Community Bankers Association of Kansas

Regulatory Dispatch

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ECOA's Safe Harbor. Or, What If the CFPB Is Wrong on Regulation B? - Womble Bond Dickinson

What Constitutes "Good Faith" and "Conformity"?
The principal uncertainty surrounding § 1691e(e) is what it means to act "in good faith" and "in conformity" with the CFPB's amended regulation. Most safe-harbor decisions arise in a very different context. The typical case involves an agency rule, interpretation, model form, or official commentary that affirmatively prescribes or authorizes particular conduct. Courts then compare the defendant's conduct against the requirements of that guidance and ask whether the defendant actually followed it.

ECOA cases applying the safe harbor generally fit that pattern. Courts have found protection where a creditor used adverse-action language that tracked or substantially mirrored model forms and official guidance issued under Regulation B. In those circumstances, the conformity inquiry is straightforward because the court can compare the creditor's conduct to specific language supplied by the agency. Conversely, courts considering analogous safe harbors under other federal consumer-finance statutes have emphasized that protection is unavailable where a regulated party departs from the governing guidance, stretches it beyond its terms, relies on guidance that does not actually address the conduct at issue, or merely forms its own mistaken view of what the law requires.

Federal courts applying safe-harbor provisions have reached much the same conclusion. Courts generally do not treat subjective belief alone as sufficient. Instead, they focus on whether the defendant can demonstrate actual reliance on qualifying agency guidance and actual conformity with that guidance. Safe harbors are commonly denied where regulated entities ignore conditions embedded in agency interpretations, apply those interpretations outside the circumstances to which they were directed, or rely on guidance they did not in fact follow. The recurring question is whether the challenged conduct can be paired with a specific regulatory requirement, authorization, or instruction, and whether the defendant acted consistently with that requirement in objective good faith.

The CFPB's 2026 revisions present a different situation. The amended rule does not establish procedures, prescribe disclosures, require monitoring, mandate underwriting practices, or otherwise direct creditors to take affirmative action with respect to disparate impact. It imposes no particular directive. Instead, the rule removes Regulation B's effects-test language and states that ECOA does not recognize disparate-impact liability. As a result, the usual conformity analysis seems out of place. There is no model form to follow, no required disclosure to provide, and no prescribed compliance step against which a creditor's conduct can be measured. A creditor invoking § 1691e(e) likely would argue that "conformity" consists simply of operating under a regulatory regime in which disparate-impact liability is not a governing legal standard.

Future potential plaintiffs likely would want to advance a narrower view. They may argue that § 1691e(e) requires something more than a favorable regulation sitting on the books. But because the CFPB's rule does not impose conditions that can be followed or violated, ECOA's safe harbor in this context may be broader than in prior, more traditional cases.

The practical takeaway is that ECOA provides a potentially substantial statutory defense to disparate-impact claims arising from conduct undertaken while the rule remains in effect. That defense, however, is limited to disparate-impact liability. The revisions to Regulation B did not affect ECOA's prohibition on intentional discrimination, disparate-treatment and proxy-discrimination theories. Additionally, the Fair Housing Act and state fair lending requirements remain in place. Accordingly, institutions should maintain risk-management, testing, monitoring, and governance practices appropriate to their fair-lending obligations.

Comment: The article highlights that the CFPB's 2026 Regulation B changes eliminated disparate-impact liability under ECOA, and even if courts later decide the CFPB was wrong, banks may have significant protection under ECOA's statutory safe harbor for actions taken in good-faith reliance on the rule while it was in effect. However, banks should continue strong fair lending monitoring and controls because ECOA's prohibitions on intentional discrimination, as well as Fair Housing Act remain fully applicable.

CBAK Insights (Ask Anything)

Q: We have questions regarding Regulation E. We have been asked by management if the bank has any rights to stop refunding and what those are, if any? They are asking about a pattern of irresponsible behavior specifically.

A: No, your bank cannot by contract – or any other means - limit its liability or shift liability to a consumer beyond the strict statutory framework set by Regulation E (12 CFR Part 1005). Under Section 914 of the Electronic Fund Transfer Act (EFTA, 15 U.S.C. 1693l), consumers cannot waive their rights, and banks cannot enforce account agreement terms that alter these protections to the consumer's *detriment*. Specifically:

Negligence: Banks cannot hold consumers liable for losses simply because they were negligent (e.g., writing a PIN on a card or falling for a phishing scam). Reg E liability caps strictly apply regardless of consumer care.

Contractual Provisions: Provisions in deposit agreements attempting to shorten the 60-day reporting window, require police reports before investigating, or cap bank dollar liability are legally void and have no impact on liability.

P2P Transactions: CFPB Guidance clarifies that fraudulently induced transfers (e.g., scammers convincing a consumer to send funds via P2P/online banking) still fall under Reg E error resolution standards if defined as unauthorized.

However, your bank can limit its actual exposure under Reg E by understanding and enforcing reporting requirements and holding consumers accountable up to the statutory maximums if they fail to report loss, theft, or errors within these required windows:

- Within 2 business days of learning of loss/theft: Consumer liability is capped at the lesser of $50 or actual unauthorized transfers.

- After 2 business days, but within 60 calendar days of statement transmittal: Liability caps at up to $500 (if the bank proves subsequent transfers would have been prevented by timely notice).

- After 60 calendar days of statement transmittal: Bank is not liable for subsequent unauthorized transfers occurring after the 60-day window, provided the bank establishes the transfers could have been prevented had notice been given.

Additionally, if your bank's investigation proves the transaction was ‘authorized’ by the consumer (or someone given actual, implied, or apparent authority) or the consumer benefitted from the transaction, Reg E error resolution protections do not apply.

Also, you can utilize card network rules (Visa/Mastercard zero-liability or chargeback mechanisms) to charge unauthorized transactions back to the merchant or acquirer.
Remember that Reg E applies exclusively to consumer accounts; business deposit accounts are not subject to Reg E liability limits or error resolution rules.

Finally, if the accountholder has proven to be irresponsible with a debit card, there is no specific right to a debit card tied to electronic payment networks. Banks are not required by law to give every person a checking account or a debit card.

Bank Management

	Joint Agencies Issue Final Rule to Prioritize Material Financial Risks (08/27/2026) – WASHINGTON—The Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation (the agencies) today issued a final rule that continues their effort to focus examiners’ and institutions’ attention on material financial risks and compliance with banking and banking-related laws and regulations. The final rule is consistent with the objectives of the agencies’ proposal (PDF) issued in October 2025, with certain modifications to clarify how the agencies will exercise their enforcement and supervisory authority. The final rule establishes a uniform definition for the term “unsafe or unsound practice” for the purposes of the agencies’ enforcement actions under 12 U.S.C. § 1818 and supervisory activities. The definition will promote greater clarity and certainty regarding certain enforcement and supervision standards and ensure that examiners prioritize concerns related to material financial risks over those regarding policies, process, documentation, and other nonfinancial risks. The final rule also establishes uniform standards for when and how the agencies may, as part of the examination process, issue Matters Requiring Attention (MRAs) and communicate supervisory observations and other violations of laws and regulations. In the final rule, the agencies clarify how the agencies will tailor their use of the unsafe or unsound practices definition and the MRA standard based on risk factors specific to an institution. The final rule also explicitly limits its scope to institutions the agencies supervise.

	Attachment(s) Federal Register Notice - Unsafe or Unsound Practices, Matters Requiring Attention Final Rule (PDF) ***Comment: The FDIC and OCC final rule is intended to focus examinations and enforcement on material financial risks and significant legal or regulatory issues, rather than less critical concerns involving policies, processes, documentation, or other nonfinancial matters. The rule also creates clearer, more consistent standards for what constitutes an "unsafe or unsound practice" and when regulators can issue Matters Requiring Attention (MRAs), providing greater transparency and predictability in the supervisory process.***
	FDIC Insured Institutions Reported Return on Assets of 1.37 Percent and Net Income of $90.1 Billion in Second Quarter 2026 (08/25/2026) – WASHINGTON— The Federal Deposit Insurance Corporation (FDIC) today released the results of its latest *Quarterly Banking Profile*, a comprehensive summary of financial results based on reports from 4,238 insured commercial banks and savings institutions. In second quarter 2026, FDIC-insured institutions reported a return on assets (ROA) ratio of 1.37 percent and aggregate net income of $90.1 billion, an increase of $9.7 billion (12.0 percent) from the prior quarter. The banking industry continued to maintain strong capital and liquidity levels, which support lending and protect against potential losses. Other key findings of the FDIC's *Quarterly Banking Profile* include: • Net income among community banks increased 8.2 percent from the prior quarter. • Industry net interest margin increased 1 basis point from the prior quarter to 3.32 percent. • Domestic deposits grew 0.8 percent, the eighth consecutive quarterly increase. • Loan growth was widespread, increasing 1.8 percent from the prior quarter and 6.8 percent from the prior year. • Asset quality metrics improved, as both the past-due and nonaccrual and net charge-off rates declined from the prior quarter. • The Deposit Insurance Fund reserve ratio increased 5 basis points to 1.48 percent. For more information, read the FDIC's statement with accompanying charts. Additional charts and data are available for download.

Deposit / Retail Operations

	FDIC Interim Final Rule on Reciprocal Deposits (08/27/2026) – On August 27, 2026, the Federal Deposit Insurance Corporation (FDIC) Board of Directors adopted an interim final rule to implement section 902 of the *21st Century ROAD to Housing Act* (the Housing Act), which amended the statutory framework governing reciprocal deposits, and to provide clarifications regarding the operation of the reciprocal deposits framework. **Statement of Applicability:** The contents of, and material referenced in, this FIL apply to all FDIC-insured financial institutions. Highlights: The interim final rule:

- Amends the FDIC's brokered deposit regulations concerning the limited exception for reciprocal deposits to conform to section 29 of the Federal Deposit Insurance Act, as amended by section 902 of the Housing Act;
- Increases the amount of reciprocal deposits agent institutions may exclude from treatment as brokered deposits by modifying the "general cap" with a new tiered liability-based calculation, up to a maximum of $30 billion;
- Amends the definition of "agent institution" to include 3-rated, well capitalized institutions;
- Clarifies when an institution "receives" nonmaturity reciprocal deposits;
- Clarifies when an institution requalifies as an agent institution following a supervisory rating change, capital-category change, approval of a brokered deposits waiver, or a reduction in reciprocal deposits below its "special cap;" and
- Outlines coordination with the Federal Financial Institutions Examination Council (FFIEC) to update Call Report instructions.

Comments on the interim final rule are due 30 days after the date of publication in the *Federal Register*.

FIL-52-2026
Attachment(s)
Federal Register Notice - Interim Final Rule on Reciprocal Deposits (PDF)

Comment: This Interim Final Rule expands the reciprocal deposits exception by increasing the amount of reciprocal deposits that can be excluded from brokered deposit treatment through a new tiered cap structure and by allowing certain 3-rated, well-capitalized institutions to qualify as agent institutions. The rule also provides important clarifications on how reciprocal deposits are counted and when institutions regain eligibility after rating, capital, or waiver changes, offering greater flexibility and certainty in managing deposit funding.

FTC Seeks Comment on Enforcement Policy Statement Regarding Personalized Pricing (08/19/2026) – The Federal Trade Commission today announced it is seeking public comment on an enforcement policy statement regarding personalized pricing, which is the use of personal data to set prices according to the amount that a company believes an individual consumer is willing to spend.

"When consumers see a listed price, they expect it to be same price that everyone else sees, not the retailer's estimate of how much they are willing to pay based on their personal data," said FTC Chairman Andrew Ferguson. "The FTC does not have the legal authority to ban personalized pricing in all circumstances, but businesses that fail to tell consumers how their personal data is being used to set a price may be in violation of the FTC Act and other laws we enforce. We are seeking public input on this draft statement, which would put businesses engaged in or considering personalized pricing on notice that the Trump-Vance FTC will not hesitate to enforce the law in this space."

This is the latest in a series of actions by the Commission, under President Donald Trump's leadership, against businesses that mislead consumers with hidden fees and surprise charges.

Consumers expect prices for products and services to change based upon supply and demand, not their web surfing habits or buying history, the statement notes. Retailers who represent or imply that a price is static when it in fact varies by individual are at risk of misleading customers. Informed consumers might take measures to avoid higher

	personalized prices, such as using a virtual private network or private browsing session, or simply avoiding retailers engaged in personalized pricing altogether. The statement goes on to note that the undisclosed collection or use of personal data for the purpose of personalized pricing could violate the FTC Act, which prohibits unfair or deceptive practices in the marketplace. Once the statement has been published in the Federal Register, the public will have 30 days to submit comments electronically. The Commission vote authorizing the Federal Register notice was 2-0. ***Comment: The FTC explicitly states that the new transparency mandates do not apply to risk-based pricing in credit transactions and insurance. Credit and loan pricing inherently rely on individualized data (such as credit scores, debt-to-income ratios, and payment history) to reflect the specific risk of lending money. Because loan structures and risk-based underwriting are already heavily regulated under banking-specific frameworks (like the Fair Credit Reporting Act and Equal Credit Opportunity Act), the FTC treats these as established, legitimate practices rather than deceptive "surveillance pricing". However, many community banks rely on third-party data analytics vendors for marketing and customer acquisition. If a bank utilizes a vendor algorithm that targets deposit accounts or non-credit services with varying pricing models based on a consumer's estimated "willingness to pay," the bank could face vendor-related compliance exposure.***

Lending

	Joint Special Purpose Credit Programs: Rescission of Interagency Statement (08/25/2026) – The Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, National Credit Union Administration, Consumer Financial Protection Bureau, Department of Housing and Urban Development, Department of Justice, and Federal Housing Finance Agency are rescinding the "Interagency Statement on Special Purpose Credit Programs Under the Equal Credit Opportunity Act and Regulation B" (2022 interagency statement). The agencies are rescinding the 2022 interagency statement to make clear that (1) creditors may not discriminate against borrowers based on prohibited characteristics and (2) creditors should not rely upon the 2022 interagency statement or other related issuances. OCC Bulletin 2022-3, "Fair Lending: Interagency Statement on Special Purpose Credit Programs," which conveyed the 2022 interagency statement, is also rescinded. **Note for Community Banks** This bulletin may be relevant to community banks with special purpose credit programs such as those described in the 2022 interagency statement. Background The 2022 interagency statement encouraged creditors to offer special purpose credit programs that "meet the credit needs of specified classes of persons" and gave assurances to participants that were uncertain about the permissibility of such credit programs. However, the Interagency Statement referenced a provision of Regulation B, the Equal Credit Opportunity Act's implementing regulation, that has since been amended.[1] The earlier version of that provision permitted creditors to implement lending programs based on the race, color, national origin, or sex of the applicant under certain circumstances, and the Interagency Statement and other related guidance referenced that earlier version.

	Related Link ▪ "Rescission of the Interagency Statement on Special Purpose Credit Programs Under the Equal Credit Opportunity Act and Regulation B" (PDF) ***Comment: The federal banking and housing agencies have rescinded their 2022 guidance on Special Purpose Credit Programs (SPCPs) and advised banks not to rely on that guidance or related issuances when designing lending programs. The agencies emphasized that creditors may not discriminate based on prohibited characteristics and noted that the prior guidance was tied to a version of Regulation B that has since been amended.***
	FFIEC CRA Alert - 2026 CRA Data Entry Software Release 2 is now available (08/26/2026) – The 2026 CRA Data Entry Software Release 2 was made available on the FFIEC CRA website. On behalf of the FFIEC, the Federal Reserve System designed the CRA Data Entry Software to assist respondents in automating the filing of their CRA data. The free software includes editing features to help verify and analyze the accuracy of the data. The data file created using this software can be submitted by one of the available submission methods listed in the software.

Open for Comment

Included only when specific to or relevant for community banks to comment on. Date posted may not be the same as the Federal Register Date.

08.27.2026 **FDIC** Reciprocal Deposits: Implementing the 21st Century ROAD to Housing Act SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is amending its brokered deposit regulations to conform with recent changes to section 29 of the Federal Deposit Insurance Act made by section 902 of the 21st Century ROAD to Housing Act related to reciprocal deposits, which took effect on July 11, 2026. The FDIC is also providing certain clarifications regarding the reciprocal deposit framework to facilitate and simplify compliance. The FDIC invites public comment on this interim final rule.

07.31.2026 **FDIC** Extensions of Credit to Insiders SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is proposing to increase quantitative thresholds for certain extensions of credit to insiders of FDIC supervised institutions, as restricted by the Federal Reserve Act and regulations promulgated thereunder. Specifically, the proposal would increase the thresholds for certain (1) extensions of credit to executive officers not otherwise specifically authorized by statute from $100,000 to $400,000; and (2) extensions of credit to insiders requiring prior approval by the board of directors from $500,000 to $2,000,000. The proposal would also establish an indexing methodology to periodically update such thresholds over time. **DATES: Comments must be received on or before on or before October 5, 2026.**

07.31.2026 **Joint** Community Reinvestment Act Regulations SUMMARY: The Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) are proposing to amend their Community Reinvestment Act rules by making certain substantive, technical, and process-oriented changes to refocus on the statutory objective of encouraging banks to meet the credit needs of their communities; to better ensure that community development grants reach the communities they are intended to benefit; to reduce unnecessary burden, particularly for community banks; and to provide greater clarity for how to obtain CRA consideration. The OCC and the FDIC are also proposing certain technical changes to their rules implementing the Community Reinvestment Act sunshine requirements of the Federal Deposit Insurance Act. In addition, the OCC is proposing similar technical changes to its Public Welfare Investments rule and its Rules, Policies, and Procedures for Corporate Activities. **DATE: Comments must be received on or before October 13, 2026.**

07.17.2026 **FDIC** Reporting Forms and Instructions Associated with Requirements and Standards for FDIC Supervised Permitted Payment Stablecoin Issuers SUMMARY: The FDIC invites comment on new forms and instructions associated with an Office of Management and Budget (OMB) control number (3064-0225) assigned in connection with a notice of proposed rulemaking. In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. As part of the notice of proposed rulemaking, the FDIC sought a new OMB control number for a new information collection that would include weekly and quarterly reporting forms that must be completed by permitted payment stablecoin issuers. **DATES: Comments must be submitted on or before September 18, 2026.**