

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

International Financial Products and Services

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Introduction

This Article summarizes important developments in 2015 in areas of law and regulation involving international financial products and services, including United States judicial decisions, United States agency decisions (including the CFPB and FinCEN), legislative, administrative actions, and executive developments, as well as specific Irish Corporate Investment Fund Vehicles and Brazilian Depository Receipt Programs.

I. Developments in Brazil¹

A. DEPOSITORY RECEIPT PROGRAMS IN BRAZIL

On March 27, 2015, the Brazilian Securities and Exchange Commission (“*Comissão de Valores Mobiliários*” or “CVM”) issued CVM Instruction No. 559 (CVM Inst. 559/2015), that updated the rules regarding the approval of Depository Receipts (DR) programs to be traded abroad (*i.e.*, outside Brazil).²

In CVM Instr. 559/2015, the following terms are defined:

- (i) *Depository Receipts* (DR) means the certificates issued abroad by a depository institution representing assets authorized in specific regulations enacted by the Brazilian Monetary Council (*Conselho Monetário Nacional*—CMN), hereinafter referred to as “authorized assets,” deposited in specific custody in Brazil;
- (ii) *custodian institution* means the institution authorized by CVM to provide custody services;

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1. This Section prepared by Walter Stuber, Walter Stuber Consultoria Juridica.

2. *See* Instrução CVM No. 559, de 27 de março de 2015, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 30.3.2015 (Braz.), available at <http://www.cvm.gov.br/legislacao/inst/inst59.html> [hereinafter CVM Instruction No. 559].

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(iii) *depository institution* means the institution abroad that issues the corresponding DR based on the authorized assets; and

(iv) *sponsoring company* means the issuer of the authorized assets which are object of the DR program, which must be a company headquartered in Brazil, and it is the signatory of the specific contract entered into with the depository institution to govern the issuance of DR.³

The DR program requires the approval of the CVM and can be ballasted on authorized assets, according to the registration category in which the issuer of securities is registered with CVM. According to CVM Instruction No. 480, of December 7, 2009,⁴ there are two different categories of registry: (1) category A that authorizes the trading of any types of securities; and (2) category B that excludes shares and share certificates of deposit, as well as securities that attribute the right of the holder to acquire shares and share certificates of deposit as a result of the conversion or the exercise of inherent rights, provided that these securities are issued by the same issuer or by a company belonging to its economic group.⁵ The approval of DR program can be requested by (1) the custodian institution; or (2) the sponsoring company.⁶

The DR program can be sponsored or non-sponsored. A sponsored program is the program established by a single depository institution, hired by the issuer of the assets constituting the ballast of the DR.⁷ A non-sponsored program is the program established at the initiative of one or more depository institutions, and in this case, the issuer of the assets constituting the ballast of the DR will not manifest an objection.⁸

The CVM approval for the DR program will be granted automatically. The application of automatic approval must be forwarded to the Securities Registration Superintendence (“*Superintendência de Registro de Valores Mobiliários*” or “SRE”) and will be accompanied by the following documents: (1) the contract between the custodian institution and the depository institution; (2) the agreement (*convênio*) entered into between the administrator entities of the Brazilian and foreign organized markets providing for the trading of securities involved in the DR program, whereby the receipts are intended for trading on an organized market abroad; (3) the authorization of the Central Bank of Brazil (“*Banco Central do Brasil*” or “Bacen”), whenever the ballast of the DR program is constituted by assets issued by a financial institution headquartered in Brazil; and (4) a statement signed by a statutory director of the custodian institution, confirming the validity and regularity of the documents listed in items (1)–(3).⁹

If the DR program is sponsored, the application of automatic approval must be accompanied by the following additional documents: (1) the contract between the sponsoring company and the depository institution; and (2) a statement signed by the statutory director of the issuer of the assets that constitute the ballast of the DR,

3. See *id.* art. 1.

4. See Instrução CVM No. 480, de 7 de dezembro de 2009, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 7.12.2009 (Braz.), translated at http://www.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/CVM-Instruction-480.pdf [hereinafter CVM Instruction No. 480].

5. See *id.* art. 2.

6. CVM Instruction No. 559, at art. 2(1).

7. *Id.* at art. 3(1).

8. *Id.* at art. 3(2).

9. *Id.* at art. 5.

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confirming the validity of the regularity of the documents listed in items (1)–(3) of the previous paragraph and the document mentioned in item (1) above.¹⁰

Should the DR program be non-sponsored, the application of automatic approval must also be accompanied by the manifestation of no objection from the issuer of the assets constituting the ballast of the DR.¹¹

The documents written in a foreign language (English, for example) must be submitted together with their respective sworn Portuguese translations in order to be valid in Brazil.¹²

The application of automatic approval will be effective within five business days of the date of filing of the application with CVM.¹³

The application for modification of the terms and conditions of the DR program must also be forwarded to SRE and will follow the same parameters outlined above.¹⁴

The issuer of shares that constitute the ballast of the sponsored DR program must convene a general shareholders' meeting with a minimum of thirty days in advance.¹⁵ Compliance with this deadline is waived in cases in which the species or class of shares that constitutes the ballast of the DR is not entitled to vote on any of the matters listed in the agenda of the meeting.¹⁶

The voting rights of the shares constituting the ballast of the DR must be exercised by the depository institutions in the manner instructed by the DR holders whenever the contracts for the program so permit, or in the best interest of the DR holders, when such contracts prevent voting as per their instructions.¹⁷

II. Developments in Ireland¹⁸

A. A NEW IRISH CORPORATE FUND STRUCTURE—THE ICAV

On March 5, 2015, the Irish Collective Asset Management Vehicle Act was formally enacted.¹⁹ The Act establishes a new Irish corporate investment fund vehicle that is specifically tailored to the needs of the global funds industry. This new structure, which will provide a greater choice for fund sponsors, is known as the Irish Collective Asset-management Vehicle or "ICAV."

1. *Key Features of the ICAV*

The ICAV is a new vehicle for Irish corporate investment funds that will exist simultaneously with the existing public limited company (PLC) structure, rather than

10. *Id.* at art. 5(1).

11. *See id.* art. 5(2).

12. *See* CVM Instruction No. 559, art. 5(3).

13. *Id.* art. 6.

14. *Id.* art. 7.

15. *Id.* art. 8.

16. *Id.*

17. *Id.* art. 9.

18. This Section authored by Cillian Bredin and Dillon Eustace.

19. Irish Collective Asset-management Vehicles Act 2015 (Act. No. 2/2015), <http://www.irishstatutebook.ie/eli/2015/act/2/enacted/en/pdf> [hereinafter ICAV Act 2015].

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replace it. There are numerous advantages to the ICAV structure, including administrative efficiency and the choice of whether to establish the corporate investments funds as an Undertaking for Collective Investment in Transferable Securities (UCITS) or as an Alternative Investment Fund (AIF). A key feature of the ICAV is its ability to elect classification under the United States “check-the-box” taxation rules, allowing the ICAV to be treated as a partnership for United States for tax purposes. This avoids certain adverse tax consequences for United States taxable investors that arise if the structure is deemed to be a passive foreign investment company (PFIC) for United States federal income tax purposes. It is not possible for United States taxable investors to “check the box” in this manner when an investment is made in a PLC; therefore, this is a clear advantage for those promoters who wish to establish funds directed towards United States taxables.

2. ICAV versus the PLC

The ICAV has been specifically designed to be distinguishable from a typical company. Most Irish funds are currently authorized as investment companies and consequently, are required to comply with many of the rules applicable to companies that are not relevant or appropriate in the context of funds.²⁰ The ICAV is a bespoke corporate structure that will avoid the obligation to comply with certain European and Irish company law requirements that are applicable to investment funds established as PLCs.²¹ For example, the ICAV has replaced the Memorandum and Articles of Association with an “instrument of incorporation” (IOI).²² This constitutive document can be amended with greater flexibility as an investor vote is not necessarily required to alter the IOI provided the custodian/depositary certifies that the change will not prejudice the shareholders.²³ This is a more efficient process when contrasted with the existing requirement that obligates amendments to be passed by way of a special resolution, requiring 75 percent of votes cast to favor the proposed update.²⁴

Furthermore, directors of an ICAV can determine whether to dispense with the general requirement to hold an annual general meeting (AGM) provided they give shareholders 60 days’ notice.²⁵ Additionally, ICAVs are not required to comply with the statutory investment diversification requirements that PLCs must adhere to, thus the legal obligation to diversify risk does not apply to ICAVs.

20. *See id.* at s. 147.

21. For example, the effects of ICAV Act 2015 on the Companies Act 2014 (Act No. 38/2014) can be found at *Effects*, IR. STAT. BOOK, http://www.irishstatutebook.ie/eli/isbc/2014_38.html (follow “Effects” hyperlink for list of Affecting Provisions of the Companies Act 2014, including ICAV Act 2015).

22. *Id.*, s. 6; *see also* Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Undertakings for Collective Investment in Transferable Securities) Regulations 2015 (SI 420/2015), at s. 2, http://www.bailii.org/cgi-bin/format.cgi?doc=/1e/legis/num_reg/2015/420.html&query=%28ICAV%29 (defining “constitutional document” as “the memorandum and articles of association” for an investment company, but “the instrument of incorporation” for an ICAV).

23. ICAV Act 2015, s. 31(1)(b).

24. Companies Act 2014 (Act. No. 38/2014), s. 191(3), <http://www.irishstatutebook.ie/eli/2014/act/38/enacted/en/print>.

25. ICAV Act 2015, s. 89(4). Subject to a right of ten percent of shareholders or the request of auditor to require such a meeting to be held. *Id.*, s. 91(3).

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In addition, an umbrella ICAV can determine whether to prepare separate accounts with respect to each sub-fund.²⁶ This will be particularly useful for platform structures with multiple sub-investment managers and would permit the adoption of separate financial-year ends for different sub-funds. This is an option not currently available for funds structured as PLCs in Ireland.

3. *The Central Bank Rather Than the Companies Registration Office*

An ICAV can be established by the Central Bank of Ireland (Central Bank).²⁷ The Central Bank ICAV registration section will issue a Registration Order for a new ICAV within ten business days from the date of receipt of a complete application for registration duly signed by two of the proposed directors and subscribers; subsequently the fund authorization section of the Central Bank will authorize the ICAV.²⁸ This is a further simplified process than that currently required to establish a PLC, which requires a dual registration process involving both the Companies Registration Office and the Central Bank.

4. *Conversion Possibilities Under the ICAV*

The ICAV Act allows both Irish and non-Irish entities to convert their existing UCITS PLCs and AIF PLCs to ICAV status.²⁹ Thus foreign investment companies can efficiently re-domicile or migrate to Ireland, becoming an ICAV upon re-registration. The conversion process is straightforward and requires an application to the Central Bank. Such application must be accompanied by the following documents: (1) a copy of the investment company's certificate of incorporation; (2) a certified copy of the investment company's memorandum and articles of association, and the IOI, in respect of the proposed ICAV; (3) details of the investment company's registered office, directors and secretary; (4) a declaration of solvency; (5) a schedule of charges or securities interests created or granted by the company; (6) details of the proposed name of the ICAV; and (7) a statutory declaration from a director of the company that no petition to wind up or liquidate the company has been issued, that the company have not been notified of the appointment of a receiver, liquidator, or examiner of a company, and confirmation that the conversion is permitted by the memorandum and articles of association.³⁰

5. *Marketing ICAVs in Europe*

The European "passport" available to UCITS and AIFs has helped Ireland evolve as one of the primary centers for domiciling funds targeting European distribution. Furthermore, international recognition of such fund structures in further afield

26. See *id.*, C. 5 ("Sub-funds of umbrella funds")

27. See *ICAV Registration and Post-Registration: Introduction*, CENT. BANK OF IR., <http://www.centralbank.ie/regulation/industry-sectors/funds/ICAV%20Registration%20and%20Post-Registration/Pages/Default.aspx> (last visited Apr. 15, 2016).

28. See *ICAV Registration and Post-Registration: Registration*, CENT. BANK OF IR., <http://www.centralbank.ie/regulation/industry-sectors/funds/ICAV%20Registration%20and%20Post-Registration/Pages/Registration.aspx>.

29. See ICAV Act 2015, Pt. 8.

30. *Id.*, s. 140(3).

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jurisdictions has resulted in the distribution of Irish funds in over 70 countries globally.³¹ The new ICAV structure is contributing to Ireland's reputation as a domicile of choice, by providing a funds structure with greater legal certainty, flexibility, and efficiency. Existing fund structures (namely the PLC structure, the Unit Trust, the Common Contractual Fund, and the Investment Limited Partnership) are still available to sponsors who wish to choose them. But the operational efficiencies discussed above provide significant cost reductions specifically for internationally marketed funds that may be subject to further operational requirements. Conclusively, these factors contribute to the administrative ease that the ICAV entails, and all signs would seem to indicate that the ICAV is fast becoming the fund structure of choice for promoters looking to establish funds in Ireland.

III. Developments in the United States³²

A. NEW REGULATIONS, ADVISORIES AND ENFORCEMENT ACTIONS AT THE CONSUMER FINANCIAL PROTECTION BUREAU, AN INDEPENDENT UNITED STATES AGENCY (CFPB)

1. *Smaller Loan Exemption from Appraisal Requirements for Higher-Priced Mortgage Loans*

The Consumer Financial Protection Bureau (CFPB), Federal Reserve Board, and Office of the Comptroller of the Currency (OCC) announced on November 25, 2015, that the threshold for exempting loans from special appraisal requirements for higher-priced mortgage loans during 2016 will remain at \$25,500.³³ According to the announcement:

The threshold amount will be effective January 1, 2016, and is the same threshold that applied in 2015—based on the annual percentage decrease in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) as of June 1, 2015. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amended the Truth in Lending Act to add special appraisal requirements for higher-priced mortgage loans, including a requirement that creditors obtain a written appraisal based on a physical visit to the home's interior before making a higher-priced mortgage loan. The rules implementing these requirements contain an exemption for loans of \$25,000 or less and also provide that the exemption threshold will be adjusted annually to reflect increases in the CPI-W. If there is no annual percentage increase in the CPI-W, the agencies will not adjust this exemption threshold from the prior year.³⁴

31. See *Global Distribution*, IRISH FUNDS, <http://www.irishfunds.ie/distribution> (last visited Apr. 15, 2016).

32. This Section prepared by Alan B. Rabkin, Holland & Hart, LLP.

33. *Agencies Announce Threshold for Smaller Loan Exemption from Appraisal Requirements for Higher-Priced Mortgage Loans*, CONSUMER FIN. PROTECTION BUREAU (Nov. 25, 2015), <http://www.consumerfinance.gov/newsroom/agencies-announce-threshold-for-smaller-loan-exemption-from-appraisal-requirements-for-higher-priced-mortgage-loans>.

34. *Id.*

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2. *Dollar Thresholds in Regulations Z and M for Exempt Consumer Credit and Lease Transactions*

On November 25, 2015, the Federal Reserve Board and the CFPB announced the dollar thresholds in Regulation Z (Truth in Lending) and Regulation M (Consumer Leasing) that will apply for determining exempt consumer credit and lease transactions in 2016.³⁵ In its November 25, 2015, announcement, the CFPB explained:

These thresholds are set pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amendments to the Truth in Lending Act and the Consumer Leasing Act that require adjusting these thresholds annually based on the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). If there is no annual percentage increase in the CPI-W, the Federal Reserve Board and the CFPB will not adjust this exemption threshold from the prior year. Transactions at or below the thresholds are subject to the protections of the regulations.

Based on the annual percentage decrease in the CPI-W as of June 1, 2015, the protections of the Truth in Lending Act and the Consumer Leasing Act generally will apply to consumer credit transactions and consumer leases of \$54,600 or less in 2016—the same thresholds that applied in 2015. However, private education loans and loans secured by real property (such as mortgages) are subject to the Truth in Lending Act regardless of the amount of the loan.

Although the Dodd-Frank Act generally transferred rulemaking authority under the Truth in Lending Act and the Consumer Leasing Act to the CFPB, the Federal Reserve Board retains authority to issue rules for certain motor vehicle dealers. Therefore, the agencies issued notices jointly.³⁶

3. *CFPB Reasserts That Companies Must Obtain Consumer Authorization for Recurring Automatic Debits and the Consent Must Be Clear*

On November 23, 2015, the CFPB issued a bulletin alerting companies that they must obtain authorization before automatically debiting a consumer's account.³⁷ The bulletin also reminds companies that they are required by law to provide notifications to consumers that clearly describe the terms of preauthorized automatic debits.³⁸ The bulletin stresses that the Bureau expects all companies to get required consumer authorization before automatically debiting a consumer's account.³⁹ Companies must also keep clear records on what the consumer has authorized and provide consumers with a

35. *Agencies Announce Dollar Thresholds in Regulations Z and M for Exempt Consumer Credit and Lease Transactions*, CONSUMER FIN. PROTECTIONS BUREAU (Nov. 25, 2015), <http://www.consumerfinance.gov/newsroom/agencies-announce-dollar-thresholds-in-regulations-z-and-m-for-exempt-consumer-credit-and-lease-transactions>.

36. *Id.*; see also Consumer Leasing (Regulation M), 12 C.F.R. § 1013, 12 C.F.R. § 213 (2015); Truth in Lending (Regulation Z), 12 C.F.R. § 1026, 12 C.F.R. § 226 (2015).

37. CONSUMER FIN. PROT. BUREAU, CFPB COMPLIANCE BULL. 2015-06, REQUIREMENTS FOR CONSUMER AUTHORIZATIONS FOR PREAUTHORIZED ELECTRONIC FUND TRANSFERS 1 (2015).

38. *Id.* at 2-4.

39. *Id.* at 3.

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copy of those terms.⁴⁰ This information can include the amount the consumer agreed to, the recurring nature of the debits, and the timing of the payments.⁴¹

4. *Financial Institutions to Comply with New Reporting Requirements for Mortgages*

On October 15, 2015, the CFPB finalized a rule to improve information reported about the residential mortgage market.⁴² According to the CFPB, “[t]he rule will shed more light on consumers’ access to mortgage credit by updating the reporting requirements of the Home Mortgage Disclosure Act (HMDA) regulation.”⁴³ Further, the CFPB also states that it “is working with other federal agencies to streamline the reporting process for financial institutions.”⁴⁴

5. *CFPB Considers Proposal to Ban Arbitration Clauses That Allow Companies to Avoid Accountability to Their Customers*

On October 7, 2015, the CFPB announced it is considering proposing rules that would ban consumer financial companies from using “free pass” arbitration clauses to block consumers from suing in groups to obtain relief.⁴⁵ The CFPB contends that “[b]uried in many contracts for consumer financial products, like credit cards and bank accounts, [these] arbitration clauses deny consumers the right to participate in group lawsuits against companies.”⁴⁶ Moreover, “[w]ith this free pass, companies can sidestep the legal system, avoid big refunds, and continue to pursue profitable practices that may violate the law and harm countless consumers.”⁴⁷ The CFPB hopes that its proposals “would give consumers their day in court and deter companies from wrongdoing.”⁴⁸

6. *CFPB Takes Action Against Fifth Third Bank for Auto-Lending Discrimination and Illegal Credit Card Practices*

On September 28, 2015, the CFPB announced two separate actions against Fifth Third Bank, for discriminatory auto loan pricing and for illegal credit card practices.⁴⁹ According to CFPB:

40. *Id.*

41. *See id.* at 4.

42. *CFPB Finalizes Rule to Improve Information About Access to Credit in the Mortgage Market*, CONSUMER FIN. PROTECTIONS BUREAU (Oct. 15, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-finalizes-rule-to-improve-information-about-access-to-credit-in-the-mortgage-market>.

43. *Id.*; *see also* Home Mortgage Disclosure (Regulation C), 12 C.F.R. § 1003 (2015).

44. *CFPB Finalizes Rule to Improve Information About Access to Credit in the Mortgage Market*, *supra* note 43.

45. *CFPB Considers Proposal to Ban Arbitration Clauses that Allow Companies to Avoid Accountability to Their Customers*, CONSUMER FIN. PROTECTION BUREAU (Oct. 7, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-considers-proposal-to-ban-arbitration-clauses-that-allow-companies-to-avoid-accountability-to-their-customers/>. The proposals can be found at http://www.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf.

46. *Id.*

47. *Id.*

48. *Id.*

49. *CFPB Takes Action Against Fifth Third Bank for Auto-Lending Discrimination and Illegal Credit Card Practices*, CONSUMER FIN. PROTECTION BUREAU (Sept. 28, 2015), <http://www.consumerfinance.gov/>

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The joint CFPB and Department of Justice (DOJ) auto-lending enforcement action requires Fifth Third to change its pricing and compensation system to minimize the risks of discrimination, and to pay \$18 million to harmed African-American and Hispanic borrowers. The CFPB's action against Fifth Third's deceptive marketing of credit card add-on products requires the bank to provide an estimated \$3 million in relief to eligible harmed consumers and pay a \$500,000 penalty.⁵⁰

7. *Hudson City Savings Bank to Pay \$27 Million to Increase Mortgage Credit Access in Communities Illegally Redlined*

On September 24, 2015, the CFPB and the Department of Justice (DOJ) announced a joint action against Hudson City Savings Bank for discriminatory redlining practices that denied residents in majority-Black-and-Hispanic neighborhoods fair access to mortgage loans.⁵¹ The complaint filed by the CFPB and DOJ alleged that Hudson City illegally provided unequal access to credit to neighborhoods in New York, New Jersey, Connecticut, and Pennsylvania.⁵² The bank located branches and loan officers, selected mortgage brokers, and marketed products to avoid and thereby discourage prospective borrowers in predominantly Black and Hispanic communities.⁵³ To resolve the matter, Hudson City agreed to pay \$25 million in direct loan subsidies to qualified borrowers in the affected communities, \$2.25 million in community programs and outreach, and a \$5.5 million penalty.⁵⁴ This represents the largest redlining settlement in history to provide such direct subsidies.⁵⁵

8. *CFPB Finalizes Rule to Facilitate Access to Credit in Rural and Underserved Areas*

On September 21, 2015, the CFPB finalized several changes to its mortgage rules to facilitate responsible lending by small creditors, particularly in rural and underserved areas.⁵⁶ According to the CFPB: "The new rule, which was proposed in January, will increase the number of financial institutions able to offer certain types of mortgages in

newsroom/cfpb-takes-action-against-fifth-third-bank-for-auto-lending-discrimination-and-illegal-credit-card-practices.

50. *Id.* See also, Fifth Third Bank, CFPB No. 2015-CFPB-0024 (Sept. 24, 2015), available at http://files.consumerfinance.gov/f/201509_cfpb_consent-order-fifth-third-bank.pdf; Fifth Third Bank, CFPB No. 2015-CFPB-0025 (Sept. 28, 2015), available at http://files.consumerfinance.gov/f/201509_cfpb_consent-order-fifth-third-bank-add-on.pdf.

51. Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray on Hudson City Saving Bank Enforcement Action Press Call*, CONSUMER FIN. PROTECTION BUREAU (Sept. 24, 2015), <http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-on-hudson-city-savings-bank-enforcement-action-press-call/>.

52. *Id.*; see also *Consumer Fin. Prot. Bureau v. Hudson City Saving Bank*, F.S.B., Consent Order, Case No. 15-7056 (D.N.J. Nov. 4, 2014).

53. Cordray, *supra* note 52.

54. *Id.*

55. *Id.*

56. *CFPB Finalizes Rule to Facilitate Access to Credit in Rural and Underserved Areas*, CONSUMER FIN. PROTECTION BUREAU (Sept. 21, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-finalizes-rule-to-facilitate-access-to-credit-in-rural-and-underserved-areas>.

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rural and underserved areas, and gives small creditors time to adjust their business practices to comply with the rules.”⁵⁷

9. *CFPB Orders Citizens Bank to Pay \$18.5 Million for Failing to Credit Full Deposit Amounts*

On August 12, 2015, the CFPB, the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) took action against Citizens Bank for failing to credit consumers the full amount of their deposited funds.⁵⁸ The CFPB found that “[t]he bank kept money from deposit discrepancies when receipts did not match actual money transferred.”⁵⁹ The consent order required the bank to “provide approximately \$11 million in refunds to consumers and pay a \$7.5 million penalty for the violations.”⁶⁰

10. *CFPB Sues Offshore Payday Lenders*

On August 4, 2015, the CFPB “announced the filing of a lawsuit in federal district court against the NDG Enterprise, a complex web of commonly controlled offshore companies, for collecting money consumers did not owe.”⁶¹ According to the CFPB, it alleged that “the defendants illegally collected loan amounts and fees that were void or that consumers had no obligations to repay, and falsely threatened consumers with lawsuits and imprisonment.”⁶² Further, “the CFPB is seeking to end the companies’ alleged illegal practices and obtain monetary relief for harmed consumers.”⁶³

11. *CFPB Takes Action Against Mortgage Payment Company and Servicer for Deceptive Ads*

On July 28, 2015, the CFPB took action against two entities known as Paymap Inc. and LoanCare, LLC, for “deceiving consumers with advertisements for a mortgage payment program that promised tens of thousands of dollars in interest savings from more frequent mortgage payments.”⁶⁴ According to the CFPB, “[u]nder the terms of the orders

57. *Id.*; see also Amendments Relating to Small Creditors and Rural or Underserved Areas Under the Truth in Lending Act (Regulation Z), 12 C.F.R. § 1026 (2015).

58. *CFPB Orders Citizens Bank to Pay \$18.5 Million for Failing to Credit Full Deposit Amounts*, CONSUMER FIN. PROTECTIONS BUREAU (Aug. 12, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-orders-citizens-bank-to-pay-18-5-million-for-failing-to-credit-full-deposit-amounts>.

59. *Id.*

60. *Id.*, see also RBS Citizens Fin. Grp., Inc., CFPB No. 2015-CFPB-0020 (Aug. 12, 2015), available at http://files.consumerfinance.gov/f/201408_cfpb_consent-order-rbs-citizens.pdf.

61. *CFPB Sues Offshore Payday Lender*, CONSUMER FIN. PROTECTIONS BUREAU (Aug. 4, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-sues-offshore-payday-lender/>.

62. *Id.*

63. *Id.*; see also Consumer Fin. Prot. Bureau v. NDG Fin. Corp., Complain, Case 1:15-cv-05211-CM (S.D.N.Y. July 31, 2015), available at http://files.consumerfinance.gov/f/201508_cfpb_complaint-northway.pdf.

64. *CFPB Takes Action Against Mortgage Payment Company And Servicer for Deceptive Ads*, CONSUMER FIN. PROTECTIONS BUREAU (July 28, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-mortgage-payment-company-and-servicer-for-deceptive-ads>.

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announced . . . , Paymap will return \$33.4 million in fees to consumers and pay a \$5 million civil penalty to the CFPB, and LoanCare will pay a \$100,000 civil penalty.”⁶⁵

12. *CFPB Orders Discover Bank to Pay \$18.5 Million for Illegal Student Loan Servicing Practices*

On July 22, 2015 the CFPB “took action against Discover Bank and its affiliates for illegal private student loan servicing practices.”⁶⁶ According to the CFPB:

The CFPB found that Discover overstated the minimum amounts due on billing statements and denied consumers information they needed to obtain federal income tax benefits. [Discover] also engaged in illegal debt collection tactics, including calling consumers early in the morning and late at night. The CFPB’s order required Discover to refund \$16 million to consumers, pay a \$2.5 million penalty, and improve its billing, student loan interest reporting, and collection practices.⁶⁷

13. *CFPB Statement on Department of Defense Military Lending Act Final Rule*

On July 21, 2015, the DOJ “issued a final rule expanding the types of [consumer] credit products that are covered by the 36-percent rate cap and other military-specific protections under the Military Lending Act.”⁶⁸ “The rule close[d] loopholes that have led to lenders skirting the law with products that fall outside the scope of the existing regulation.”⁶⁹

14. *CFPB Orders Citibank to Pay \$700 Million in Consumer Relief for Illegal Credit Card Practices*

On July 21, 2015, the CFPB “ordered Citibank, N.A. and its subsidiaries to provide an estimated \$700 million in relief to eligible consumers harmed by illegal practices related to credit card add-on products and services.”⁷⁰ According to the CFPB:

Roughly 7 million consumer accounts were affected by Citibank’s deceptive marketing, billing, and administration of debt protection and credit monitoring add-on products. A

65. *Id.*; see also Paymap Inc., CFPB No. 2015-CFPB-0017 (2015), available at http://files.consumerfinance.gov/f/201507_cfpb_consent-order_paymap.pdf; LoanCare, LLC, CFPB No. 2015-CFPB-0018 (2015), available at http://files.consumerfinance.gov/f/201507_cfpb_consent-order_loan-care.pdf.

66. *CFPB Orders Discover Bank to Pay \$18.5 Million for Illegal Student Loan Servicing Practices*, CONSUMER FIN. PROTECTIONS BUREAU (July 22, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-orders-discover-bank-to-pay-18-5-million-for-illegal-student-loan-servicing-practices/>.

67. *Id.*

68. *CFPB Statement on Department of Defense Military Lending Act Final Rule*, CONSUMER FIN. PROTECTIONS BUREAU (July 21, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-statement-on-department-of-defense-military-lending-act-final-rule>.

69. *Id.* See also Press Release, U.S. Dep’t of Def., Department of Defense Issues Final Military Lending Act Rule, Release No. NR-289-15 (July 21, 2015), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=17395>.

70. *CFPB Orders Citibank to Pay \$700 Million in Consumer Relief for Illegal Credit Card Practices*, CONSUMER FIN. PROTECTIONS BUREAU (July 21, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-orders-citibank-to-pay-700-million-in-consumer-relief-for-illegal-credit-card-practices>.

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Citibank subsidiary also deceptively charged expedited payment fees to nearly 1.8 million consumer accounts during collection calls. Citibank and its subsidiaries will pay \$35 million in civil money penalties to the CFPB.⁷¹

15. *CFPB and DOJ Reach Resolution with Honda to Address Discriminatory Auto Loan Pricing*

On July 14, 2015, the CFPB and DOJ announced that they had “resolved an action with American Honda Finance Corporation that will put new measures in place to address discretionary auto loan pricing and compensation practices.”⁷² The CFPB reported that:

Honda’s past practices resulted in thousands of African-American, Hispanic, and Asian and Pacific Islander borrowers paying higher interest rates than white borrowers for their auto loans, without regard to their creditworthiness. As part of [the] order, Honda will change its pricing and compensation system to substantially reduce dealer discretion and minimize the risks of discrimination, and will pay \$24 million in restitution to affected borrowers.⁷³

16. *CFPB to Oversee Nonbank Auto Finance Companies*

On June 10, 2015, the CFPB “published a rule . . . that will allow the agency to supervise larger nonbank auto finance companies for the first time.”⁷⁴ “The CFPB also released the examination procedures that examiners will use to ensure that auto finance companies are following the law.”⁷⁵

17. *CFPB Study Finds Reverse Mortgage Advertisements Can Create False Impressions*

On June 4, 2015, the CFPB “released results of a focus-group study on reverse mortgage advertisements that found many participants were left with [serious] misimpressions about the product.”⁷⁶ The CFPB reported that “[a]fter viewing the ads, consumers were confused about reverse mortgages being loans, and [the consumers] were left with false impressions that [the reverse mortgage products sold] are a government benefit or that they would ensure consumers could stay in their homes for the rest of their

71. *Id.*

72. *CFPB and DOJ Reach Resolution with Honda to Address Discriminatory Auto Loan Pricing*, CONSUMER FIN. PROTECTIONS BUREAU (July 14, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-and-doj-reach-resolution-with-honda-to-address-discriminatory-auto-loan-pricing/>.

73. *Id.*; see also Am. Honda Fin. Corp., CFPB No. 2015-CFPB-0014 (2015), available at http://files.consumerfinance.gov/f/201507_cfpb_consent-order_honda.pdf.

74. *CFPB to Oversee Nonbank Auto Finance Companies*, CONSUMER FIN. PROTECTIONS BUREAU (June 10, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-to-oversee-nonbank-auto-finance-companies>.

75. *Id.*

76. *CFPB Study Finds Reverse Mortgage Advertisements Can Create False Impressions*, CONSUMER FIN. PROTECTIONS BUREAU (June 4, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-study-finds-reverse-mortgage-advertisements-can-create-false-impressions/>.

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lives.⁷⁷ On the same day, the CFPB also issued “an advisory that warns consumers that many reverse mortgage ads do not tell the full story.”⁷⁸

18. *CFPB Takes Action Against PayPal for Illegally Signing up Consumers for Unwanted Online Credit*

On May 19, 2015, the CFPB “filed a complaint and proposed consent order in federal court against PayPal, Inc., for illegally signing up consumers for its online credit product, PayPal Credit, formerly known as Bill Me Later.”⁷⁹ The CFPB alleged that:

PayPal deceptively advertised promotional benefits that it failed to honor, signed consumers up for credit without their permission, made them use PayPal Credit instead of their preferred payment method, and then mishandled billing disputes. Under the proposed order, PayPal would pay \$15 million in consumer redress and a \$10 million penalty, and [PayPal] would be required to improve its disclosures and procedures.⁸⁰

19. *CFPB Takes Action to Obtain \$120 Million in Redress from Sprint and Verizon for Illegal Mobile Cramming*

On May 12, 2015, the CFPB “filed proposed orders in federal courts against Sprint and Verizon which, if approved, would provide \$120 million in redress to wireless customers who were illegally billed hundreds of millions of dollars in unauthorized third-party charges.”⁸¹

According to the CFPB:

The CFPB alleges that the companies operated billing systems that allowed third parties to “cram” unauthorized charges on customers’ mobile-phone accounts and ignored customer complaints about the charges. [The] actions [were] taken in coordination with the [multiple] state attorneys general and the Federal Communications Commission (FCC). Under the proposed terms, the CFPB will oversee \$120 million in consumer refunds. The companies will also pay \$38 million in federal and state fines.⁸²

77. *Id.*

78. *Id.* See also *Consumer Advisory: Don't be misled by reverse mortgage advertising*, CONSUMER FIN. PROTECTIONS BUREAU (June 2015), http://files.consumerfinance.gov/f/201506_cfpb_consumer-advisory-dont-be-misled-by-reverse-mortgage-advertising.pdf.

79. *CFPB Takes Action Against PayPal for Illegally Signing Up Consumers for Unwanted Online Credit*, CONSUMER FIN. PROTECTIONS BUREAU (May 19, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-paypal-for-illegally-signing-up-consumers-for-unwanted-online-credit>.

80. *Id.* See also *Consumer Fin. Prot. Bureau v. PayPal, Inc.*, Stipulated Final Judgment and Order, Civ Action No. 1:15-cv-01426 (D. Md. May 19, 2015), available at http://files.consumerfinance.gov/f/201505_cfpb_consent-order-paypal.pdf.

81. *CFPB Takes Action to Obtain \$120 Million in Redress from Sprint and Verizon for Illegal Mobile Cramming*, CONSUMER FIN. PROTECTIONS BUREAU (May 12, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-to-obtain-120-million-in-redress-from-sprint-and-verizon-for-illegal-mobile-cramming/>.

82. *Id.* See also *Consumer Fin. Prot. Bureau v. Celco P'ship*, Stipulated Final Judgment and Order, Civ. Action No. 12-3268 (D.N.J. June 9, 2015), available at http://files.consumerfinance.gov/f/201506_cfpb-cfpb-v-verizon-stipulated-final-judgment-and-order.pdf; *Consumer Fin. Prot. Bureau v. Sprint Corp.*, Stipulated

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20. *CFPB Fines Regions Bank \$7.5 Million for Unlawful Overdraft Practices*

On April 28, 2015, the CFPB “took action against Regions Bank for charging overdraft fees to consumers who had not opted-in for overdraft coverage.”⁸³ According to the CFPB:

[Regions] also charged overdraft and non-sufficient funds fees on its deposit advance product despite claims that it would not. Regions has already refunded hundreds of thousands of consumers approximately \$49 million in fees, and the consent order requires the bank to fully refund all sums required to remaining consumers. The [CFPB] also fined the company \$7.5 million for its illegal actions.⁸⁴

21. *CFPB Issues Supervisory Compliance Bulletin*

On January 27, 2015, the CFPB issued a bulletin to remind supervised financial institutions, including nonbank companies that may be unfamiliar with the rigors of federal supervision, of existing regulatory requirements regarding information not being disclosed to regulators as supposedly “confidential.”⁸⁵ Moreover, “[t]he CFPB supervises companies to determine their compliance with federal consumer financial laws, to assess risks to consumers, and to help ensure a fair and transparent marketplace for consumers.⁸⁶ The CFPB stated it was “aware that some supervised financial institutions may have entered into non-disclosure agreements that purport to restrict the institution from sharing information with a regulator, or to require the institution to notify a third party when it shares information.”⁸⁷ But, the CFPB clarified that “the bulletin explains that provisions in non-disclosure agreements do not alter or [in any way] limit the [CFPB’s] existing supervisory authority or the supervised financial institution’s obligations relating to confidential supervisory information that must be revealed.”⁸⁸

Final Judgment and Order, Civ Action No. 14-cv-09931 (S.D.N.Y. June 30, 2015), *available at* http://files.consumerfinance.gov/f/201509_cfpb-cfpb-v-sprint-corporation-stipulated-final-judgment-and-order.pdf.

83. *CFPB Fines Regions Bank \$7.5 Million for Unlawful Overdraft Practices*, CONSUMER FIN. PROTECTIONS BUREAU (Apr. 28, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-fines-regions-bank-7-5-million-for-unlawful-overdraft-practices>.

84. *Id.* See also Region Bank, CFPB No. 2015-CFPB-0009 (2015), *available at* http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf; *Consumer Advisory: You’ve got options when it comes to overdraft*, CONSUMER FIN. PROTECTIONS BUREAU (Apr. 2015), http://files.consumerfinance.gov/f/201504_cfpb_consumer-advisory_overdraft.pdf.

85. *CFPB Fines Regions Bank \$7.5 Million for Unlawful Overdraft Practices*, CONSUMER FIN. PROTECTIONS BUREAU (Apr. 28, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-fines-regions-bank-7-5-million-for-unlawful-overdraft-practices>.

86. *CFPB Issues Supervisory Compliance Bulletin*, CONSUMER FIN. PROTECTIONS BUREAU (Jan. 27, 2015), <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-issues-supervisory-compliance-bulletin/>.

87. *Id.*

88. *Id.* See also CONSUMER FIN. PROTECTIONS BUREAU, CFPB COMPLIANCE BULL. NO. 2015-01, TREATMENT OF CONFIDENTIAL SUPERVISORY INFORMATION (2015), *available at* http://files.consumerfinance.gov/f/201501_cfpb_compliance-bulletin_treatment-of-confidential-supervisory-information.pdf.

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B. RULEMAKING AND ENFORCEMENT ACTIONS BY THE FINANCIAL CRIMES
ENFORCEMENT NETWORK OF THE U.S. DEPARTMENT OF TREASURY
(FINCEN)

1. *FinCEN Issues Assessment after Court Approval of FinCEN's Settlement with Desert
Palace, Inc. d/b/a Caesars Palace for BSA Violations*

On October 19, 2015, the United States Bankruptcy Court for the Northern District of Illinois approved the Financial Crimes Enforcement Network's settlement with Desert Palace, Inc. d/b/a Caesars Palace.⁸⁹ Caesars agreed to pay a large civil money penalty for its willful and repeated violations of the Bank Secrecy Act (BSA) in relation to certain gaming patrons and its failure to comply with the BSA.⁹⁰ In addition, "Caesars agreed to conduct periodic external audits and independent testing of its anti-money laundering (AML) compliance program, report to FinCEN on mandated improvements, adopt a rigorous training regime, and engage in a 'look-back' for suspicious transactions."⁹¹

2. *FinCEN Proposes Anti-Money Laundering (AML) Rules for Investment Advisors*

On August 25, 2015, FinCEN proposed rulemaking that "would address money laundering vulnerabilities in the U.S. financial system" with regards to the investment advisory business.⁹² Presently, FinCEN believes that "illicit actors seeking to access the financial system may attempt to gain such access through an investment adviser as a means to avoid detection of their activity which might otherwise occur in dealings with financial institutions [or regulated companies] that have AML programs and suspicious activity reporting requirements."⁹³ "Requiring investment advisers to also establish AML programs and file reports of suspicious activity would bring them under similar regulations as financial institutions and other companies already subject to the BSA, such as mutual funds, broker-dealers in securities, banks, and insurance companies."⁹⁴ Additionally, "requiring investment advisers to file CTRs [cash transactions reporting forms] and comply with the recordkeeping requirements of the BSA will also deter illicit actors from using [those advisors] as conduits for avoidance of BSA requirements."⁹⁵

89. *FinCEN Issues Assessment after Court Approval of FinCEN's settlement with Desert Palace, Inc. d/b/a Caesars Palace*, FIN. CRIMES ENFORCEMENT NETWORK (Oct. 19, 2015), https://www.fincen.gov/news_room/nr/html/20151106.html.

90. *FinCEN Reaches \$8 Million Settlement with Caesars Palace for Lax Anti-Money Laundering Controls on High Rollers*, FIN. CRIMES ENFORCEMENT NETWORK (Sept. 8, 2015), https://www.fincen.gov/news_room/nr/html/20151106.html.

91. *Id.*

92. *FinCEN Proposes AML Regulations for Investment Advisors*, FIN. CRIMES ENFORCEMENT NETWORK (Aug. 25, 2015), https://www.fincen.gov/news_room/nr/html/20150825.html.

93. *Id.*

94. *Id.*

95. *Id.*

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C. FEDERAL RESERVE (FED) AND FEDERAL DEPOSIT INSURANCE CORPORATION
(FDIC) ITEMS OF INTEREST

1. *Primary United States Financial Agencies Issue Host State Loan-to-Deposit Ratios*

According to a June 29, 2015, press release from the FED:

The Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency issued [the 2015] host state loan-to-deposit ratios that they will use to determine compliance with section 109 of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. These ratios update previously disclosed data released on July 2, 2014.

In general, section 109 of the Act prohibits a bank from establishing or acquiring a branch or branches outside of its home state primarily for the purpose of deposit production. Section 109 also prohibits branches of banks controlled by out-of-state bank holding companies from operating primarily for the purpose of deposit production.

Section 109 provides a process to test compliance with the statutory requirements. The first step in the process involves a loan-to-deposit ratio screen that compares a bank's statewide loan-to-deposit ratio to the host state loan-to-deposit ratio for banks in a particular state.

A second step is conducted if a bank's statewide loan-to-deposit ratio is less than one-half of the published ratio for that state or if data are not available at the bank to conduct the first step. The second step further requires the appropriate agency to determine whether the bank is reasonably helping to meet the credit needs of the communities served by the bank's interstate branches.

A bank that fails both steps is deemed to be in violation of section 109 and is subject to sanctions by the appropriate agency.⁹⁶

2. *Federal Reserve Board Proposes New Rule to Strengthen the Ability of the Largest Domestic and Foreign Banks Operating in the United States to Be "Resolved" Without Extraordinary Government Support or Taxpayer Assistance*

On October 30, 2015, the FED issued a press release:

Federal Reserve Board . . . proposed a new rule that would strengthen the ability of the largest domestic and foreign banks operating in the United States to be resolved without extraordinary government support or taxpayer assistance.

The proposed rule would apply to domestic firms identified by the Board as global systemically important banks (GSIBs) and to the U.S. operations of foreign GSIBs. These institutions would be required to meet a new long-term debt requirement and

⁹⁶ Press Release, Fed. Sys. Bd. of Governors, Agencies Issue Host State Loan-to-Deposit Ratios (June 29, 2015), <http://www.federalreserve.gov/newsevents/press/bcreg/20150629a.htm>.

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a new “total loss-absorbing capacity,” or TLAC, requirement. The requirements will bolster financial stability by improving the ability of banks covered by the rule to withstand financial stress and failure without imposing losses on taxpayers.⁹⁷

3. *Federal Reserve Board Announced New Transparency for Enhanced Supervision of Large and Complex Banking Organizations*

On November 24, 2015, the FED issued the following in a press release:

The Federal Reserve Board announced . . . that it is implementing several recommendations to enhance the supervision of large and complex banking organizations. The recommendations were developed after an extensive review of Reserve Bank procedures for supporting consistent and sound supervisory decisions as well as methods used by Reserve Banks to resolve differing staff opinions related to the supervision of large and complex firms

Additionally, the review found that some supervisory teams employed sound practices and produced detailed and thorough analysis. However, the review also identified inconsistencies in documentation produced by other supervisory teams and noted instances of inconsistent practices by Reserve Banks.⁹⁸

97. Press Release, Fed. Res. Sys. Bd. of Governors (Oct. 30, 2015), <http://www.federalreserve.gov/newsevents/press/bcreg/20151030a.htm>.

98. Press Release, Fed. Res. Sys. Bd. of Governors (Nov. 24, 2015), <http://www.federalreserve.gov/newsevents/press/bcreg/20151124b.htm>.

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