority to conduct an independent evaluation when it receive[d] a federal adverse impact report." 414 F.3d 1, 5, 6 (D.C. Cir. 2005). As the Court explained, the question is whether the issuing agency "expects and intends its decision to influence" the recipient. *Id.* In that case, the plaintiffs had standing where, "[h]ad Interior not withdrawn its adverse impact report, the Montana [agency] would have been bound to consider that report before proceeding with its permitting decision and, crucially, would have been required to justify its decision in

writing if it disagreed with the federal report." *Id.*

Similarly, in *Town of Barnstable v. FAA*, the Court of Appeals held that plaintiffs had standing to challenge an FAA determination that certain wind turbines were not hazardous, even though the "Interior Department … [wa]s the ultimate arbiter of whether the wind farm receives government permission," and the FAA determinations " ha[d] no enforceable legal effect," because the Court "f[ou]nd it likely, as opposed to merely speculative, that the Interior Department would rethink the project if faced with an FAA determination that the project posed an unmitigable hazard." 659 F.3d 28, 30-34 (D.C. Cir. 2011) (internal quotation marks omitted).

SNB easily satisfies the demands of that precedent. However ineffectual the Government might now attempt to portray the CFPB to be, any suggestion that its written recommendation of enforcement would not constitute at least a "substantial factor" motivating the OCC, *Tozzi*, 271 F.3d at 308, is totally implausible. For one, it is inconsistent with the statutory provisions that govern the Bureau's interactions with the OCC. When the OCC receives notice from the Bureau of a material violation of the law, it is bound to provide "a written response … not later than 60 days thereafter." 12 U.S.C. § 5516(d)(2)(B); *compare id. with Nat'l Parks*, 414 F.3d at 6. Furthermore, there can be no serious doubt that the Bureau "expects and intends its decision to influence" the OCC. *Nat'l Parks*, 414 F.3d at 6. The CFPB is *the* authority on what constitutes an unfair, deceptive, or abusive practice under Federal consumer financial law. When granted rulemaking power, the Bureau has "exclusive authority" to issue regulations "for purposes of assuring compliance with Federal consumer financial law," and courts are required to defer to the Bureau's "determination[s] … regarding the meaning or interpretation of any provision of a Federal consumer financial law … as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer" it. 12 U.S.C. § 5512(b)(4)(A), (B).

Lest there be any doubt on this point, the Comptroller of the Currency has already confirmed that he views the OCC and other bank regulatory agencies as "general practitioner[s]," with the CFPB "as the specialist" whose "insights can help [them] do [their] job." Remarks by Thomas J. Curry, Comptroller of the Currency, Before the FFIEC Consumer Compliance Specialists Conference at 5 (Jan. 30, 2013). In fact, the Bureau and other banking regulators, including the OCC, have already adopted a Memorandum of Understanding ("MOU") under which, "[i]f the CFPB notifies the Prudential Regulator that it will examine or take supervisory or enforcement action … against any Nondepository Subsidiary" of a small depository institution like SNB, "*the Prudential Regulator will defer to the CFPB* on matters relating to the supervision or enforcement of the Federal consumer financial laws." MOU on Supervisory Coordination at 3 n.4 (May 16, 2012) (emphasis added). The MOU does not cover small depository institutions like SNB, *see id.* & n.1, but the Government offers no reason to believe agencies will proceed any differently with respect to those institutions than with respect to their Nondepository Subsidiaries. Furthermore, the Dodd-Frank Act itself instructs that "Federal consumer financial law"—which includes the UDAAP authority, *see* 12 U.S.C. § 5481(14)—should be "enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition." *Id.* § 5511(b)(4). It is no surprise, therefore, that the Government recognizes the CFPB as the "single agency with *the authority and accountability to ensure* that Federal consumer financial law is 'comprehensive, fair, and vigorously enforced.'" Mem. 6 (quoting H.R. Rep. No. 111-517, at 730 (2010) (emphasis added)).

The Government's criticism of the Bank for failing to allege "that it sought any guidance from OCC" prior to exiting the industry is similarly misplaced. Mem. 21. It is the CFPB, not

the OCC, that has the authority to define unfair and abusive practices under the law. And at the time SNB exited the market, the Bureau lacked a director and was in no position to issue any authoritative guidance aside from its insistence that the law would be enforced—and vigorously. Thus, unlike the situation in *National Family Planning & Reproductive Health Association, Inc. v. Gonzales* (*see* Mem. 21-22), this is not a case in which the Bank had an "easy means for alleviating" its uncertainty. 468 F.3d 826, 831 (D.C. Cir. 2006). The CFPB to this day has refused to clarify its UDAAP authority through rulemaking. Furthermore, when the Bank became concerned that it could not safely offer its traditional menu of mortgages consistent with the Bureau's authority under the Dodd-Frank Act, the Bank did express its concerns to OCC officials, and the OCC provided the Bank with no reassurance that it could remain in the market with its then-current practices. Ex. A ¶ 29. It was that absence of authoritative guidance, as well as the very real threat that an officially-led Bureau might subsequently—and retroactively—deem the Bank's practices to violate Federal consumer financial law, that led the Bank's directors to determine in good faith that they could no longer risk the penalties that might accompany their higher-priced mortgage practice. That is enough to support the Bank's standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 181-85 (2000) (plaintiffs had standing to challenge alleged violation of the Clean Water Act where they averred they had ceased engaging in activities near allegedly illegal discharges for fear that they would be harmed by the pollution, because plaintiffs had "reasonable concerns about the effects of" the challenged discharges and had been injured as a result of their response to those concerns).

ii. Section 1818(i)(1) Does Not Apply Here

The Government is also mistaken in its assertion that this suit is nonjusticiable under 12 U.S.C. § 1818(i)(1). That law by its terms says nothing about general constitutional challenges

to the authority of the OCC, apart from any order, and it in no way limits judicial review of *another* agency's constitutional authority under an entirely different statute. *Cf. Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3108, 3150 (2010) (rejecting argument that petitioners were required to seek agency review of Board's standards before raising constitutional challenge in court to the Board's composition and noting that "petitioners object to the Board's existence, not to any of its auditing standards"). In fact, § 1818(i)(1) and the statutes it cites govern when an "appropriate Federal banking agency" may take certain actions. 12 U.S.C. §§ 1818(i)(1), 1831o, 1831p-1. That term is defined by statute, *see id.* § 1813(q), and it does not include the CFPB.

Even assuming the focus of this suit were the order of an "appropriate Federal banking agency," the Government errs in suggesting that the statute necessarily precludes review of a constitutional claim. The Court of Appeals in *Ridder v. Office of Thrift Supervision*, 146 F.3d 1035 (D.C. Cir. 1998), did not in fact apply § 1818(i) to bar it from considering the constitutional questions posed by a challenge to an enforcement order. To the contrary, the Court explicitly considered whether the plaintiffs had made "a 'strong and clear' showing that the issuance of the [challenged] Order violated their constitutional rights" and after some analysis concluded that the constitutional claim at issue lacked merit. *Id.* at 1041. The Court also recognized that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Id.* Nothing in § 1818 evidences an intent to bar a constitutional challenge of the type at issue here with respect to the CFPB (or the OCC).

E. The Bank Has Standing Because It Is Directly Regulated by the CFPB

The Bank also has standing to raise its constitutional challenge because it is directly regulated by the Bureau. The D.C. Circuit has held that "litigants have standing to challenge the

authority of an agency on separation-of-powers grounds … where they are directly subject to the authority of the agency, whether such authority is regulatory, administrative, or adjudicative in nature." *Comm. for Monetary Reform*, 766 F.2d at 543. The Government does not deny that the Bank is directly subject to the Bureau's rulemaking authority, and concedes it is subject to the Bureau's administrative authority to require reports. *See* Mem. 9; *id.* at 25-26.

II. THE BANK HAS STANDING TO CHALLENGE THE UNCONSTITUTIONAL APPOINTMENT OF MR. CORDRAY

The Government's argument that the Bank lacks standing to challenge the unconstitutional appointment of Mr. Cordray rests on the same flawed premises on which the Government bases its claim that SNB lacks standing to challenge the unconstitutional formation and operation of the Bureau generally—that SNB has not shown actual or imminent injury from actions taken by the CFPB. *See* Mem. 28. For the reasons stated above, that contention fails.[13] Furthermore, the Bank—an FDIC-insured institution—is directly subject to Mr. Cordray's authority as "as ex officio Director of the Federal Deposit Insurance Corporation" (SAC p.2) and has standing to challenge his appointment on that ground, as well.

The Government also objects that SNB's coerced exit from the mortgage market cannot support SNB's standing to challenge Mr. Cordray's appointment because "that alleged injury is not traceable to … [the] appointment and is unlikely to be redressed by a favorable decision."

[13] The Government had good reason not to advance Amicus Professor Williams' meritless argument that the challenge to Mr. Cordray's appointment presents a political question. The constitutionality of such an appointment is a legal question that the courts are well equipped to answer, *see Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012), and no court called upon to address the issue has held it a nonjusticiable political question—including the D.C. Circuit, which had a similar brief from Professor Williams before it in *Noel Canning* but did not hold that the case presented a political question. *See Noel Canning*, 2013 WL 276024; *see also, e.g.*, *United States v. Woodley*, 751 F.2d 1008, 1009 (9th Cir. 1985) (en banc); *cf. Evans v. Stephens*, 387 F.3d 1220, 1227 (11th Cir. 2004) (resolving general appointment question and rejecting as "political" separate question whether President acted with sufficient "political wisdom").

Mem. 29.[14] The Government contends that this alleged injury "flows from the UDAAP prohibition itself[,] … not from the Director's appointment or any Bureau action under his leadership." *Id.* The Government's argument is foreclosed by precedent.

As noted above, "litigants have standing to challenge the authority of an agency on separation-of-powers grounds … where they are directly subject to the authority of the agency, whether such authority is regulatory, administrative, or adjudicative nature." *Comm. for Monetary Reform*, 766 F.2d at 543. "A litigant is not required to show that he has received less favorable treatment than he would have if the agency were lawfully constituted and otherwise authorized to discharge its functions." *NRA Political Victory Fund*, 6 F.3d at 824 (internal quotation marks omitted). Rather, "litigants need only demonstrate that they have been directly subject to the authority of the agency." *Id.* (internal quotation marks omitted). In *NRA Political Victory Fund*, therefore, the D.C. Circuit rejected the Government's argument that the plaintiff could not fairly trace its injury to the alleged constitutional defects of a commission because it did not allege that the outcome of the commission's decisionmaking process would have been different if the commission were constitutionally composed. *Id.*

Similarly, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010), the Supreme Court rejected the Board's argument that plaintiffs could not trace their asserted injury to appointments that were allegedly invalid because they were made by a committee, rather than by the Chairman alone, simply because none of the appointments was made over the Chairman's objection. As the Court explained, "[w]e cannot assume … that the

[14] The Government's argument on this point addresses only the CFPB's UDAAP authority. Perhaps for obvious reasons, the Government does not assert that any injury flowing from the Remittance Rule that Mr. Cordray himself authorized (*see* 77 Fed. Reg. at 6309) is not fairly traceable to his appointment, and the Government does not contend that compliance costs incurred to stay abreast of rules, interpretations, and enforcement actions authorized by Mr. Cordray cannot be traced to his appointment.

Chairman would have made the same appointments acting alone; and petitioners' standing does not require precise proof of what the Board's policies might have been in that counterfactual world." *Id.* at 3163 n.12. Here, too, the Court cannot assume that actions taken by the Bureau would be the same absent the appointment of Mr. Cordray. It cannot be said with certainty, for example, that the Bureau would hold the same enforcement priorities (including the focus on mortgages) if Mr. Cordray were removed from office. Here, as in *Free Enterprise*, plaintiffs are "entitled to declaratory relief sufficient to ensure that the … standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." *Id.* at 3164.

The Government's argument also fails because the Bank's injuries plainly are traceable to Mr. Cordray's appointment. The Dodd-Frank Act severely curtails the implementation of Title X when the Bureau lacks a director, such that had Mr. Cordray not been appointed, the Bureau could exercise no UDAAP authority at all. *See* Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System to Request for Information Regarding the Bureau of Consumer Financial Protection from the U.S. House of Representatives Financial Services Committee at 7 (Jan. 10, 2011) ("[I]f there is no Senate-confirmed Director by the designated transfer date [of power to the CFPB]," the "Treasury Secretary is not permitted to exercise the Bureau's authority to …. prohibit unfair, deceptive, or abusive acts or practices under subtitle C").[15] As such, there can be no question that SNB's mortgage-related injuries are fairly traceable to Mr. Cordray's appointment and fully redressable by a court order declaring it unconstitutional.

[15] Before a director is confirmed, the Treasury Secretary is authorized to perform only "the functions of the Bureau under this part," 12 U.S.C. § 5586, which authorizes the CFPB to (among other things) prescribe rules under pre-existing consumer financial laws. That part does not, however, encompass the Bureau's UDAAP authority (which is granted in Subtitle C) or the Bureau's enforcement powers generally (which are in set forth in Subtitle E).

III. PLAINTIFFS CEI AND 60 PLUS ASSOCIATION HAVE STANDING TO CHALLENGE THE BUREAU

The Government also errs in contending that CEI and the 60 Plus Association lack the "personal stake in the outcome" of this case necessary to invoke federal jurisdiction. Mem. 40 (internal quotation marks omitted). As explained in the Complaint, both the Institute and the 60 Plus Association have suffered concrete injuries as a result of Title X, which has increased the costs, and limited the availability, of financial services on which the Institute and the Association's members depend. *See* SAC ¶¶ 18-22. CEI, for example, maintains checking accounts with Wells Fargo, which has recently increased fees on such accounts.[16] CEI has thus suffered concrete financial injuries as a result of the formation and operation of the CFPB.

The 60 Plus Association and its members have been similarly harmed.[17] The increased fees and more limited selection of financial services that have resulted from the CFPB's

[16] *See* Ex. B, Declaration of Sam Kazman; *see also* Wells Fargo & Company Annual Report 2011, at 102 ("our consumer businesses … may be negatively affected by the activities of the CFPB, which has broad rulemaking powers and supervisory authority over consumer financial products and services"; although its "full impact" is uncertain, "CFPB's activities may increase our compliance costs and require changes in our business practices as a result of new regulations and requirements which could limit or negatively affect the products and services that we currently offer our customers"). Wells Fargo certainly is not alone in increasing fees for such services; numerous other financial institutions have responded in kind to the increased costs imposed by the Bureau's regulatory authority. *See* Fitch Ratings, Press Release, *CFPB Overdraft Inquiry Keeps Pressure on U.S. Banks* (Apr. 24, 2012) ("We also anticipate the CFPB inquiry [into overdraft methods], coupled with regulatory and legislative changes, will further hasten the demise of free checking accounts"), *available at* http://www.fitchratings.com/credit desk/press_releases/detail.cfm?pr_id =748170.

[17] At the motion-to-dismiss stage, the Association need not identify which of its members have been harmed by the Bureau. Since the decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), "several Courts have found that a plaintiff need not identify the affected members by name at the pleading stage." *Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, --- F. Supp. 2d ----, No. 10–0499 (ABJ), 2012 WL 5353562, at *5 (D.D.C. Oct. 31, 2012) (collecting cases). "At the pleading stage, the Court presumes that general allegations encompass the specific facts necessary to support the claim, so the plaintiff need not identify an affected member by name." *Id.* (internal citation omitted).

authority under Dodd-Frank constitute an injury sufficient to support CEI's and the Association's standing.[18] *See Energy Action Educ. Found. v. Andrus*, 654 F.2d 735, 756 n.** (D.C. Cir. 1980) (consumers had standing to challenge leasing activity claimed to "inflat[e] prices, limit[] supplies, and restrict[] choice on the market"), *rev'd on other grounds sub nom. Wyatt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981); *Jones v. Gale*, 405 F. Supp. 2d 1066, 1076 (D. Neb. 2005) (standing to challenge law that, among other things, "impaired his financial and estate-planning options"). The 60 Plus Association's millions of members (*see* SAC ¶ 14) are further disproportionately impacted by the reduced interest rates offered by banks as a result of the increased regulatory burdens imposed by the CFPB.[19]

IV. THE BANK HAS STANDING TO CHALLENGE THE UNCONSTITUTIONAL OPERATION OF THE FSOC

The Government next asserts that the imminent injury SNB faces from the FSOC's designation of nonbank SIFIs is insufficient to provide standing to sue. But what the Government disparages as layers of "speculation" in fact involve nothing more than reliance on the Government's promise that SIFI designations are imminent, and the application of

[18] For example, the 60 Plus Association has checking and money market accounts at PNC Bank (*see* Ex. C, Declaration of Laura Clauser), which has been raising, or imposing new fees, on depositors since Dodd-Frank was enacted. *See* PNC Financial Services Group, Annual Report for the Fiscal Year Ended December 31, 2011 at 6 (*available at* http://quote.morningstar.com/stock-filing/AnnualReport/2011/12/31/t.aspx?t=XNYS:PNC&ft=10K&d=fb2f2e5966b99745aee8ed415f5c7f7f) (as a result of the Bureau's formation and operation, among other factors, PNC expects "to experience an increase in regulation of [its] retail banking business and additional compliance obligations, revenue and costs impacts").

[19] Alvin C. Harrell, *Commentary: State Chartered Financial Institutions in the 1990s—A New Perspective*, 48 Consumer Fin. L.Q. Rep. 2, 52-53 (1994) ("[b]y saving $100-$200,000 annually in regulatory costs," small bank "could afford to pay substantially higher deposit interest rates"). Lowered interest rates on bank accounts "are especially hard on the elderly, many of whom rely on interest income to pay basic living expenses." Walter Hamilton, *With Interest Rates So Low, What's a Saver to Do?*, Los Angeles Times Sept. 18, 2011.

elementary economic logic routinely relied on by the D.C. Circuit in competitor standing cases.

A. An FSOC Designation Benefits SNB's Competitors and Injures SNB

The D.C. Circuit has held time and time again that a plaintiff has standing to sue when it "face[s] intensified competition" as a result of agency action affecting a relevant market. *Shays v. FEC*, 414 F.3d 76, 86 (D.C. Cir. 2005); *see, e.g.*, *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (citing cases); *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998) (noting "repeated[]" holdings of competitor standing). In particular, that court has "recognized that regulatory decisions that permit subsidization of some participants in a market can have the requisite injurious impact on those participants' competitors" to confer standing. *U.S. Telecomms. Ass'n v. FCC*, 295 F.3d 1326, 1331 (D.C. Cir. 2002). Knowledgeable individuals from the industry, the academy, and the Government have all recognized the existence of a status-related subsidy that provides SIFIs a competitive advantage. *See* Ex. D, Declaration of Greg Jacob, Ex. 1 (Letter from Senators Sherrod Brown and David Vitter to Comptroller General Gene L. Dodaro at 1-2 (Jan. 1, 2013) (collecting sources)). SNB has standing to challenge that subsidy here.

Although the FSOC has not yet made any SIFI designations, the Complaint clearly alleges an *imminent* injury based on then-Treasury Secretary Geithner's 2012 announcement that designations are imminent. SAC ¶ 150. An imminent injury is sufficient to confer standing. *See* Mem. 1.; *e.g.*, *Sherley*, 610 F.3d at 72 ("Because increased competition almost surely injures a seller in one form or another, he need not wait until allegedly illegal transactions … hurt [him] competitively before" bringing suit (alteration in original; internal quotation marks omitted).).

The Government suggests that FSOC designees would not compete with SNB because they are not banks, Mem. 33, but the Complaint explicitly and plausibly alleges that SNB

competes with "*nonbank* SIFIs." SAC ¶ 148 (emphasis added). The Bank competes with non-banks both in markets in which it seeks to raise capital, SAC ¶¶ 144, 149, and in markets in which it seeks to sell loans to consumers, and the cost-of-capital advantage that non-banks designated as SIFIs will enjoy will place SNB at a competitive disadvantage in each. The Bank is thus injured by each additional SIFI designation.[20]

B. SNB's Injury from SIFI Designation Is Fairly Traceable to the FSOC

That some large financial companies may already enjoy a cost-of-capital advantage, even without formal SIFI status, does not mean that no harm to SNB is fairly traceable to FSOC designations. The Complaint expressly alleges *both* that the FSOC's imminent designations will confer a cost-of-capital advantage on non-bank entities that did not previously enjoy it, *and* that formal designations will enhance any cost-of-capital advantage already enjoyed by "unofficial" SIFIs. SAC ¶ 148. Either way, the Bank is harmed. *See Meese v. Keene*, 481 U.S. 465, 476-77 (1987) (recognizing reputational impact of government designations).[21]

[20] None of the cases on which the Government relies to suggest that SNB must "introduce[] evidence" of the alleged competition arose on a motion to dismiss. Mem. 33-34 (alteration in original); *see KERM, Inc. v. FCC*, 353 F.3d 57, 60-61 (D.C. Cir. 2004) (petition for review of merits of agency decision); *D.E.K. Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001) (same); *Lee v. Bd. of Governors of the Fed. Reserve Sys.*, 118 F.3d 905, 913 (2d Cir. 1997) (same). At this stage—as the Government at one point acknowledges—it is sufficient for SNB to "allege that it is a direct and current competitor" with potential SIFI designees. Mem. 32 (emphases and internal quotation marks omitted); *see, e.g.*, *Whitney v. Guys, Inc.* 700 F.3d 1118, 1128 (8th Cir. 2012) ("Evidence is not required because on a motion to dismiss, inferences are to be drawn in favor of the non-moving party." (internal quotation marks omitted)). That the Bank has done.

[21] Although the Government claims in a footnote (Mem. 40 n.19) that SNB cannot trace this competitive injury to the constitutional violations in the composition of the FSOC, unbounded delegation of authority to select SIFIs, and limitation on judicial review of FSOC designations, it is those very provisions that inflict the imminent competitive injury on SNB. The uncabined delegation permits the FSOC to designate entities as SIFIs based on whatever criteria it deems relevant, and the limitations on judicial review prevent the Bank from seeking any redress of the competitive harm such a delegation inflicts.

Nor is there any merit to the Government's suggestion that the Bank lacks standing because the cost-of-capital benefit enjoyed by SIFI designees "would depend[] on the unfettered choices made by independent actors not before the courts"—creditors' investment decisions. Mem. 36 (internal quotation marks omitted). The D.C. Circuit has consistently "allowed plaintiffs claiming that regulatory changes have caused competitive injury, defined only as exposure to competition, to sue the regulating agencies, even though the harm resulted most directly from independent purchasing decisions of third parties." *Tozzi*, 271 F.3d at 308-09 (internal quotation marks omitted).[22] And, of course, *all* competitive injuries necessarily arise from the independent choices of market actors. Where, as here, the source of the injury is clearly identified—specifically, the FSOC's unbounded conferral on competitors of formal SIFI status—and the market's reaction thereto is both predictable and reasonable—as the sources previously-cited show it to be—the harm is sufficiently concrete to confer standing.[23]

C. Plaintiffs Have Standing Irrespective of Any Alleged Net Benefit to SIFIs

The Government cites no authority for the novel proposition that the benefits flowing from a statute should be netted against its harms for purposes of determining whether a party has

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[22] *See also Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990) ("For standing purposes, petitioners need not prove a cause-and-effect relationship with absolute certainty …. This is true even in cases where the injury hinges on the reactions of third parties … to the agency's conduct."); *Clinton v. City of New York*, 524 U.S. 417, 426-28, 432-33 (1998) (holding that farmer's cooperative seeking to acquire processing plant had standing to challenge line-item veto of law providing deferred tax treatment to certain refiners who might sell plants to cooperatives—even though the injury depended on whether refiner would wish to avail itself of the cancelled deferral, and citing similar precedent).

[23] *Already, LLC* dealt with very different circumstances. There, the Court determined that it was "absolutely clear" that Already could not be harmed by any further trademark litigation brought by Nike. 133 S. Ct. at 730. The Court therefore refused to find an alleged competitive harm based on the unreasonable and speculative belief of some market participants that Nike could still harm Already through trademark litigation.

been injured, Mem. 37, and authority is to the contrary. *See, e.g., Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 20 (D.C. Cir. 2006) (offset not taken into account for purposes of assessing injury); *Markva v. Haveman*, 317 F.3d 547 (6th Cir. 2003) (rejecting netting of costs and benefits for purposes of assessing injury to Medicaid recipients); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 n.2 (D.C. Cir. 1978) (for antitrust standing, "'offsetting benefits' … are utterly irrelevant to a determination of 'injury-in-fact' at the Standing stage"). Moreover, the Government has not offered even a scintilla of evidence to support its bald assertion that "the costs associated with the more stringent government regulation associated with a Council designation" might outweigh the cost-of-capital advantage. Mem. 37. The Court must at this stage accept Plaintiffs' plausible pleading of harm. *Haase v. Sessions*, 835 F.2d 902, 907 (D.C. Cir. 1987).

V. THE QUESTIONS PRESENTED ARE RIPE FOR REVIEW

The Government briefly argues that Plaintiffs' challenges are not ripe "[f]or reasons similar to the reasons" the Government alleges that plaintiffs lack standing. Mem. 51. The Government is again mistaken. As explained above, Plaintiffs have standing to raise each of the constitutional challenges asserted in the Complaint. Furthermore, the Government offers "a mangled view of the ripeness doctrine," *Rio Grande*, 178 F.3d at 540, that is inconsistent with Circuit precedent and must be rejected.

When determining whether a claim is ripe, the Court considers two factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). "When a petitioner raises a purely legal question," the Court "assume[s] that issue is suitable for judicial review." *Rio Grande*, 178 F.3d at 550 (internal quotation marks omitted). Plaintiffs' claims are plainly ripe

under this standard. As the Government acknowledges, "the issues presented here are purely legal." Mem. 52 (internal quotation marks omitted). And the Government "does not argue that this dispute would look any different, be more ripe if you will, were [the Court] to put off review until another day." *Action for Children's Television v. FCC*, 59 F.3d 1249, 1258 (D.C. Cir. 1995).[24] Because the claims are fit for immediate review, the Court need not consider the hardship to SNB of withholding it. *Id.* However, to the extent hardship is considered, the ongoing harm caused to SNB by the Dodd-Frank Act, including increased compliance costs and the loss of two profitable lines of business, weighs in favor of immediate review.

CONCLUSION

The Government's Motion to Dismiss the Second Amended Complaint should be denied.

Respectfully submitted,

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[24] The one instance the Government offers of the Court of Appeals dismissing a purely legal claim as unripe is totally inapposite: in *Toca Producers v. FERC*, 411 F.3d 262, 264 (D.C. Cir. 2005), the court dismissed a petition because it determined "the [petitioners] may yet secure th[e] very relief [they sought] in a proceeding now pending before the [defendant]." In this case, by contrast, the only way for Plaintiffs to obtain the relief they seek is before this Court.

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Dated: February 27, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Case No. 1:12-cv-01032 (ESH)
NEIL S. WOLIN, in his official capacity as Acting United States Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council 1500 Pennsylvania Avenue, NW Washington, DC 20220, *et al.*,	)	Judge: Hon. Ellen S. Huvelle
Defendants.	)	

[PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

Upon consideration of Defendants' Motion to Dismiss the Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1), it is hereby ORDERED that the motion is DENIED.

_____
HONORABLE ELLEN S. HUVELLE
U.S. District Court Judge

Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING *et al.*, Plaintiffs, v. TIMOTHY GEITHNER, in his official capacity as United States Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council, *et al.*, Defendants.	Case No. 1:12-cv-01032 (ESH) Judge: Hon. Ellen S. Huvelle

DECLARATION OF JIM R. PURCELL

In Accordance with 28 U.S.C. § 1746, I, Jim R. Purcell, declare as follows, under the pains and penalties of perjury:

1. I am the Chairman of the Board and CEO of the State National Bank of Big Spring in Big Spring, Texas ("the Bank"). I have served as CEO since 1988 and became Chairman of the Board in 2012.

2. I served as President of the Bank from 1988 to 2012.

3. I am familiar with the Bank's legal compliance practices, remittance services, and mortgage lending.

Compliance Practices

4. The regulatory and enforcement authority conferred on and exercised by the Consumer Financial Protection Bureau (the "Bureau" or "CFPB") under the Dodd-Frank Act has required the Bank to incur significant legal compliance costs.

5. In the year 2012, for example, the Bank incurred $231,000 in compliance costs.

That includes costs for compliance personnel (including an outside auditor), compliance software, and compliance education.

6. In particular, the Bank's annual compliance costs in 2012 included over $2,500 to send a representative to the Texas Bankers Association Compliance School. That training covered, among other things, the Bureau's regulations governing electronic funds transfers and mortgage disclosures.

7. In addition, after the Dodd-Frank Act was passed, the Bank determined that it needed to stay informed of the regulatory requirements that would be adopted by the CFPB and other agencies under the Act. The Bureau's authority to enforce its views of "unfair, deceptive, or abusive" practices ex post facto further made it necessary to stay abreast of its interpretations, announcements, and enforcement actions. For this reason the Bank began to subscribe to a service from the Texas Bankers Association, the Compliance Alliance, that keeps the Bank informed of the activities and pronouncements of Government agencies that regulate the Bank, including the Bureau, as well as their impact on the Bank. Attached to this declaration are true and correct copies of marketing materials the Bank received from the Compliance Alliance to induce the Bank to subscribe to its service, which specifically note that the service is necessary because of the Dodd-Frank Act and CFPB. The Bank found these materials persuasive.

8. The Bank used the Compliance Alliance service to aid in its understanding of the CFPB's rules governing international remittance transfers, mortgage disclosures, and ability-to-pay requirements, as well as to stay abreast of Bureau interpretations and enforcement actions. Attached to this declaration are true and correct copies of materials the Bank has received from the Compliance Alliance.

9. The Compliance Alliance subscription costs the Bank $9,900 annually. The

original subscription price was $12,000, but so many institutions signed up for the service that the Compliance Alliance was able to lower its fees. The Compliance Alliance now has customer banks in 18 States and is sponsored by 16 state banking associations.

10. The Bank also responded to the Dodd-Frank Act by subscribing to the compliance service TriNovus, paying $2,340 for a one-year subscription in 2011.

Remittance Transfers

11. Until May 22, 2012, the Bank offered international remittance transfers to consumers and businesses that requested them. The Bank regularly offered more than 25 transfers a year and has offered up to 70 transfers a year.

12. From May 1, 2011 to April 30, 2012, for example, the Bank offered 18 international consumer remittance transfers and 8 mixed use transfers.

13. On February 7, 2012, the CFPB published a rule governing the provision of international remittance transfers. Electronic Fund Transfers, 77 Fed. Reg. 6194 (Feb. 7, 2012) (to be codified at 12 C.F.R. pt. 1005) ("the Remittance Rule").

14. The 18 international consumer remittance transfers the Bank offered from May 2011-2012 are covered by the Remittance Rule. For the 8 mixed-use transfers offered during that period, the Bank does not have the details necessary to determine whether they would be covered by the Rule.

15. On May 22, 2012, the Bank determined that it would not be able to comply with the requirements of the Bureau's Remittance Rule and still offer international consumer remittance transfers at a profit.

16. On June 21, 2012, the Bank filed this suit.

17. On August 20, 2012, the Bureau revised the Remittance Rule to include a safe

harbor exemption for providers that perform 100 or fewer international consumer remittance transfers per calendar year. Electronic Fund Transfers, 77 Fed. Reg. 50244 (Aug. 20, 2012).

18. On November 27, 2012, in response to the Bureau's revision of the Remittance Rule, the Bank adopted an exception to its policy barring international consumer remittance transfers under which the Bank may offer those transfers but will never perform more than 99 such transfers in any given year. The Bank did so in order to fall within the Remittance Rule exception for banks performing under 100 international consumer remittance transfers annually.

19. But for the Remittance Rule, the Bank would offer an international consumer remittance transfer to any customer that requested it, even if the Bank exceeded 100 transfers each year.

20. The Bureau's Remittance Rule has caused the Bank financial harm. The Bank lost income on the international consumer remittance transfers it declined to offer after the adoption of the original Rule. In addition, the revised Remittance Rule limits the Bank's opportunity to expand that transfer business in the future. The Rule therefore has placed the Bank at a competitive disadvantage vis-à-vis other (typically larger) banks that can afford to offer remittances under the Rule without limitation, a service expected of a lending institution from its existing and prospective customers.

Mortgage Lending

21. In addition to authorizing the CFPB to regulate remittance transfers, the Dodd-Frank Act prohibits unfair, deceptive, and abusive consumer financial practices and authorizes the Bureau to identify what those practices entail and to take or recommend enforcement against institutions that engage in such practices. 12 U.S.C. § 5531(a)-(b).

22. The Director of the Bureau, Richard Cordray, has acknowledged the abstract

nature of the term "abusive," explaining in a January 24, 2012 hearing before a subcommittee of the U.S. House Committee on Oversight and Government Reform, that it is "a little bit of a puzzle because it is a new term" and is "not something [the Bureaus is] likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs."

23. Government officials have repeatedly stated that the Bureau's enforcement efforts will focus on mortgage lending practices. President Obama stated that the Bureau would "crack down on the abusive practice of unscrupulous mortgage lenders" on September 17, 2010. In March 2012, Director Cordray reiterated the Bureau's intention to "address the origination of mortgages, including loan originator compensation and the origination of high-priced mortgages."

24. Up until the last quarter of 2010, the Bank offered consumers several types of mortgages, including mortgages with five-year balloon payments and "character loans," which are loans based on the borrower's known character in addition to estimates of the borrower's ability to repay.

25. Before leaving the market, the Bank offered several loans at interest rates that were at least 1.5% higher than the Average Prime Offer Rate, as calculated with reference to the "Average Prime Offer Rates – Fixed" listed at http://www.ffiec.gov/ratespread/aportables.htm. Had it continued to offer consumer mortgage loans, it would have expected many of them to be of this character.

26. Based on statements Government officials made after the enactment of Dodd-Frank concerning the Bureau's authority over mortgage practices and the limits the Bureau could

impose on those practices, the Bank became concerned that the Bureau might retroactively deem its mortgage loans abusive. The Bank is a local, community bank, and it operates under different internal guidelines than other financial institutions. For example, the Bank's charter specifically provides that the Bank will serve the community, and the Bank therefore focuses on serving the needs of the community. The Bank does not sell its loans. As a result, the Bank has offered mortgages to its customers, based on its knowledge of their character and circumstances, that other institutions have been (and still today would likely be) unwilling to provide. The Bank would continue this practice of serving the community if it were to reenter the mortgage market.

27. For example, if the Bank were approached by a young couple whose income alone did not suggest ability to repay under traditional standards, but the Bank knew the parents of the couple were members of the community who themselves would be willing and able to pay for the mortgage, even if they were not themselves on the note, the Bank would be willing and able to offer that couple the mortgage. But the Bank would be concerned that the Bureau, looking at only the figures directly involved in such a loan, and not the unique circumstances the Bank evaluates as a community banker making that loan, would deem it abusive.

28. As another example, the Bank in the past made a loan with a 50% debt-to-income ratio to a borrower because the Bank had engaged in past transactions with the customer and knew that the customer—a single head-of-household whose credit had been negatively impacted by a previous relationship—would repay the obligations the customer incurred, even if the customer's former spouse had not.

29. When the Bank became concerned that it could not safely offer mortgages consistent with the Bureau's authority under the Dodd-Frank Act, the Bank expressed its concerns to officials at its prudential regulator, the Office of the Comptroller of the Currency (the

"OCC"). The OCC provided the Bank with no reassurance that it could remain in the market without fear of prosecution under the Bank's then-current practices.

30. In the last quarter of 2010, the Bank decided to exit the consumer mortgage business and determined that it would no longer offer any consumer mortgage loans. The Bank did so due to fear that those loans would be subject to enforcement action under the Dodd-Frank Act because they might be deemed to violate the prohibition against unfair, deceptive, and abusive practices.

31. The Bank also recognized that if it attempted to stay in the consumer mortgage market, it would have to incur significant additional costs to comply with proposed regulations governing mortgage loans, and thus would not be able to offer them in the cost-effective manner to which it was previously accustomed.

32. For example, if the Bank were to reenter the mortgage market and offer the terms it previously provided on consumer mortgage loans, many of the mortgages would constitute higher-priced covered transactions under the Bureau's new regulations. That means the loans would not fall within the safe harbor created by the Bureau pursuant to which the Bank could not be held liable to the borrower or to the Government on the theory that it did not adequately consider the borrower's ability to repay. The Bureau's regulations providing the Bank with only a rebuttable presumption of an adequate investigation, but otherwise leaving it subject to the costs of litigation, would require the Bank to reconsider whether it could offer the customer the loan at all and would impose an additional risk factor that would affect the costs and structure of the loan if the Bank were to offer it.

33. The Bank's inability to offer mortgages has harmed it financially in a number of ways. First, the Bank's mortgage business was regularly profitable. It was one of the best and

most prudent ways to invest and earn a return on the Bank's deposits and also one of the best ways for the Bank to reinvest in the community. The Bank's alternative use of funds is not as profitable.

34. Moreover, the Bank can no longer offer the full array of mortgage services existing and prospective customers expect of a lending institution, putting the Bank at a competitive disadvantage.

35. Finally, the Bureau's new rules governing mortgage foreclosure increase the Bank's costs of doing business. On January 17, 2013, the Bureau issued a rule that governs, among other things, the mortgage loan foreclosure process. *See* Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X) (Jan. 17, 2013), *available at* http://www.consumerfinance.gov/regulations/2013-real-estate-settlement-procedures-act-regulation-x-and-truth-in-lending-act-regulation-z-mortgage-servicing-final-rules/. Under this rule, "[a] small servicer shall not make the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process unless a borrower's mortgage loan obligation is more than 120 days delinquent." *Id.* at 696 (to be codified at 12 CFR §1024.41(j)).

36. Although the Bank no longer makes new consumer mortgage loans, it still holds several such loans from previous years that have yet to be satisfied. Under Texas law, the Bank could initiate foreclosure proceedings on such a loan, should the borrower default, if the borrower did not cure that default within 20 days of a letter notifying him of the delinquency. *See* Tex. Prop. Code Ann. § 51.002(a), (b), (d) (West 2012). After those 20 days expired, the Bank could post a foreclosure notice at the courthouse, file the notice with the county clerk, and notify the borrower of the foreclosure sale, which could be held as soon as 21 days thereafter. *Id.* Even if the Bank does not intend to actually foreclose on a defaulted borrower, posting a

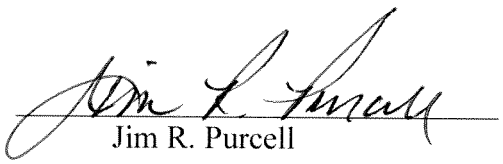
foreclosure notice at the courthouse soon after a default can be a useful tool to induce such a borrower to get current on their payments—but the Bank is now prohibited by the Bureau's new rule from doing so for 120 days. The Bureau's new rule will increase the Bank's costs by drawing out the process by which the Bank may seek to recover on a defaulted loan.

37. Any new loans the Bank would make would also be subject to the Bureau's foreclosure limitations.

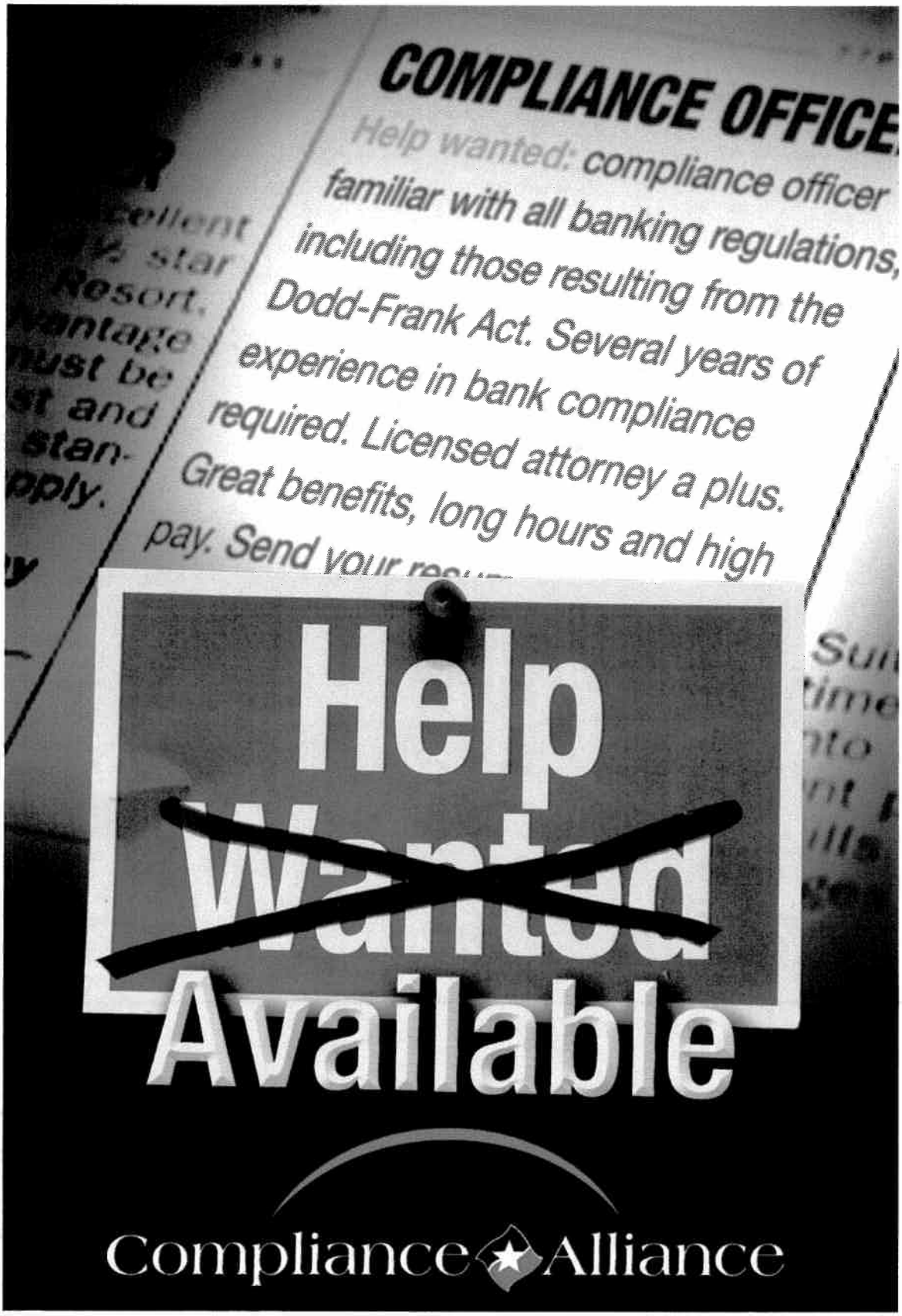
38. But for the Bureau, its rules, and its enforcement authority, the Bank would reenter the consumer mortgage and remittance markets without limitation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 12, 2013, at Big Spring, Texas.



Jim R. Purcell



Are the hundreds of new and changing rules and regulations forcing you to hire additional staff to keep your bank in compliance?

Compliance officers receive an average salary of $62,000 plus benefits. Bank attorneys are paid upwards of $100,000. The risk of noncompliance is too great to not get help.

HELP IS AVAILABLE!

CALL TODAY
888-353-3933

OR VISIT
www.compliancealliance.com

Compliance Alliance

Has the onset of regulatory changes made your bank struggle to keep its head above water?

With the tsunami of regulations coming, the amount of work, financial resources and time demands will put a tremendous strain on banks. Facing the storm alone can be risky. Compliance Alliance is a banker's life raft to safety and security.

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A SUBSIDIARY OF THE TEXAS BANKERS ASSOCIATION

The Industry – Ready or Not – *It's Coming…*

- You have undoubtedly heard and read much about the compliance and operational impacts of the Dodd-Frank Act.
- The Dodd-Frank Act will have a significant and costly effect on traditional banks.
- Banks should pay close attention to the rules, regulations and statements that come from the newly created CFPB and other regulatory banking agencies.
- Each of these new compliance mandates will affect consumer financial products and services and enterprise risk management throughout the bank.

Compliance Alliance

Survey Says…

- Survey results indicated that banks plan to hire or redirect one or more FTEs to handle compliance needs

- Average salary for a compliance officer is $62,000 plus benefits (Based on TBA Salary Survey)

Research Says…

TBA is a member-driven Association that strives to meet our members' needs. When we saw the insurmountable compliance burden grow for our members, we set out to help our members navigate through the complexity of the compliance maze.

- Held a Compliance Focus Group meeting in 2010, comprised of 16 banking compliance personnel from TBA member banks across the state to explore ways to ease the compliance and regulatory burdens on banks.
- Surveyed our TBA Board of Directors to get feedback on their plans to adapt to the compliance and operational impacts of the Dodd-Frank Act.

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What we found…

Compliance Focus Group

Focus Group Findings:

- Understaffed. Bank employees spreading compliance duties across departments to accommodate the load
- Hard to track. Bankers' need for a simple calendar to track all things compliance and the mandatory effective dates
- Mundane tasks. There is an enormous amount of tedious tasks related to taking a new regulation from introduction to policy
- Trusted source. There are other compliance website resources out there, but can they be trusted?
- One location. Other compliance websites may have one or two beneficial resource tools, but there is not one site that offers it all, which creates multiple and time consuming web searches. There is a need for a one-stop, up-to-date and trusted website
- Full Capacity. Compliance staff are already overloaded with the current level of regulations – How will they survive the 200+ coming?
- Extra Set of Hands. Compliance staff repeatedly reported the need for an extra set of hands. Hiring is one option, but leveraging the expertise and economies of scale with a trusted and knowledgeable third party will be more economical and free up existing staff's time to take on more.

What we do…

Compliance Alliance Benefits:

- Cliff Notes on New Regulations (White Papers)
- Policy Templates
- Procedures
- Processes
- Action Plans
- Lending Matrices
- Compliance Hotline

Compliance Alliance

What we do…

Compliance Alliance Benefits:

- Cheat Sheets
- Checklists
- Worksheets
- Compliance Calendar
- Risk Assessment Tools
- Tracking Tools
- Review of Advertising and Marketing
- Review of Website

Compliance Alliance

What we do…

Compliance Alliance Benefits:

- Evaluate new products to ensure compliance
- Review Disclosures
- Training Tools
- Statutes
- Regulations
- Rules
- Interpretations
- Compliance Webinars
- Compliance Newsletter

Compliance Alliance

What we do…

Compliance Alliance Benefits:

- Forms
- Notices
- Website
- Notification of changes, updates, and news
- FAQs
- And more to come…

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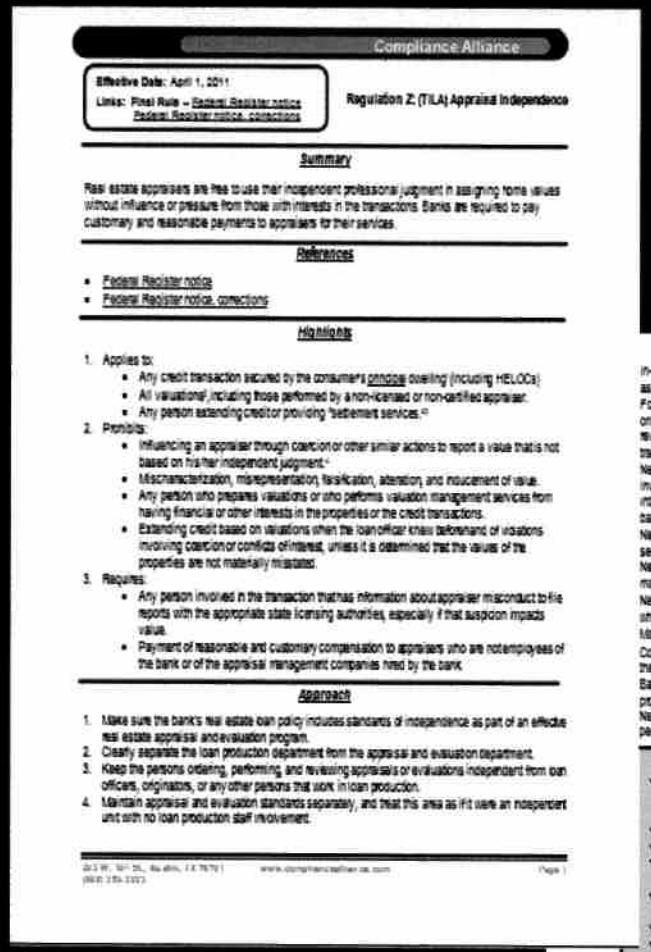
Regulatory Cliff Notes

(White Papers)



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Effective Date: April 1, 2011

Links: Final Rule – Federal Register notice
Federal Register notice, corrections

Regulation Z: (TILA) Appraisal Independence

Summary

Real estate appraisers are free to use their independent professional judgment in assigning home values without influence or pressure from those with interests in the transactions. Banks are required to pay customary and reasonable payments to appraisers for their services.

References

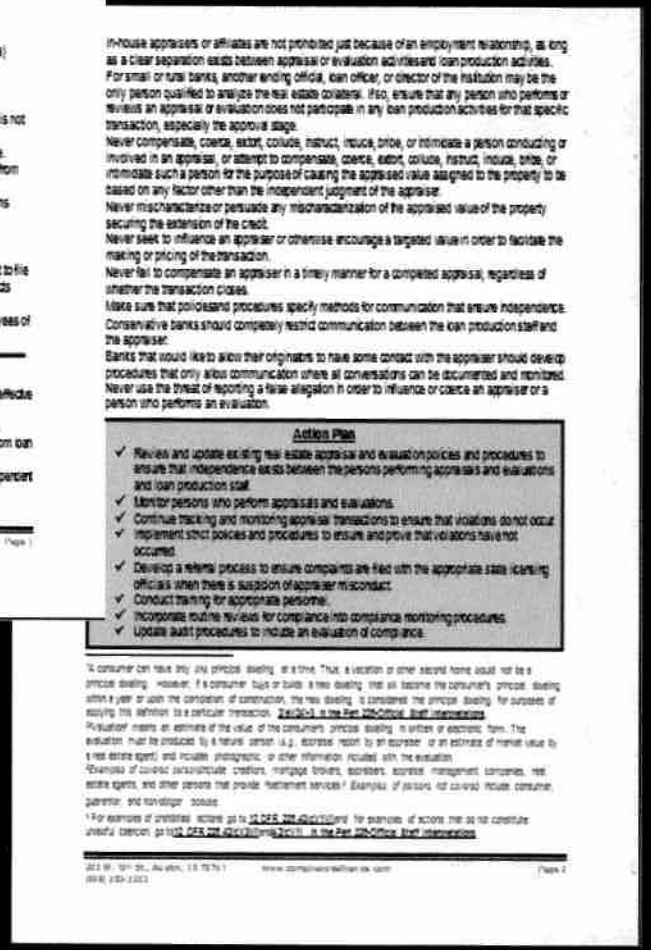
- Federal Register notice
- Federal Register notice, corrections

Highlights

1. Applies to:
   - Any credit transaction secured by the consumer's principal dwelling (including HELOCs)
   - All valuations[1] including those performed by a non-licensed or non-certified appraiser.
   - Any person extending credit or providing "settlement services."[2]
2. Prohibits:
   - Influencing an appraiser through coercion or other similar actions to report a value that is not based on his/her independent judgment.[3]
   - Mischaracterization, misrepresentation, falsification, alteration, and inducement of value.
   - Any person who prepares valuations or who performs valuation management services from having financial or other interests in the properties or the credit transactions.
   - Extending credit based on valuations when the loan officer knew beforehand of violations involving coercion or conflicts of interest, unless it is determined that the values of the properties are not materially misstated.
3. Requires:
   - Any person involved in the transaction that has information about appraiser misconduct to file reports with the appropriate state licensing authorities, especially if that suspicion impacts value.
   - Payment of reasonable and customary compensation to appraisers who are not employees of the bank or of the appraisal management companies hired by the bank.

Approach

1. Make sure the bank's real estate loan policy includes standards of independence as part of an effective real estate appraisal and evaluation program.
2. Clearly separate the loan production department from the appraisal and evaluation department.
3. Keep the persons ordering, performing, and reviewing appraisals or evaluations independent from loan officers, originators, or any other persons that work in loan production.
4. Maintain appraisal and evaluation standards separately, and treat this area as if it were an independent unit with no loan production staff involvement.



In-house appraisers or affiliates are not prohibited just because of an employment relationship, as long as a clear separation exists between appraisal or evaluation activities and loan production activities.
For small or rural banks, another lending official, loan officer, or director of the institution may be the only person qualified to analyze the real estate collateral. If so, ensure that any person who performs or reviews an appraisal or evaluation does not participate in any loan production activities for that specific transaction, especially the approval stage.
Never compensate, coerce, extort, collude, instruct, induce, bribe, or intimidate a person conducting or involved in an appraisal, or attempt to compensate, coerce, extort, collude, instruct, induce, bribe, or intimidate such a person for the purpose of causing the appraised value assigned to the property to be based on any factor other than the independent judgment of the appraiser.
Never mischaracterize or persuade any mischaracterization of the appraised value of the property securing the extension of the credit.
Never seek to influence an appraiser or otherwise encourage a targeted value in order to facilitate the making or pricing of the transaction.
Never fail to compensate an appraiser in a timely manner for a completed appraisal, regardless of whether the transaction closes.
Make sure that policies and procedures specify methods for communication that ensure independence.
Conservative banks should completely restrict communication between the loan production staff and the appraiser.
Banks that would like to allow their originators to have some contact with the appraiser should develop procedures that only allow communication where all conversations can be documented and monitored.
Never use the threat of reporting a false allegation in order to influence or coerce an appraiser or a person who performs an evaluation.

Action Plan

- ✓ Review and update existing real estate appraisal and evaluation policies and procedures to ensure that independence exists between the persons performing appraisals and evaluations and loan production staff.
- ✓ Monitor persons who perform appraisals and evaluations.
- ✓ Continue tracking and monitoring appraisal transactions to ensure that violations do not occur.
- ✓ Implement strict policies and procedures to ensure and prove that violations have not occurred.
- ✓ Develop a referral process to ensure complaints are filed with the appropriate state licensing officials when there is suspicion of appraiser misconduct.
- ✓ Conduct training for appropriate personnel.
- ✓ Incorporate routine reviews for compliance into compliance monitoring procedures.
- ✓ Update audit procedures to include an evaluation of compliance.

[illegible] www.compliancealliance.com Page 2

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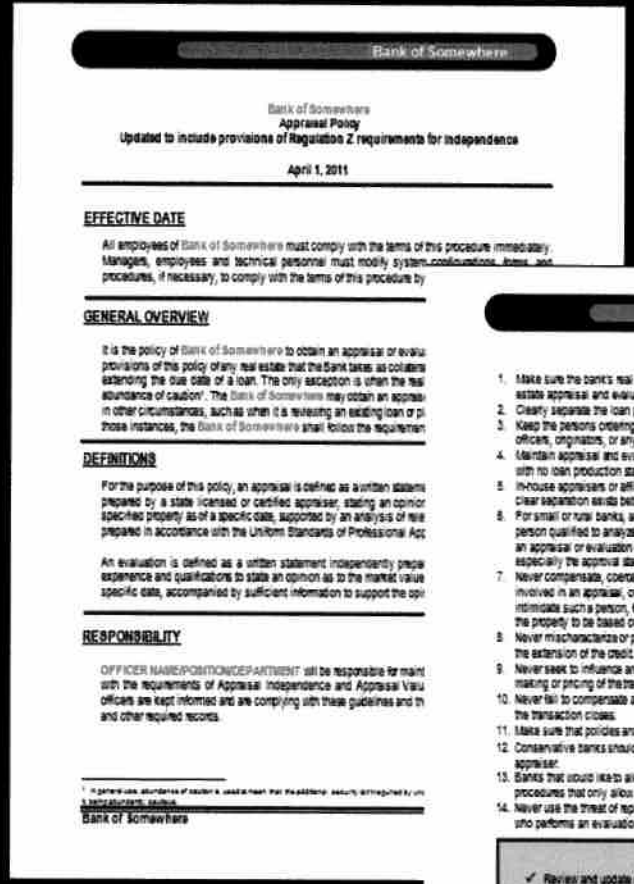
Policy

Sample Letters



Bank of Somewhere

Bank of Somewhere
Appraisal Policy
Updated to include provisions of Regulation Z requirements for independence

April 1, 2011

EFFECTIVE DATE

All employees of Bank of Somewhere must comply with the terms of this procedure immediately. Managers, employees and technical personnel must modify system configurations, forms, and procedures, if necessary, to comply with the terms of this procedure by

GENERAL OVERVIEW

It is the policy of Bank of Somewhere to obtain an appraisal or evalu provisions of this policy of any real estate that the Bank takes as collatera extending the due date of a loan. The only exception is when the rea abundance of caution[1]. The Bank of Somewhere may obtain an apprai in other circumstances, such as when it is reviewing an existing loan or pi those instances, the Bank of Somewhere shall follow the requiremen

DEFINITIONS

For the purpose of this policy, an appraisal is defined as a written statem prepared by a state licensed or certified appraiser, stating an opinior specified property as of a specific date, supported by an analysis of rele prepared in accordance with the Uniform Standards of Professional Apr

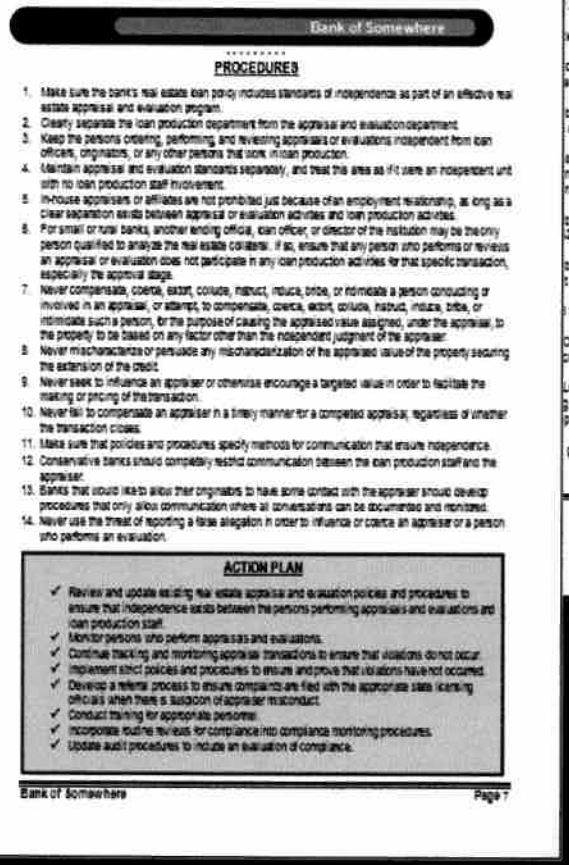
An evaluation is defined as a written statement independently prepa experience and qualifications to state an opinion as to the market value specific date, accompanied by sufficient information to support the opi

RESPONSIBILITY

OFFICER NAME/POSITION/DEPARTMENT will be responsible for maint with the requirements of Appraisal Independence and Appraisal Valu officers are kept informed and are complying with these guidelines and th and other required records.

[1] A general rule, abundance of caution is usually kept that the additional security arrangement is not necessary, positive.

Bank of Somewhere



Bank of Somewhere

PROCEDURES

1. Make sure the bank's real estate loan policy includes standards of independence as part of an effective real estate appraisal and evaluation program.
2. Clearly separate the loan production department from the appraisal and evaluation department.
3. Keep the persons ordering, performing, and reviewing appraisals or evaluations independent from loan officers, originators, or any other persons that work in loan production.
4. Maintain appraisal and evaluation standards separately, and treat this area as if it were an independent unit with no loan production staff involvement.
5. In-house appraisers or affiliates are not prohibited just because of an employment relationship, as long as a clear separation exists between appraisal or evaluation activities and loan production activities.
6. For small or rural banks, another lending official, loan officer, or director of the institution may be the only person qualified to analyze the real estate collateral. If so, ensure that any person who performs or reviews an appraisal or evaluation does not participate in any loan production activities for that specific transaction, especially the approval stage.
7. Never compensate, coerce, extort, collude, instruct, induce, price, or intimidate a person conducting or involved in an appraisal, or attempt, to compensate, coerce, extort, collude, instruct, induce, bribe, or intimidate such a person, for the purpose of causing the appraised value assigned, under the appraisal, to the property to be based on any factor other than the independent judgment of the appraiser.
8. Never mischaracterize or persuade any mischaracterization of the appraised value of the property securing the extension of the credit.
9. Never seek to influence an appraiser or otherwise encourage a targeted value in order to facilitate the making or pricing of the transaction.
10. Never fail to compensate an appraiser in a timely manner for a completed appraisal, regardless of whether the transaction closes.
11. Make sure that policies and procedures specify methods for communication that ensure independence.
12. Conservative banks should completely restrict communication between the loan production staff and the appraiser.
13. Banks that would like to allow their originators to have some contact with the appraiser should develop procedures that only allow communication where all conversations can be documented and monitored.
14. Never use the threat of reporting a false allegation in order to influence or coerce an appraiser or a person who performs an evaluation.

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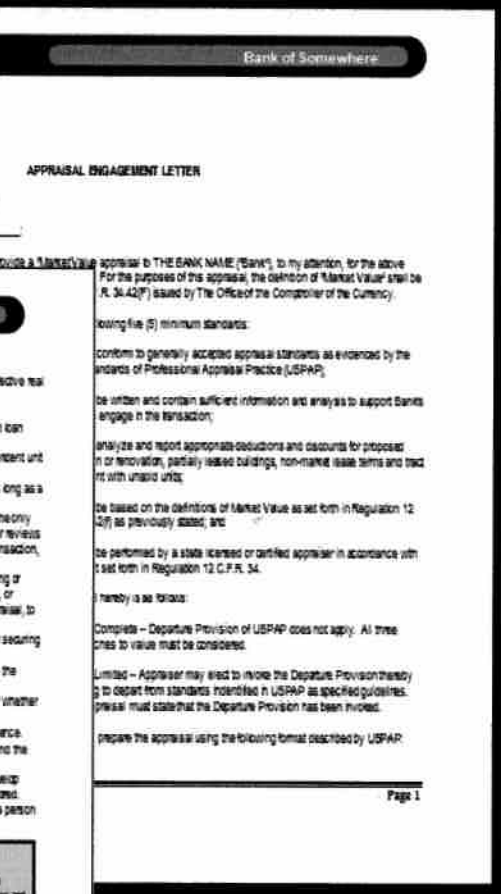
- ✓ Conduct training for appropriate personnel.
- ✓ Incorporate routine reviews for compliance into compliance monitoring procedures.
- ✓ Update audit procedures to include an evaluation of compliance.

Bank of Somewhere Page 7



Bank of Somewhere

Date

RE: **APPRAISAL ENGAGEMENT LETTER**

Property:

Dear _____:

Please provide a "Market Value appraisal to THE BANK NAME ("Bank"), to my attention, for the above For the purposes of this appraisal, the definition of "Market Value" shall be R. 34.42(f) issued by The Office of the Comptroller of the Currency.

lowing five (5) minimum standards:

conform to generally accepted appraisal standards as evidenced by the andards of Professional Appraisal Practice (USPAP);

be written and contain sufficient information and analysis to support Banks engage in the transaction;

analyze and report appropriate deductions and discounts for proposed n or renovation, partially leased buildings, non-market lease terms and tract nt with unsold units;

be based on the definitions of Market Value as set forth in Regulation 12 2(f) as previously stated; and

be performed by a state licensed or certified appraiser in accordance with t set forth in Regulation 12 C.F.R. 34.

I hereby is as follows:

Complete – Departure Provision of USPAP does not apply. All three ches to value must be considered.

Limited – Appraiser may elect to invoke the Departure Provision thereby g to depart from standards identified in USPAP as specified guidelines. praisal must state that the Departure Provision has been invoked.

prepare the appraisal using the following format described by USPAP:

Page 1

Procedures

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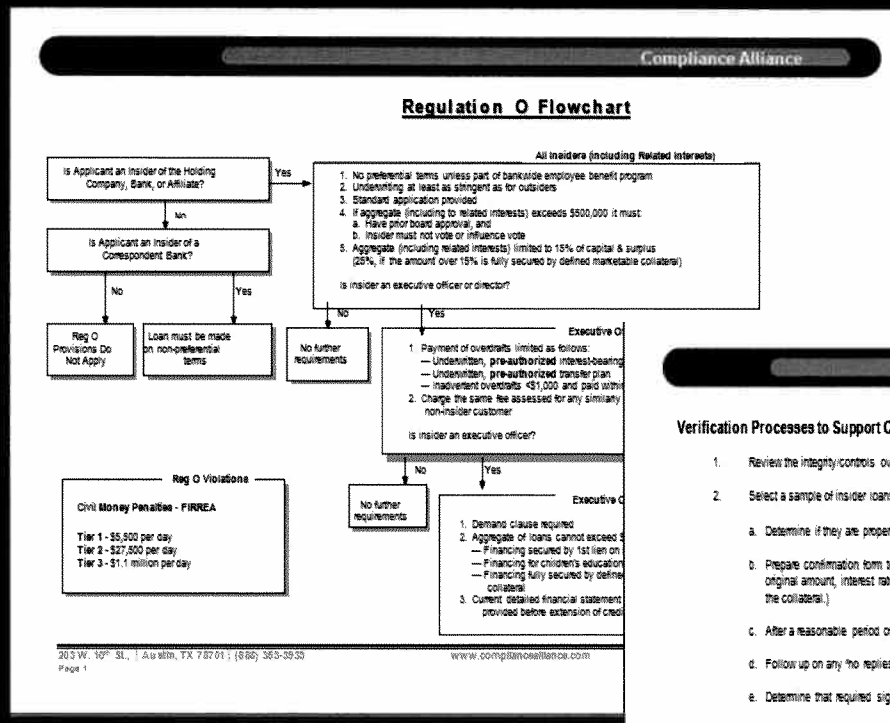
Flowcharts

Check Lists

Processes



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Regulation O Flowchart

All insiders (including Related interests)

Is Applicant an insider of the Holding Company, Bank, or Affiliate? — Yes

1. No preferential terms unless part of bank-wide employee benefit program
2. Underwriting at least as stringent as for outsiders
3. Standard application provided
4. If aggregate (including to related interests) exceeds $500,000 it must:
   a. Have prior board approval, and
   b. Insider must not vote or influence vote
5. Aggregate (including related interests) limited to 15% of capital & surplus (25%, if the amount over 15% is fully secured by defined marketable collateral)

No

Is Applicant an insider of a Correspondent Bank?

No — Reg O Provisions Do Not Apply

Yes — Loan must be made on non-preferential terms

Is insider an executive officer or director?

No — No further requirements

Yes — Executive O

1. Payment of overdrafts limited as follows:
   — Underwritten, **pre-authorized** interest-bearing
   — Underwritten, **pre-authorized** transfer plan
   — Inadvertent overdrafts <$1,000 and paid within
2. Charge the same fee assessed for any similarly non-insider customer

Is insider an executive officer?

No — No further requirements

Yes — Executive O

1. Demand clause required
2. Aggregate of loans cannot exceed $
   — Financing secured by 1st lien on
   — Financing for children's education
   — Financing fully secured by defined collateral
3. Current detailed financial statement provided before extension of credi

Reg O Violations

Civil Money Penalties - FIRREA

Tier 1 - $5,500 per day
Tier 2 - $27,500 per day
Tier 3 - $1.1 million per day

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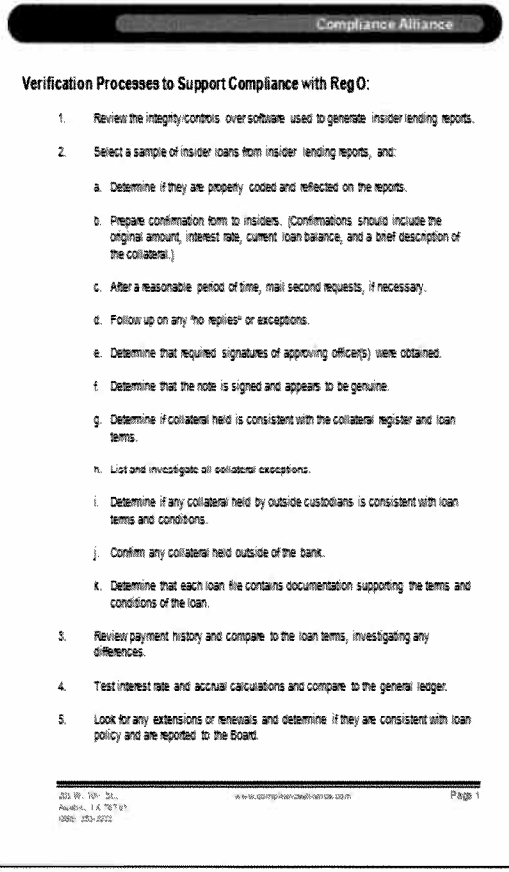
Page 1



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Verification Processes to Support Compliance with Reg O:

1. Review the integrity/controls over software used to generate insider lending reports.
2. Select a sample of insider loans from insider lending reports, and:
   a. Determine if they are properly coded and reflected on the reports.
   b. Prepare confirmation form to insiders. (Confirmations should include the original amount, interest rate, current loan balance, and a brief description of the collateral.)
   c. After a reasonable period of time, mail second requests, if necessary.
   d. Follow up on any "no replies" or exceptions.
   e. Determine that required signatures of approving officer(s) were obtained.
   f. Determine that the note is signed and appears to be genuine.
   g. Determine if collateral held is consistent with the collateral register and loan terms.
   h. List and investigate all collateral exceptions.
   i. Determine if any collateral held by outside custodians is consistent with loan terms and conditions.
   j. Confirm any collateral held outside of the bank.
   k. Determine that each loan file contains documentation supporting the terms and conditions of the loan.
3. Review payment history and compare to the loan terms, investigating any differences.
4. Test interest rate and accrual calculations and compare to the general ledger.
5. Look for any extensions or renewals and determine if they are consistent with loan policy and are reported to the Board.

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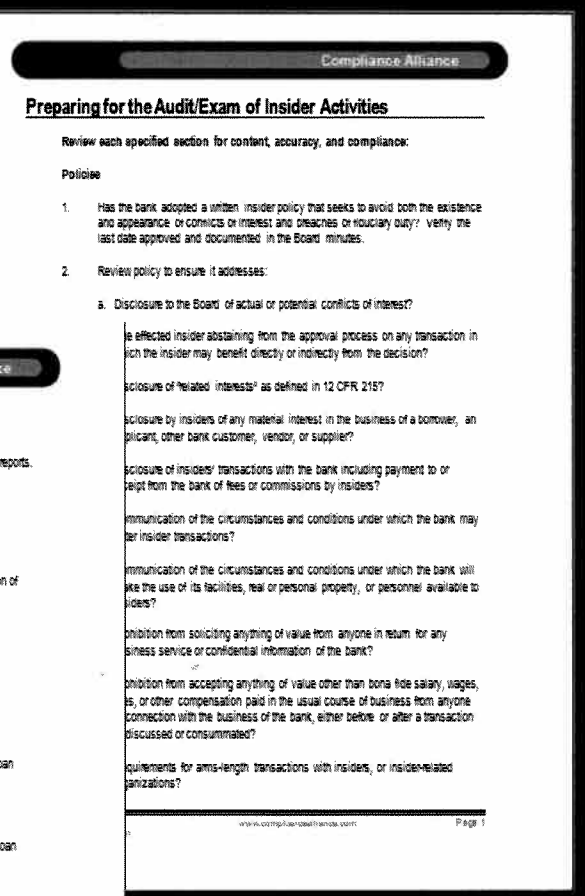

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Preparing for the Audit/Exam of Insider Activities

Review each specified section for content, accuracy, and compliance:

Policies

1. Has the bank adopted a written insider policy that seeks to avoid both the existence and appearance of conflicts of interest and breaches of fiduciary duty? Verify the last date approved and documented in the Board minutes.
2. Review policy to ensure it addresses:
   a. Disclosure to the Board of actual or potential conflicts of interest?

e effected insider abstaining from the approval process on any transaction in ich the insider may benefit directly or indirectly from the decision?

sclosure of "related interests" as defined in 12 CFR 215?

sclosure by insiders of any material interest in the business of a borrower, an plicant, other bank customer, vendor, or supplier?

sclosure of insiders' transactions with the bank including payment to or ceipt from the bank of fees or commissions by insiders?

mmunication of the circumstances and conditions under which the bank may ter insider transactions?

mmunication of the circumstances and conditions under which the bank will ke the use of its facilities, real or personal property, or personnel available to siders?

hibition from soliciting anything of value from anyone in return for any siness service or confidential information of the bank?

hibition from accepting anything of value other than bona fide salary, wages, s, or other compensation paid in the usual course of business from anyone connection with the business of the bank, either before or after a transaction discussed or consummated?

quirements for arms-length transactions with insiders, or insider-related anizations?

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Another Training Tool

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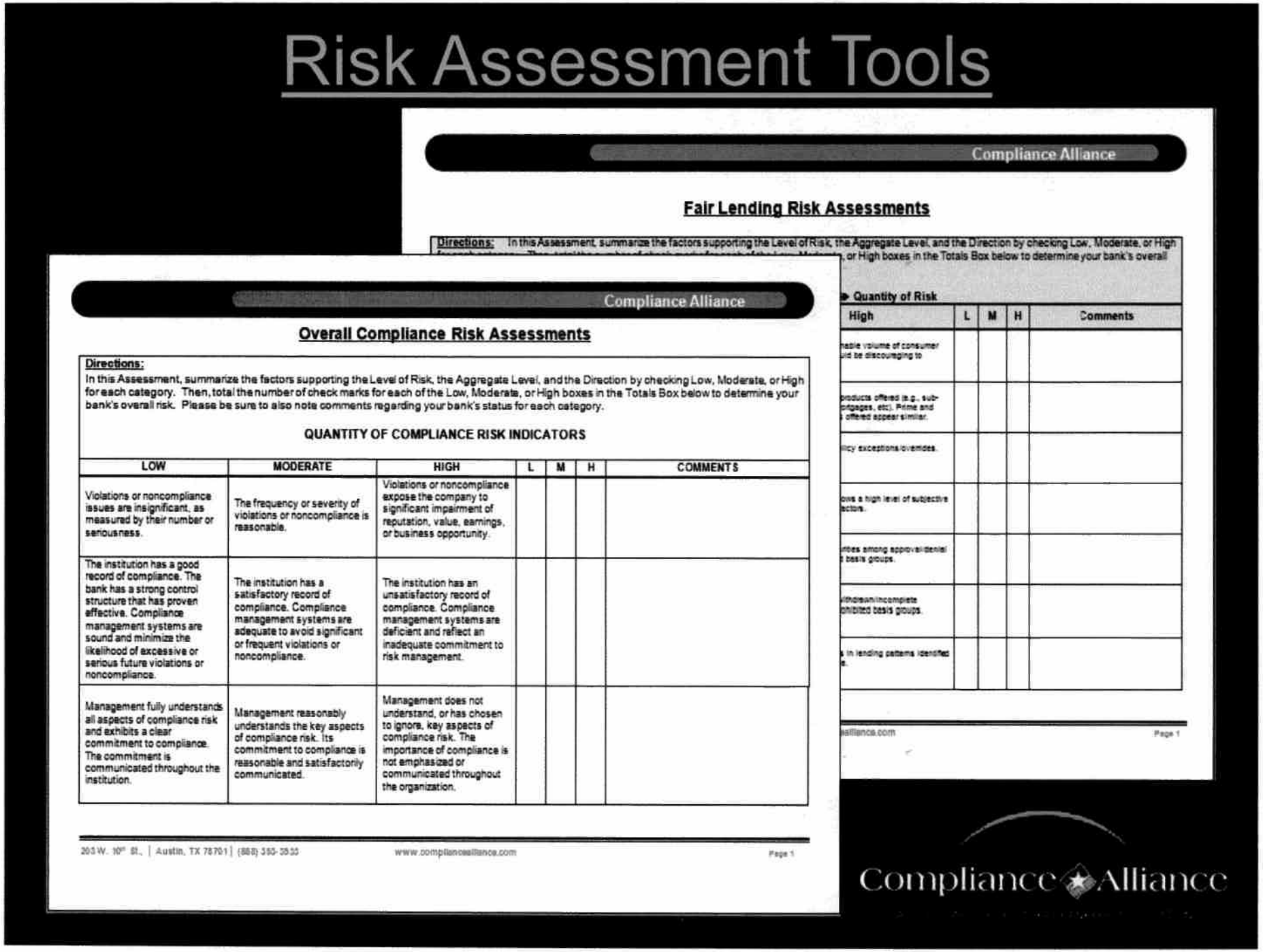
Regulatory Policy & Training Requirements and Penalties

Regulation	Policies **	Training	Penalties for non compliance
Regulation B, Equal Credit Opportunity Act	Expected	Strongly Recommended For New Account and Loan Personnel	• FIRREA Penalties Civil liability: • Actual damages • Punitive damages: a. $10,000 in individual cases, b. the lesser of $500,000 or 1% of the creditor's net worth in class action suits • Attorney's fees
Regulation C, Home Mortgage Disclosure Act	Expected	Recommended Regularly For New Account and Loan Personnel (Consumer Compliance Handbook Examination Manual p 122)	• FIRREA Penalties
Regulation D, Reserve Requirements of Depository Institutions	Expected	Recommended Regularly For New Account Personnel	• FIRREA Penalties: Civil penalties are available; Federal Reserve may waive penalties exempt for gross negligence or willful noncompliance
Regulation E, Electronic Fund Transfer Act	Expected	Recommended Regularly For Teller and New Account Personnel (Consumer Compliance Handbook Examination Manual, pg 25)	• FIRREA Penalties Civil liability: • Actual damages • Court costs and attorney's fees Criminal liability: • Fines up to $5,000 and/or imprisonment of up to one year for knowingly giving false information • Fines up to $10,000 and/or imprisonment for 10 years for forgery, counterfeiting, and stealing debit devices
Flood Insurance Flood Disaster Protection Act	Expected 12 CFR 208.25	Recommended Regularly For New Account and Loan Personnel 12 CFR 208.25	• FIRREA Penalties Statutory penalties: • $385 per violation • Up to $125,000 per lender per, calendar year Potential of negligence liability if lender does not comply with the act and the borrower's property is damaged or destroyed
Regulation M, Consumer Leasing			• FIRREA Penalties Civil liability: • Actual damages • Court costs, attorney's fees • Statutory damages ($100 to $1,000) • Class Actions ($500,000 or 1% of the creditor's net worth, whichever is less) Criminal liability

Risk Assessment Tools



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Overall Compliance Risk Assessments

Directions:
In this Assessment, summarize the factors supporting the Level of Risk, the Aggregate Level, and the Direction by checking Low, Moderate, or High for each category. Then, total the number of check marks for each of the Low, Moderate, or High boxes in the Totals Box below to determine your bank's overall risk. Please be sure to also note comments regarding your bank's status for each category.

QUANTITY OF COMPLIANCE RISK INDICATORS

LOW	MODERATE	HIGH	L	M	H	COMMENTS
Violations or noncompliance issues are insignificant, as measured by their number or seriousness.	The frequency or severity of violations or noncompliance is reasonable.	Violations or noncompliance expose the company to significant impairment of reputation, value, earnings, or business opportunity.				
The institution has a good record of compliance. The bank has a strong control structure that has proven effective. Compliance management systems are sound and minimize the likelihood of excessive or serious future violations or noncompliance.	The institution has a satisfactory record of compliance. Compliance management systems are adequate to avoid significant or frequent violations or noncompliance.	The institution has an unsatisfactory record of compliance. Compliance management systems are deficient and reflect an inadequate commitment to risk management.				
Management fully understands all aspects of compliance risk and exhibits a clear commitment to compliance. The commitment is communicated throughout the institution.	Management reasonably understands the key aspects of compliance risk. Its commitment to compliance is reasonable and satisfactorily communicated.	Management does not understand, or has chosen to ignore, key aspects of compliance risk. The importance of compliance is not emphasized or communicated throughout the organization.				

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Fair Lending Risk Assessments

Directions: In this Assessment, summarize the factors supporting the Level of Risk, the Aggregate Level, and the Direction by checking Low, Moderate, or High [illegible] or High boxes in the Totals Box below to determine your bank's overall

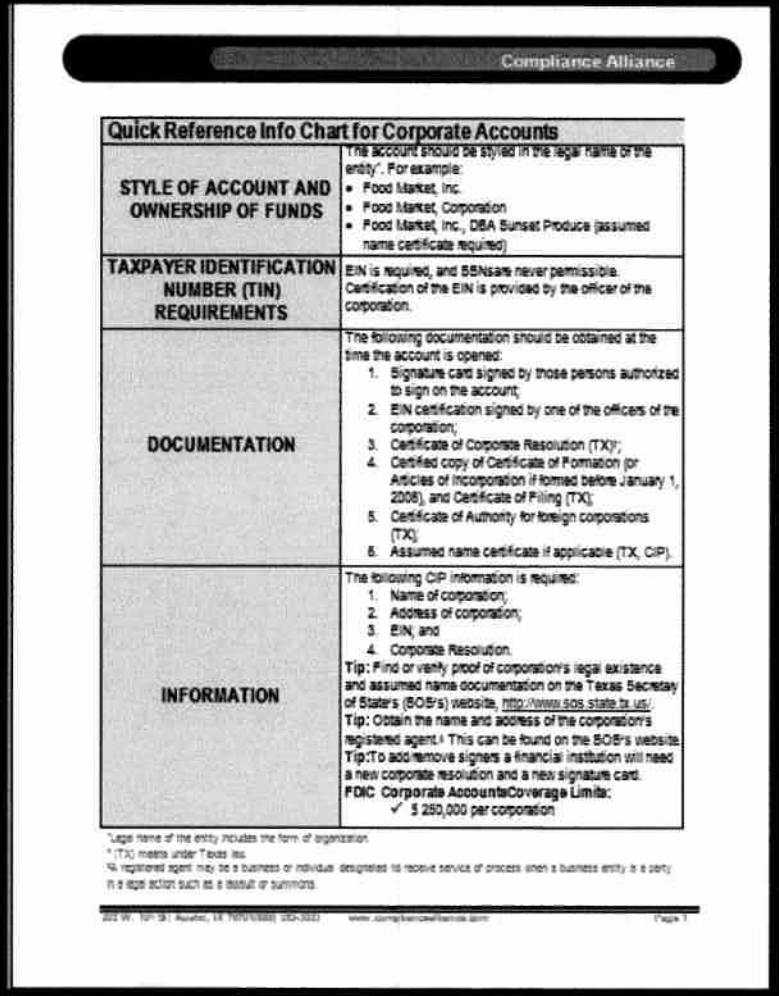
Quantity of Risk

High	L	M	H	Comments
[illegible] volume of consumer uld be discouraging to				
products offered (e.g., sub-prime mortgages, etc). Prime and offered appear similar.				
licy exceptions/overrides.				
ows a high level of subjective ctors.				
ntes among approval/denial basis groups.				
withdrawn/incomplete ohibited basis groups.				
in lending patterns identified e.				

alliance.com Page 1

Compliance Alliance

Cheatsheets



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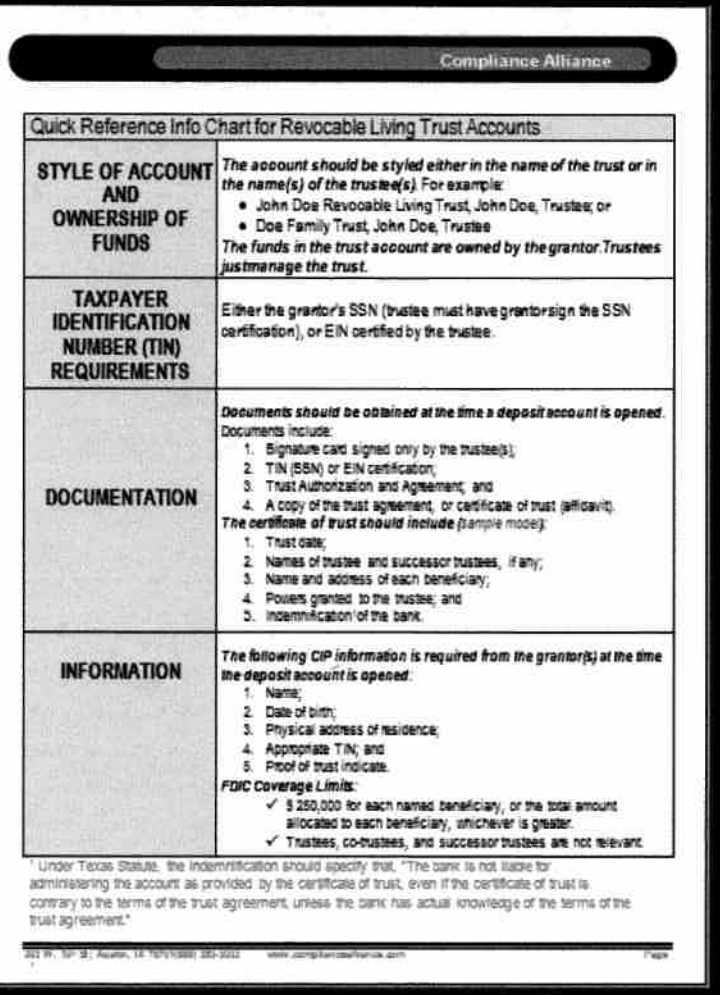
Quick Reference Info Chart for Corporate Accounts

STYLE OF ACCOUNT AND OWNERSHIP OF FUNDS	The account should be styled in the legal name of the entity*. For example: • Food Market, Inc. • Food Market, Corporation • Food Market, Inc., DBA Sunset Produce (assumed name certificate required)
TAXPAYER IDENTIFICATION NUMBER (TIN) REQUIREMENTS	EIN is required, and SSNs are never permissible. Certification of the EIN is provided by the officer of the corporation.
DOCUMENTATION	The following documentation should be obtained at the time the account is opened: 1. Signature card signed by those persons authorized to sign on the account; 2. EIN certification signed by one of the officers of the corporation; 3. Certificate of Corporate Resolution (TX)†; 4. Certified copy of Certificate of Formation (or Articles of Incorporation if formed before January 1, 2006), and Certificate of Filing (TX); 5. Certificate of Authority for foreign corporations (TX); 6. Assumed name certificate if applicable (TX, CIP).
INFORMATION	The following CIP information is required: 1. Name of corporation; 2. Address of corporation; 3. EIN; and 4. Corporate Resolution. **Tip:** Find or verify proof of corporation's legal existence and assumed name documentation on the Texas Secretary of State's (SOS's) website, http://www.sos.state.tx.us/. **Tip:** Obtain the name and address of the corporation's registered agent.¶ This can be found on the SOS's website. **Tip:** To add/remove signers a financial institution will need a new corporate resolution and a new signature card. **FDIC Corporate Account Coverage Limits:** ✓ $ 250,000 per corporation

*Legal name of the entity includes the form of organization.

† (TX) means under Texas law.

¶ A registered agent may be a business or individual designated to receive service of process when a business entity is a party in a legal action such as a lawsuit or summons.



Compliance Alliance

Quick Reference Info Chart for Revocable Living Trust Accounts

STYLE OF ACCOUNT AND OWNERSHIP OF FUNDS	***The account should be styled either in the name of the trust or in the name(s) of the trustee(s).*** For example: • John Doe Revocable Living Trust, John Doe, Trustee; or • Doe Family Trust, John Doe, Trustee ***The funds in the trust account are owned by the grantor. Trustees just manage the trust.***
TAXPAYER IDENTIFICATION NUMBER (TIN) REQUIREMENTS	Either the grantor's SSN (trustee must have grantor sign the SSN certification), or EIN certified by the trustee.
DOCUMENTATION	***Documents should be obtained at the time a deposit account is opened.*** Documents include: 1. Signature card signed only by the trustee(s); 2. TIN (SSN) or EIN certification; 3. Trust Authorization and Agreement; and 4. A copy of the trust agreement, or certificate of trust (affidavit). ***The certificate of trust should include*** *(sample model):* 1. Trust date; 2. Names of trustee and successor trustees, if any; 3. Name and address of each beneficiary; 4. Powers granted to the trustee; and 5. Indemnification† of the bank.
INFORMATION	***The following CIP information is required from the grantor(s) at the time the deposit account is opened:*** 1. Name; 2. Date of birth; 3. Physical address of residence; 4. Appropriate TIN; and 5. Proof of trust indicate. ***FDIC Coverage Limits:*** ✓ $ 250,000 for each named beneficiary, or the total amount allocated to each beneficiary, whichever is greater. ✓ Trustees, co-trustees, and successor trustees are not relevant.

† Under Texas Statute, the indemnification should specify that, "The bank is not liable for administering the account as provided by the certificate of trust, even if the certificate of trust is contrary to the terms of the trust agreement, unless the bank has actual knowledge of the terms of the trust agreement."

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Loan Matrix

Compliance Alliance

CHARACTERISTICS OF LOAN REQUEST				Reg B		HOEPA	Reg C	Reg Z							RESPA					Reg AA	Reg M
TYPE OF SECURITY	USE OF SECURITY	USE OF PROCEEDS	I NS. DISC.	WRITTEN APP.	NOTICE OF RIGHT TO RECEIVE COPY OF APPRAISAL	NOTICE TO HOME LOAN APPLICANT	(GOV. MON. INFO) HMDA	HOME EQUITY BROCHURE & PROGRAM DISC.	ARM BOOKLET & PROGRAM DISC	HOEPA (NA if purchase)	HPML CHECK LIST	EARLY TIL DISC.	TIL DISC.	RIGHT TO RESCIND	BUYING YOUR HOME BOOKLET	GOOD FAITH ESTIMATES	UTIL. SERV. DISC. (1ST LIENS ONLY)	HUD-1 OR HUD-1A	INITIAL ESCROW STMT. (if escrow)	NOTICE TO CO-SIGNER	FLD DD CHK DX
Consumer goods, real land, unsecured	Consumer use	Purchase	X	Persons									X							X	
		Refinance	X	Persons									X							X	
		Equity	X	Persons									X							X	
	Business use	Purchase, refi, equity		CAA*																	
Residential dwelling of 1-4 families, or a mobile home (less than 25 acres)	Primary Residence	Purchase	X	URLA	X	X	X		X*		X	X	X		X*	X*	X*	X*	if Escrow	X	X
		Refinance	X	URLA	X	X	X		X*	X	X	X	X	X		X*	X*	X*	if Escrow	X	X
		Home Improvement	X	URLA	X	X	X		X*	X	X	X	X	X		X*	If 1st lien	X*	if Escrow	X	X
		Bridge to Purchase		Home Equity	X	X						X	X	X						X	X
		Home Equity (non-HUDA)	X	Home Equity	X	X			X*	X	X	X	X	X		X*	If 1st lien	X*	if Escrow	X	X
		HELOC (open end)(& 2nd home)	X	Home Equity	X	X		X						X						X	X
		Business or Ag		CAA*	X	XX	If HVDA														X
	Rental House	Purchase, refi, improvement		CAA*	X	XX	X														X
		Home Equity-consumer	X	Home Equity	X	X			X*			X	X			X*	If 1st lien	X*	if Escrow	X	X
		Home Equity-business		CAA*	X	XX															X
	Secondary or other residence	Purchase, refi, improvement	X	URLA	X	X	X					X	X		X*	X*	X*	X*	if Escrow	X	X
		Home Equity	X	Home Equity	X	X						X	X			X*	If 1st lien	X*	if Escrow	X	X
Residential dwelling of 1-4 families, or a mobile home (25 acres or more)	Primary Residence	Purchase	X	URLA	X	X	X		X*		X	X	X							X	X
		Refinance	X	URLA	X	X	X		X*	X	X	X	X	X						X	X
		Home Improvement	X	URLA	X	X	X		X*	X	X	X	X	X						X	X
		Home Equity (non-HUDA)	X	Home Equity	X	X			X*	X	X	X	X	X						X	X
		HELOC (open end)	X	Home Equity	X	X		X						X						X	X
		Business or Ag		CAA*	X	XX	If HVDA														X
Raw Land	Primary Residence	Construction to Permanent	X	URLA	X	X	X		X*		X	X	X		X*	X*	X*	X*	if Escrow	X	X

Current Compliance Alliance Staff Experience

- One Attorney with 18 Years Banking Experience
- One Attorney with 9 Years Banking Experience
- One Compliance Specialist with 13 years at OCC and 14 years of Compliance and Auditing Experience
- One Compliance Specialist with 25 years of Bank Compliance Experience

Compliance Alliance


We listened to you...
and designed
a bank compliance company
for bankers by bankers.
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Compliance Alliance Pricing

Three Year Contract – signed by 08/15/11	Three Year Contract – signed after 08/15/11	One Year Contract
$12,000/ yr.	**$15,000/ yr.**	**$18,000/ yr.**

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Join Compliance Alliance

- **Due to the vast interest and demand for service, Compliance Alliance will start servicing banks based on the order of sign-up.**

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  complianceallliance@texasbankers.com

Compliance Alliance

CFPB Issues Rule To Protect Consumers From Irresponsible Mortgage Lending

01/10/13

CFPB Issues Rule to Protect Consumers from Irresponsible Mortgage Lending

Today the Consumer Financial Protection Bureau (CFPB) adopted a new rule that will protect consumers from irresponsible mortgage lending by requiring lenders to ensure prospective buyers have the ability to repay their mortgage. The rule also protects borrowers from risky lending practices such as "no doc" and "interest only" features that contributed to many homeowners ending up in delinquency and foreclosure after the 2008 housing collapse.

"When consumers sit down at the closing table, they shouldn't be set up to fail with mortgages they can't afford," said CFPB Director Richard Cordray. "Our Ability-to-Repay rule protects borrowers from the kinds of risky lending practices that resulted in so many families losing their homes. This common-sense rule ensures responsible borrowers get responsible loans."

Leading up to the mortgage crisis, certain lenders originated mortgages to consumers without considering their ability to repay the loans. The gradual deterioration in underwriting standards led to dramatic increases in mortgage delinquencies and rates of foreclosures. What followed was the collapse of the housing market in 2008 and the subsequent financial crisis. The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act created broad-based changes to how creditors make loans and included new ability-to-repay requirements, which the CFPB is charged with implementing. Read more.

Read Other news

CFPB Launches Inquiry On Campus Financial Products

01/31/13

CFPB Launches Inquiry on Campus Financial Products

The Consumer Financial Protection Bureau (CFPB) announced that it is launching an inquiry into the impact of financial products marketed to students through colleges and universities. The CFPB intends to use the information gathered to determine whether these arrangements are in the best interest of students.

"We have seen many colleges establish relationships with financial institutions to offer banking services to their students," said CFPB Director Richard Cordray. "The Bureau wants to find out whether students using college-endorsed banking products are getting a good deal."

The Credit CARD Act of 2009 (CARD Act) restricted financial institutions from using certain types of marketing practices on college campuses. The CARD Act also made agreements between credit card issuers and institutions of higher education subject to public disclosure. However, less is known about arrangements regarding other products marketed to students. To better understand the market, the CFPB is publishing today a Notice and Request for Information on the topic of campus financial products. Campus financial products include student identification cards that double as debit cards, cards used to access scholarships and student loans, and school-affiliated bank accounts. Read more.

Read Other news

Compliance Alliance

April 10, 2012

Email to a friend

REMEMBER CONSUMER COMPLAINTS WHEN REVIEWING YOUR OVERDRAFT PROGRAM

In the wake of the comment period ending for overdrafts, we wanted to address an important component to remember when reviewing your overdraft program, whether it is automated or ad hoc.

If you have been out in the trenches you know that customers seem to have shorter fuses these days. Aggravation and stress levels seem higher than normal. Right in the middle of the aggravation, the regulatory agencies are going to make sure the stakes for keeping our customers happy have never been higher, especially now that the new Consumer Financial Protection Bureau has "gone live."

One of the first icons that any visitor to the Consumer Financial Protection Bureau's home page sees is a reddish box labeled "Submit a credit card complaint." That is just the first complaint reporting function the Bureau plans.

"The Dodd-Frank Act directs the CFPB to facilitate the collection and monitoring of and response to consumer complaints regarding certain financial products and services. These complaints and consumers' inquiries will help the CFPB identify areas of concern and will help the CFPB in its supervision and other responsibilities."

How the Bureau will handle complaints remains to be seen. But bank regulators have already stepped up their own attention to consumer complaints, both those filed with the agencies and those made to banks directly. New channels for complaints, ranging from tweets on Twitter and demonstrative videos on YouTube to angry blogs and more, underscore that consumer dissatisfaction with their financial services providers have entered a new age.

The message to remember is ... Don't wait for Washington to come to you. Before you get a visit from the regulators or the Department of Justice, your bank should have a process in place to address consumer complaints. The complaints that are coming in should be being used as an early warning system to protect customers and the bank from an unintentional problem. It is important to note that anything the customers are telling the banks, good or bad, can be used to "control our destiny." Don't wait for the Consumer Financial Protection Bureau or other regulatory agencies to notify the bank that they have received numerous complaints about your overdraft checking program.

Complaints represent an opportunity to spot weaknesses, places where the bank needs to improve processes, procedures, or, where those are correct, communication with consumers so they understand what is going on. Regulators' exam procedures now stress not only that examiners review a bank's complaints management process, but weigh how well the bank is dealing with what its systems

track.

The Federal Reserve exam manual procedure states: "Determine whether the bank reviews consumer complaints to identify potential compliance problems and negative trends that have the potential to be unfair or deceptive. Determine whether the bank reviews concentrations of complaints about the same product or about bank conduct in order to identify potential areas of concern."

It is not unusual for consumers, when first sending a letter of complaint, for instance, to ramp things up immediately. They not only write to the bank, but carbon copy all banking regulators.

A strong complaint management system will give a bank an overview of six critical factors:

1. Overall volume of complaints.

2. Number of open complaints at a given time, versus resolved complaints.

3. Number of complaints open for a given length of time.

4. Number of complaints where the issue involved has resulted in regulatory violations.

5. Concentrations of complaints tied to a specified area of the bank.

6. The number of complaints arising from a specific source among the bank's operations.

In some areas of banking compliance and regulation, a "dispute" and a "complaint" are not the same thing (for example: electronic funds transfer transactions). Don't confuse disputes with complaints, but don't let a dispute go unresolved and turn into a complaint.

Complaints have always been a serious matter, but they have grown more critical to a bank's compliance record because banking regulators are playing hard ball these days.

When regulators see multiple complaints that all fall into the same area, they may regard this as a pattern or practice of behavior by the bank.

Complaints can wind up as exam issues and be written into the formal report as a "matter requiring attention," and it has been reported that examiners may follow up independently of formal visits to determine how the bank is following up on complaints.

It is important to note that patterns that indicate systemic issues may result in regulatory referrals to the Department of Justice, and even morph into "UDAAP" under the Dodd-Frank Act. (UDAP stood for "Unfair or Deceptive Acts and Practices," while UDAAP underscores the expansion of the standard to "Unfair Deceptive and Abusive Acts and Practices.")

That being said, the banks should not assume they have done something wrong just because a complaint has been received, but if the bank was in the wrong, self-identification will weigh in the bank's favor when regulators examine the bank's complaint record and its impact on overall compliance issues.

The goals of a complaint handling system range from tracking them so they are dealt with to providing an appropriate overview to various levels of bank leadership.

One of the regulators' key interests when reviewing complaint handling systems is whether senior management and the board are given "meaningful data" on customer complaints. Only reporting numbers is not enough. We recommend that complaint reports include the following elements:

- Summaries of significant items,
- Status of complaints,
- Age of pending complaints awaiting resolution,
- Lines of business and bank regions impacted by complaints,
- Regulations impacted by complaints,
- Trends in complaints, and
- Opportunities for improvement.

Once this information is received and reported, the bank can use this information to improve the affected product or line of business.

Compliance Alliance, Inc.
Phone: 888-353-3933 | Feedback

Compliance Alliance

May 30, 2012

Email to a friend

THE CFPB TAKES AIM AT CURTAILING RULES FOR MORTGAGES

I am sure you have heard the news regarding one of the CFPB's latest proposals, specifically regarding flat fee compensation instead of origination fees being tied to a loan amount. On May 8, 2012, the Consumer Financial Protection Bureau (CFPB) said it plans to propose tighter mortgage lending regulations that would limit the ability of banks to charge specified transaction fees to consumers when they buy a house.

If you recall, on March 9, 2012, the CFPB announced that they will propose residential mortgage loan origination (MLO) rules this summer with a goal of adopting the final rules by January 2013. According to the CFPB, these rules will make it easier for consumers to understand mortgage costs and compare loans in order to get the best deal.

Director Richard Cordray stated that "Mortgages today often come with so many different types of fees and points that it can be hard to compare offers. We want to bring greater transparency to the market so consumers can clearly see their options and choose the loan that is right for them."

The CFPB is considering proposals that would:

- Require an interest-rate reduction when consumers elect to pay discount points;
- Require lenders to offer consumers a no-discount-point loan option;
- Ban origination charges that vary with the size of the loan;
- Implement federal standards for qualification of loan originators; and
- Reconfirm the prohibition on paying steering incentives to mortgage loan originators.

The CFPB also has plans to convene a Small Business Review Panel that will meet with a group of representatives of the small financial services providers that would be directly affected by the proposals under consideration.

In my opinion, the most concerning proposals issued by the CFPB are the complete ban on dual compensation of loan origination, the potential flat charge per loan originated, regardless of size, and the limitations on upfront payments of discount points, origination points, or fees. While the CFPB may create some exemptions related to the points and fees provision if it finds that doing so would be "in the interest of consumers and in the public interest," the Bureau believes generally that points and fees present the possibility of consumer confusion. Thus, by providing

no exemptions, lenders would be forced to offer no-point, no-fee loans and to recover their administrative costs through the rate over time, rather than through upfront payments.

The CFPB's lack of forethought as to the overall effect these types of bans will have on the consumers ability to actually availability of consumer credit and the mortgage industry as a whole is disturbing.

Similarly, with regard to the licensing requirements, the CFPB's suggestion of one size fits all, namely, that licensing requirements will be the same for all originators (e.g., banks, thrifts, mortgage brokers, nonprofit organizations), will likely increase problems in implementation and effectiveness. These types of ultimatums, invariably, will cause small businesses to struggle, given the increased regulatory burdens and limitations. Further, the availability of consumer credit to borrowers seeking smaller mortgages may decrease if banks are not able to seek some sort of guaranteed compensation for the risk they incur to offer credit to many of their customers.

These proposals will be reviewed by the public and a small-business panel to be convened by the consumer bureau. This panel is a requirement of Dodd-Frank, as a way of trying to limit the effect of new regulations on small businesses.

After taking comments, the bureau will formally propose the rules this summer and, after another round of comments, hopes to make them permanent by January.

Please take the time to write a comment letter addressing these concerns.

Compliance Alliance, Inc.
Phone: 888-353-3933 | Feedback

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING, *et al.*,

Plaintiffs,

v.

TIMOTHY GEITHNER, in his official capacity as United States Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council, *et al.*,

Defendants.

Case No. 1:12-cv-01032 (ESH)

DECLARATION OF SAM KAZMAN

1. I am General Counsel for the Competitive Enterprise Institute (CEI), a plaintiff in this action. I am familiar with CEI's business operations. I have examined CEI's bank statements and have discussed them with its bank account representative.

2. CEI has two "Business Cash Manager Accounts" with Wells Fargo. Both of these accounts include an "Analyzed Business Checking Account."

3. As set forth in a Wells Fargo notice, "Analyzed Business Checking Accounts" have been subject to increased fees for a number of items beginning in August, 2012. Wells Fargo, *Connecticut Maryland North Carolina Virginia Washington D.C. Business Account Addenda*, at 4-5 (new fees) (https://www.wellsfargo.com/downloads/pdf/biz/accounts/ADD/EN/ADD-DC-EN.pdf). *Compare* Wells Fargo, *Connecticut Maryland North Carolina Virginia Washington, D.C. Business Account Fee and Information Schedule Effective May 14, 2012*, at 18-19

(showing prior lower fees) (https://www.wellsfargo.com/downloads/pdf/biz/accounts/FEE/EN/FII-DC-EN.pdf).[1]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 13, 2013 in Washington, D.C.

Sam Kazman
General Counsel
Competitive Enterprise Institute
1899 L St. NW
12th Floor
Washington DC 20036
202-331-2265

[1] *See Nebraska v. E.P.A.*, 331 F.3d 995, 998 n.3 (D.C. Cir. 2003) (court may take judicial notice of web pages).

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING, *et al.*,

Plaintiffs,

v.

TIMOTHY GEITHNER, in his official capacity as United States Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council, *et al.*,

Defendants.

Case No. 1:12-cv-01032 (ESH)

DECLARATION OF LAURA CLAUSER

1. I am Laura Clauser, Director of Operations for the 60 Plus Association, Inc., a plaintiff in this action. I am familiar with the Association's business operations, including its bank accounts.

2. The 60 Plus Association maintains checking and money market accounts with PNC.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 12, 2013 in Alexandria, VA.

Laura Clauser

Laura Clauser, Director of Operations
60 Plus Association, Inc.
515 King Street, Suite 315
Alexandria, VA 22314

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE NATIONAL BANK OF BIG SPRING *et al.*,	)	
Plaintiffs,	)	
v.	)	
	)	Case No. 1:12-cv-01032 (ESH)
NEIL S. WOLIN, in his official capacity as Acting United States Secretary of the Treasury and *ex officio* Chairman of the Financial Stability Oversight Council 1500 Pennsylvania Avenue, NW Washington, DC 20220, *et al.*,	)	Judge: Hon. Ellen S. Huvelle
Defendants.	)	

DECLARATION OF GREGORY JACOB IN SUPPORT OF PRIVATE PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

Under 28 U.S.C. § 1746, I, Gregory Jacob, state:

1. I am a partner with the law firm of O'Melveny & Myers LLP. I represent Plaintiffs State National Bank, the Competitive Enterprise Institute, and the 60 Plus Association ("Plaintiffs") in the above-entitled action, and I am admitted to practice in the United States District Court for the District of Columbia.

2. I submit this declaration in support of Private Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint ("Motion") in the above-entitled action. I have personal knowledge of the matters set forth in this declaration, and if called to testify to the facts stated herein, I could and would do so

competently.

3. Attached hereto as Exhibit 1 is a true and correct copy of a January 1, 2013, letter from Senators Sherrod Brown and David Vitter to Gene L. Dodaro, Comptroller General of the United States, which is offered in support of the Motion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of February 2013, at Minneapolis, Minnesota

s/Gregory Jacob
Gregory Jacob

Exhibit 1

United States Senate
WASHINGTON, DC 20510

January 1, 2013

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Comptroller General Dodaro:

There is broad bipartisan support for the position that we must end "too big to fail" (TBTF) government policies, whereby the U.S. government provides financial support to large financial institutions to protect them from failures of their own making. The largest Wall Street megabanks enjoy protection from a "safety net" – a variety of explicit and implicit guarantees that their profits will be enjoyed by private parties and the costs will be paid by taxpayers.[1] Wall Street megabanks, their shareholders, and their bondholders expect the U.S. government to step in during a crisis and provide capital to keep them in business. The implicit – and in some cases explicit – taxpayer-funded safety net provides subsidies to these large financial institutions.

Though Congress has enacted financial sector reforms that its supporters, both in Congress and the Administration, intended to mitigate the TBTF problem, we are concerned that these measures may not be sufficient to eliminate government support for the largest bank holding companies. Federal Reserve Board Governor Daniel Tarullo recently lamented, "to the extent that a growing systemic footprint increases perceptions of at least some residual too-big-to-fail quality in such a firm, notwithstanding the panoply of measures in Dodd-Frank and our regulations, there may be funding advantages for the firm, which reinforces the impulse to grow."[2]

We therefore request that GAO conduct a study of the economic benefits that bank holding companies (BHCs) with more than $500 billion in consolidated assets receive as a result of actual or perceived government support. Specifically, we ask that you study:

1. *The favorable pricing of the debt of these bank holding companies, relative to their risk profile resulting from the perception that such institutions will receive Government support in the event of any financial stress;*

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[1] *See, e.g.*, Remarks By Paul A. Volcker Before The Statutory Congress Of The European People's Parties, Bonn, Germany, Dec. 9, 2009 ("One consistent response has been to protect and support national commercial banking systems with a combination of regulation and a so-called 'safety net', including deposit insurance and a central bank able and willing to serve as a 'lender of last resort'. The central idea is to provide liquidity to troubled but solvent institutions while protecting individual depositors.").

[2] *See* Remarks by Daniel K. Tarullo, At the Distinguished Jurist Lecture, University of Pennsylvania Law School, Philadelphia, Pennsylvania, October 10, 2012.

In short, the largest banks are able to borrow more cheaply than they otherwise would, based upon their risk profiles.[3] According to the Federal Reserve Bank of Dallas, "TBTF banks' sheer size and their presumed guarantee of government help in time of crisis have provided a significant edge—perhaps a percentage point or more—in the cost of raising funds."[4]

The IMF estimates that banks larger than $100 billion have about a 50 basis points (bps) funding advantage over banks in the $10-100 billion range.[5] The *Wall Street Journal* editorial board noted that, in 2010, "[t]he funding advantage enjoyed by banks with more than $100 billion in assets over those in the $10-$100 billion range rose from 71 basis points in the first quarter to 78 basis points in the third quarter ... The advantage increased to 81 in the fourth quarter."[6]

There have already been significant studies of the effects that explicit and implicit government guarantees have on institutions' ability to borrow in the capital markets. Several academic studies have sought to calculate the precise borrowing advantages enjoyed by the largest banks, ranging from 10 to 88 bps and providing billions of dollars in economic benefits.[7]

2. *Any favorable funding or economic treatment resulting from an increase in the credit rating for these BHCs, as a result of express, implied, or perceived Government support;*

Credit rating agencies have stated that they will consider the likelihood of government support when determining an institution's credit rating.[8] Government support provides five of the six

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[3] *See* Anat R. Admati, Peter M. DeMarzo, Martin F. Hellwig & Paul Pfleiderer, *Fallacies, Irrelevant Facts, and Myths in the Discussion of Capital Regulation: Why Bank Equity is Not Expensive*, Stanford University Working Paper No. 86 (Mar. 2011) at 22.

[4] Rosenblum, *supra*, at 17.

[5] *See* İnci Ötker-Robe, Aditya Narain, Anna Ilyina, & Jay Surti, *The Too-Important-to-Fail Conundrum: Impossible to Ignore and Difficult to Resolve*, IMF SDN/11/12, May 27, 2011 at 6, Figure 1.

[6] Review & Outlook, *Still Too Big, Still Can't Fail*, WALL ST. J. (Mar. 5, 2011).

[7] *See* Andrew G. Haldane, Executive Director, Financial Stability, Bank of England, "The $100 Billion Question", Comments at the Institute of Regulation & Risk, Hong Kong, Mar. 30, 2010 at 5; *see also* International Monetary Fund, *A Fair And Substantial Contribution By The Financial Sector: Final Report For The G-20*, June 2010, at 55-56 (estimating that government support provides "too big to fail" institutions with a funding benefit between 10 and 50 bps, with an average of about 20 bps); *see also* Santiago Carbo-Valverde, Edward J. Kane & Francisco Rodriguez-Fernandez, *Safety-Net Benefits Conferred On Difficult-To-Fail-And-Unwind Banks In The US And EU Before And During The Great Recession*, Paolo Baffi Centre Research Paper Series No. 2011-95, at 9-10 (finding that "too big to fail" banks receive a safety net subsidy between 10 and 22 bps per dollar of assets, and also show more leverage); *see also* A. Joseph Warburton & Deniz Anginer, "The End of Market Discipline? Investor Expectations of Implicit State Guarantees" 4 (Nov. 18, 2011) (finding that large banks had an annual funding cost advantage of approximately 16 bps before the financial crisis, increasing to 88 bps during the crisis, and peaking at more than 100 bps in 2008. The authors estimate the total value of the implicit government subsidy at about $4 billion per year before the financial crisis, $60 billion during the crisis, and a high of $84 billion in 2008) *available at* http://ssrn.com/abstract=1961656; *see also* Dean Baker & Travis MacArthur, *The Value of the "Too Big to Fail" Big Bank Subsidy*, Center for Economic and Policy Research (2009) (estimating that, at the time of the financial crisis, banks with assets in excess of $100 billion had an average borrowing advantage of 78 bps, implying a subsidy of $34.1 billion a year).

[8] *See* Standard & Poor's, *The U.S. Government Says Support For Banks Will Be Different "Next Time"—But Will It?*, 9-10 (July, 2011)("Ultimately, in our views of new legislation and regulation, we need to consider the long track-record of extraordinary support that may be essential for a handful of institutions despite government reluctance to offer such support.").

largest banks with a boost in their credit ratings of one to three notches.[9] Though this perceived support is lower than it had been before the financial crisis, it clearly still exists.[10]

Some estimate that implicit governmental guarantees provide a subsidy of 3.10 percent per year to the cost of equity capital for the largest banks, and impose a 3.25 percent tax on the smallest banks, amounting to an annual subsidy of $4.71 billion per bank.[11] By doubling the size of its market capitalization, a bank receives a subsidy of 68 bps.[12]

The credit rating bump resulting from government support may not just allow TBTF megabanks to borrow at lower rates. This boost may also results in more favorable terms for their financial contracts, including posting less margin behind their derivatives contracts.

3. *Any economic benefit to these BHCs resulting from the ownership of, or affiliation with, an insured depository institution;*

Support, such as FDIC deposit insurance, provides insured depository institution affiliates of bank holding companies with government support, both real and perceived. Markets believe that, despite existing deposit insurance caps, all deposits of the largest backs are ultimately protected.[13]

Government support also provides insured depository institutions with higher credit ratings that can encourage institutions to shift activities into these subsidiaries. For example, Bank of America moved $15 trillion in derivatives contracts from its broker-dealer, Merrill Lynch, to its insured depository institution affiliate in response to a credit downgrade. The result is that taxpayers would subsidize, and ultimately backstop, potentially risky investments. This move reportedly saved the bank $3.3 billion in additional collateral payments.[14]

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[9] *See* Susanne Craig & Peter Eavis, *Three Major Banks Prepare for Possible Credit Downgrades*, N.Y. TIMES DEALBOOK, Mar. 29, 2012, *available at* http://dealbook.nytimes.com/2012/03/29/three-major-banks-prepare-for-possible-credit-downgrades.

[10] *See* Esther L. George, President and Chief Executive Officer, Federal Reserve Bank of Kansas City, "Looking Ahead: Financial Stability and Microprudential Supervision" 6, Levy Economics Institute of Bard College, 21st Annual Hyman P. Minsky Conference, New York, N.Y., Apr. 11, 2012 ("These ratings advantages continue to exist after the crisis—albeit at a notch or two less now, and investors have reason to believe that similar advantages may yet exist.").

[11] *See* Priyank Gandhi & Hanno Lustig, *Size Anomalies in U.S. Bank Stock Returns: A Fiscal Explanation*, NBER Working Paper 16553 (2010) at 5.

[12] *See id.*, at 26 ("[A] 100% increase in the size of market cap relative to GDP … increases the subsidy by 68 bps per annum.").

[13] *See* Nathaniel Popper & Jessica Silver-Greenberg, *Big Depositors Seek a New Safety Net*, N.Y. TIMES, Dec. 31, 2012 at BU1 ("For the nation's largest banks, there is a widely shared assumption that the government would be forced to provide a backstop to protect depositors in a crisis, as it did in 2008. 'Implicitly or explicitly, most of this money is going to still be guaranteed,' said Bruce Hinkle, an executive with Farin & Associates, a consulting firm that works with banks."); *see also id.* ("The vast majority of the holdings in these accounts are above the $250,000 limit and are held in the nation's largest banks. That money is expected to stay put no matter what, in part because corporations and municipalities widely believe that the government will step in if those large banks encounter trouble, effectively considering them too big to fail.").

[14] *See* Bob Ivry, Hugh Son & Christine Harper, *BofA Said to Split Regulators Over Moving Merrill Derivatives to Bank Unit*, BLOOMBERG, Oct. 18, 2011 *available at:* http://www.bloomberg.com/news/2011-10-18/bofa-said-to-split-regulators-over-moving-merrill-derivatives-to-bank-unit.html. Moody reportedly considered cutting Bank of

When the Federal Reserve granted a 23A exemption to Goldman Sachs Bank in 2009, Goldman moved its multi-purpose derivatives dealer into its insured bank affiliate. Likewise, Morgan Stanley converted to a bank holding company, and received a 23A exemption for its derivatives business. And JPMorgan Chase Bank, N.A., currently holds 99 percent of the notional derivatives of JPMorgan Chase & Co.[15]

Morgan Stanley is reportedly considering similar measures in response to a threatened downgrade by Moody's.[16] Such a downgrade could require Morgan Stanley to post as much as $6.5 billion over the course of a year.[17]

4. *Any economic benefit resulting from the status of these BHCs as a bank holding company, including access to the discount window of the Board of Governors of the Federal Reserve System; and*

The sweep of the government safety net was expanded during the financial crisis of 2008, when Goldman Sachs and Morgan Stanley converted to bank holding companies, in large part to participate in Federal Reserve programs, including the Federal Reserve's discount window.[18] This development was, "widely interpreted as a clear signal that the federal government would not let either of them fail."[19]

The Federal Reserve also made a series of decisions to exempt insured banks from Section 23A of the Federal Reserve Act, and extend the safety net of bank holding companies to repurchase agreements, or "repos," and derivative dealing activities.[20] Professor Saule Omarova has argued that, "the Board dismantled the entire section 23A regime in order to make an emergency transfusion of the federal subsidy into the shadow banking system."[21]

5. *Any economic benefit to these BHCs received through extraordinary Government actions taken during the financial crisis, including actions taken to prop up the government-sponsored enterprises and the insurer American Insurance Group (AIG).*

The benefits of the safety net were on display during the financial crisis, with the largest megabanks receiving a disproportionate amount of assistance. One IMF report found that an institution's size plays a key role in authorities' decisions about whether the bank receives a bailout in the event of distress.[22] It should therefore come as no surprise that 190 financial firms

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America's rating further, potentially requiring up to $4.5 billion in additional cash and collateral. *See* Craig & Eavis, *supra.*

[15] *See* Office of the Comptroller of the Currency, OCC's Quarterly Report on Bank Trading and Derivatives Activities Second Quarter 2011, at Table 1, Table 2.

[16] *See* Tracy Alloway, *Morgan Stanley Tries to Stave off Ratings Cut*, FINANCIAL TIMES, Apr. 5, 2012, *available at* http://www.ft.com/intl/cms/s/0/99979138-7e67-11e1-b20a-00144feab49a.html#axzz1rAjV9Gao.

[17] *See* Craig & Eavis, *supra.*

[18] *See* Saule T. Omarova, *From Gramm-Leach-Bliley To Dodd-Frank: The Unfulfilled Promise of Section 23A of the Federal Reserve Act*, 89 N.C. L. REV. 1683, 1745-46 (2011).

[19] *Id.*, at 1746.

[20] *See id.*, at 1735-41; *see also id.*, at 1745-50.

[21] *Id.*, at 1690.

[22] *See* Ötker-Robe, Narain, Ilyina, & Surti, *supra*, at 8.

borrowed $1.2 trillion from the Federal Reserve from 2007 to 2009,[23] with the six biggest U.S. banks borrowing as much as $460 billion and accounting for 63 percent of the average daily debt to the Fed.[24] The same six firms also received $160 billion in Troubled Asset Relief Program (TARP) funds.[25] According to the Congressional Oversight Panel for TARP (COP), the six largest banks received a total of $1.27 trillion in government support.[26]

Commentators have noted that a loan to an underwater bank is a long-shot investment whose substantial downside easily justifies a 15% to 20% return, comparable to the rates charged on risky sovereign bonds.[27] But the Fed's emergency lending was not nearly so stringent – for example, the Federal Reserve's Term Auction Facility maxed out at an interest rate of 4.67 percent.[28] The result is that failing banks can borrow money far more cheaply than the market would bear. Comparing net interest margins for these loans and the loans made by banks, *Bloomberg* estimates that the six largest banks made $4.8 billion in profit from these loans–equal to 23 percent of their combined net income during those two years.[29]

Some suggest that other central bank policies provide significant subsidies to struggling banks well after the financial crisis.[30] For example, a recent paper by the Federal Reserve Bank of New York found that, despite extraordinary purchases of mortgage-backed securities, there is currently a 115 bps spread between primary and secondary mortgage rates.[31] The paper estimates that mortgage loan rates are 70 bps higher than they should be based upon secondary market prices, and conclude that this results in profits for mortgage lenders.[32]

TARP also provided megabanks with significant benefits. The COP concluded that "Treasury paid substantially more for the assets it purchased under the TARP than their then-current market value."[33] This provided the six biggest megabanks with a subsidy of $25 billion.[34]

The largest banks also benefit from the bailouts of Fannie Mae and Freddie Mac, which will cost taxpayers the most of any action taken during the financial crisis. The two companies have received nearly $187 billion in taxpayer assistance and their conservator projects that the two

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[23] *See* Bob Ivry, Bradley Keoun & Phil Kuntz, *Secret Fed Loans Gave Banks Undisclosed $13B*, BLOOMBERG, Nov. 27, 2011 available at http://www.bloomberg.com/news/2011-11-28/secret-fed-loans-undisclosed-to-congress-gave-banks-13-billion-in-income.html.
[24] *See id.*
[25] *See id.*
[26] *See* Congressional Oversight Panel, *March Oversight Report: The Final Report of the Congressional Oversight Panel* 36 (Mar. 2011).
[27] *See* Kane, *supra*, at 6.
[28] *See* Board of Governors of the Federal Reserve, Term Auction Facility Data, available at http://www.federalreserve.gov/newsevents/files/taf.xls.
[29] *See* Ivry, Keoun & Kuntz *supra.*
[30] *See* Yalman Onaran, ZOMBIE BANKS: HOW BROKEN BANKS AND DEBTOR NATIONS ARE CRIPPLING THE GLOBAL ECONOMY 67 (Bloomberg Press, 2012).
[31] *See* Andreas Fuster & David Lucca, "Why Isn't the Thirty-Year Fixed-Rate Mortgage at 2.6 Percent?", Liberty Street Economics, Dec. 31, 2012 available at http://libertystreeteconomics.newyorkfed.org/2012/12/why-isnt-the-thirty-year-fixed-rate-mortgage-at-26-percent-.html.
[32] *See id.*
[33] *See* Congressional Oversight Panel, *supra*, at 39.
[34] *See id.*

companies will require $191 billion to $209 billion by the end of 2015.[35] The two companies' market share for the first half of 2012 spiked to 77 percent meaning that that, when combined with Ginnie Mae who securitizes government-backed loans, the taxpayer is guaranteeing 100 percent of the mortgages originated.[36]

These are just some examples of the issues that we hope that you will examine in your study. Thank you for your prompt attention to this request, and we look forward to working with you as you move forward on this important study. Please contact Graham Steele on Senator Brown's staff at (202) 224-3215 or Travis Johnson on Senator Vitter's staff at (202) 224-4623 if you have any questions.

Sincerely,

Sherrod Brown

Sherrod Brown
Chairman
Financial Institutions and
Consumer Protection Subcommittee
Committee on Banking, Housing,
and Urban Affairs

David Vitter

David Vitter
Ranking Member
Economic Policy Subcommittee
Committee on Banking, Housing,
and Urban Affairs

[35] *See* Federal Housing Finance Agency, Projections of the Enterprises' Financial Performance, Oct. 2012.
[36] *See* Federal Housing Finance Agency, Conservator's Report on Enterprises' Financial Performance, Second Quarter 2012.

CERTIFICATE OF SERVICE

I, Gregory Jacob, hereby certify that on February 27, 2013, I electronically filed the foregoing Private Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(1) through the CM/ECF system, which will send a notice of electronic filing to counsel for the defendants in this matter, as well as counsel for the State of Oklahoma and the State of South Carolina.

I further certify that on February 27, 2013, I caused one hard-copy of the foregoing to be mailed by first-class U.S. Mail to each of the below-listed counsel, who are not registered with the Court's electronic filing system.

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