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# JANUARY 2023 RECAP

## *Developments to know in Banking, Fintech & Crypto*

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**In traditional banking:** (1) A final rule implementing the LIBOR Act became effective; (2) the CFPB noted that there has been an increase in identity theft by military consumers; and (3) the DOJ entered into its largest redlining settlement.


### Final rule implementing LIBOR Act becomes effective

On December 16, 2022, a final rule implementing the LIBOR Act was published by the Federal Reserve. That rule became effective 30 days after publication in the Federal Register. The purpose of the final rule addressing "legacy contracts" was to avert issues relating to potential breaches of trillions of dollars in contracts for which there is no substitute for terms based on LIBOR. The legacy contracts reference LIBOR, mature after the final LIBOR settings cease at the end of June 2023 and lack LIBOR replacement provisions.

Among other things, the final rule:

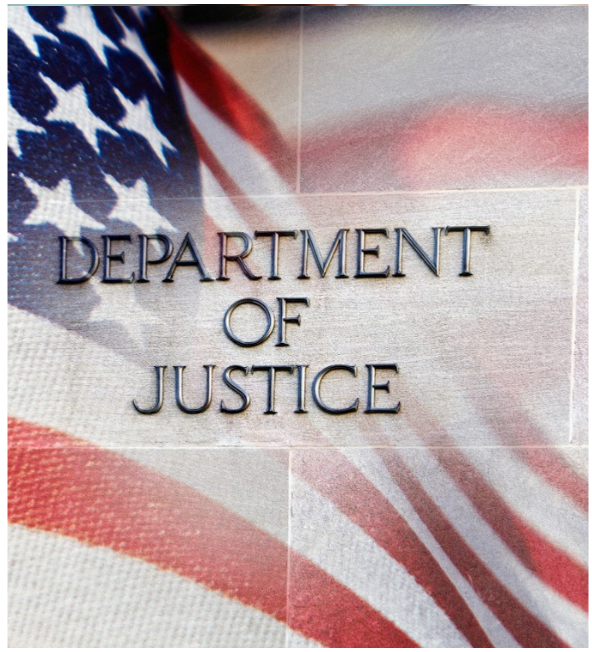
- Identifies benchmarks based on SOFR to replace LIBOR settings in legacy contracts;
- Specifies benchmark conforming changes related to the calculation, administration and other implementing actions of SOFR benchmarks to replace LIBOR; and
- Preempts state and local laws or standards relating to the LIBOR benchmark replacement in legacy contracts.

Lenders should review their legacy contracts and determine the loans to which the final rule may apply.

### Servicemember reports about identity theft are increasing

The CFPB released a report that identified an increase in identity theft reported by military consumers (defined as active duty servicemembers, veterans, and military family members). The report emphasized that the onus is on financial institutions and creditors as the first line of defense. Financial institutions and some creditors are required to have procedures in place to identify suspicious activities or red flags that may suggest a wider problem of fraud or identity theft. These procedures must be able to identify possible signs of identity theft in day-to-day operations, have a process to detect red flags of identity theft when they occur, include a course of action for use when red flags are detected and provide a plan to stay current on new threats. Financial services providers should review policies and procedures to confirm that they comport with CFPB guidance.

## Department of Justice reaches largest ever redlining settlement with California bank




Redlining is a discriminatory practice that puts financial services out of reach for residents of certain areas based on race or ethnicity.

As part of its "Combating Redlining Initiative," the DOJ reached a settlement with a California bank in which the bank agreed to pay more than $31 million to resolve allegations that it engaged in a pattern or practice of redlining in violation of the Fair Housing Act and the Equal Credit Opportunity Act. The DOJ alleged that from 2017 to 2020, the bank “avoided” providing mortgage lending services to majority-Black and Hispanic neighborhoods in Los Angeles County.

Of note, the Complaint alleged:

- The bank only maintained three of its 37 branches in majority-Black and Hispanic neighborhoods;
- It opened only one branch in a majority-Black and Hispanic neighborhood in the past 20 years despite having opened or acquired 11 branches in other neighborhoods during the same period and did not assign any employee to generate mortgage loan applications at that one branch contrary to the practice at branches in majority-white areas; and
- The bank made only 7% of its residential mortgage loans to residents of majority-Black and Hispanic neighborhoods as compared to its peers’ 44% average.

Given the "Combating Redlining Initiative," mortgage lenders should review their Home Mortgage Disclosure Act data and compare it to that of their peers and examine the type of data cited in the DOJ’s complaint to avoid regulatory issues.

**In Fintech & Crypto:** (1) A proposed rule may require fintech companies to register with the CFPB; (2) The Federal Reserve, FDIC and OCC issue a joint statement regarding the risk associated with crypto-assets; and (3) The SEC continues regulation of cryptocurrency through enforcement actions.

## Proposed rule may require Fintech companies register with CFPB

The CFPB proposed a rule to establish a public registry of supervised nonbanks' terms and conditions in form contracts that purport to waive or limit consumer rights and protections.

Under the proposed rule, nonbanks subject to the CFPB's supervisory jurisdiction would need to submit information on terms and conditions in form contracts that seek to waive or limit individuals' rights and other legal protections.

The rule would require registration of form contracts that:

- Waive the claims a consumer could bring in a lawsuit;
- Limit the company's liability to a consumer;
- Limit a consumer's ability to bring a legal action by limiting the time frame or venue of an action;
- Limit the consumer's ability to participate in a class action;
- Limit the ability of a consumer to complain or post a review of services
- Contain an arbitration agreement; and
- Waive consumer legal protections including defenses available under the statutes, regulations or common law.

If your non-bank financial institution uses form contracts with the above provisions, you may want to provide comments to this proposed rule and follow developments closely.

## The Federal Reserve, FDIC and OCC issue joint statement regarding crypto-asset risks to banking organizations

In a joint statement, the Federal Reserve, FDIC and OCC stated that "issuing or holding crypto-assets that are issued, stored, or transferred on an open, public, and/or decentralized network, or similar system is highly likely to be inconsistent with safe and sound banking practices" while acknowledging that "banking organizations are neither prohibited nor discouraged from providing banking services to customers of any specific class or type."

Without promulgating any new rules or regulations, these agencies identified a number of key risks associated with crypto-assets of which banking organizations should be aware including:

- Risk of fraud and scams among crypto-asset participants;
- Legal uncertainties related to custody practices, redemptions, and ownership rights;
- Inaccurate or misleading representations and disclosures by crypto-asset companies;
- Significant volatility in crypto-asset markets impacting deposit flows;
- The susceptibility of stablecoins for creating potential deposit outflows;
- Contagion risk within the crypto-asset sector due to interconnections that may present concentration risks; and
- Risk management and governance practices that lack maturity and robustness and therefore create heightened risk due to a lack of established roles, responsibilities and liabilities.

Participants in the crypto-asset market should note the areas of concern identified by the agencies as they are likely to provide insight into future regulatory developments.

## The SEC continues efforts to regulate cryptocurrency through securities laws

On January 12, the Securities and Exchange Commission charged Genesis Global Capital, LLC and Gemini Trust Company, LLC for the unregistered offer and sale of securities to retail investors alleging that they raised billions of dollars' worth of crypto assets from hundreds of thousands of investors. According to the complaint, in December 2020, Genesis entered into an agreement with Gemini to give retail investors an opportunity to loan their crypto assets to Genesis in exchange for Genesis' promise to pay interest. The SEC asserts that, under the *Reves* test, the lending of crypto-assets for a promise of the return of the assets plus interest constituted notes, i.e. securities. The offering of notes was made to the general public and thus should have been registered under the Securities Act. The SEC also argues that the program constituted the offer and sale of investment contracts under the *Howey* test because it involved the investment of money in a common enterprise with the expectation of profit from the efforts of promoters of the program. The position taken by the SEC is consistent with arguments made in other cases and signals continued efforts to regulate crypto-assets within the framework of existing securities laws.