Title V: REGULATORY RELIEF FOR MAIN STREET AND COMMUNITY FINANCIAL INSTITUTIONS

Mortgage Lending

CHOICE Act 2.0 would provide certain regulatory relief to mortgage lenders by revising the current regulatory framework governing residential mortgage loans. Among these, the bill would provide a safe harbor from consumer "ability to pay" requirements in respect of residential mortgage loans for those loans that are originated by a depository institution and then held in portfolio on the depository institution's balance sheet. By retaining the risk of a loan for its term, the Committee's comprehensive summary notes that a depository institution would have "a powerful incentive to conduct sound underwriting to determine whether the borrower has the ability to repay the loan."

A safe harbor from escrow requirements for creditors having less than $10 billion in consolidated assets would also be created. Additionally, CHOICE Act 2.0 would make certain other modifications to the Truth in Lending Act, including modifying the definition of "mortgage originator" to broaden the exemption from the definition for retailers of manufactured or modular homes, and increasing the APR and dollar amount thresholds for certain transactions to be treated as "high-cost mortgages."

Additional Administrative Changes and Regulatory Relief

CHOICE Act 2.0 would place increased obligations on federal banking agencies regarding all of their future rulemakings. The bill would require that, for all future rulemakings of the OCC, Federal Reserve, FDIC, CFPB and NCUA, such agencies: (i) take into consideration certain factors, including the necessity, appropriateness and impact of applying such rulemaking to covered institutions, (ii) tailor the rulemakings to limit regulatory compliance impact, cost, liability risk and other burdens, (iii) consider the impact of the rulemakings, and (iv) disclose in each rulemaking how the foregoing considerations were applied. The agencies would also be required to submit a report annually to Congress explaining the specific actions taken to comply with this requirement.

CHOICE Act 2.0 also includes a provision that is intended to restrict initiatives similar to the Department of Justice's "Operation Chokepoint" in 2013. The bill would prohibit federal banking agencies from formally or informally requesting or ordering a depository institution to terminate a specific customer account or group of customer accounts or otherwise restrict or discourage the depository institution from entering into or maintaining a banking relationship with such person(s) unless the applicable agency has a material reason, beyond "reputational risk," for doing so. The bill provides examples of "material reasons," including where customers pose a threat to national security or are involved in terrorist financing. Each banking agency would also be required to report annually on all requests for termination of customer accounts.

Well capitalized depository institutions would be permitted to submit a short-form call report for the first and third quarters of each year, rather than submit a full report of condition for every quarter.

An Office of Independent Examination Review would be established within FFIEC, which would be charged with receiving and investigating complaints made by financial institutions regarding examinations, examination practices and reports, and reviewing examination policies and procedures. Financial institutions would also be able to petition the newly established office for review of material supervisory determinations contained in final examination reports, and subsequently petition for judicial review of the Office's decision. Certain revisions to examination procedures are also contemplated by the legislation, including certain standards regarding when a commercial loan may be placed in non-accrual status.

The bill would also increase the asset threshold for institutions to which the Federal Reserve's *Small Bank Holding Company Policy Statement on Assessment of Financial and Managerial Factors* would apply, from $1 billion to $10 billion.

Federal savings associations would be able to elect to be treated as "covered savings associations," having the same rights and privileges as national banks, other than for certain specified purposes, such as governance, change of control, conversion, winding-up, and other purposes determined by the OCC.

The bill would also eliminate requirements for financial institutions to collect certain information regarding credit applications in respect of women-owned, minority-owned and small businesses.

Also included in Title V is an expression of the sense of Congress that consumer reporting agencies should use multi-factor authentication procedures when providing consumers with the information contained in the file about the consumer, as well as a mandate requiring the Secretary of the Treasury to issue a report to Congress on efforts to ensure that legitimate financial transactions along the southern border move globally and freely.

<u>"Valid When Made" Doctrine</u>

CHOICE Act 2.0 would include in each of the Federal Deposit Insurance Act, Home Owners' Loan Act and Federal Credit Union Act, a provision stating that when a loan is valid with respect to its interest rate at the time it is made, that loan shall remain valid irrespective of whether the loan is sold, assigned or transferred to a third party even where state usury laws applicable to the transferee may prohibit the interest rate that was applicable to the loan at the time it was originally made. By codifying the "valid when made" doctrine, this provision of CHOICE Act 2.0 would overturn the Second Circuit's holding to the contrary in *Madden v. Midland Funding, LLC.*

FIRREA

Section 951 of the FIRREA currently provides for civil penalties for violations of certain code sections that "affect" federally insured financial institutions. The relevant conduct includes, but is not limited to, violations of 18 U.S.C. 1341 ("Fraud and Swindles") and 18 U.S.C. 1343 ("Fraud by Wire, Audio or Television") and conspiracy to violate such sections. CHOICE Act 2.0 would strike the requirement that such conduct "affect a federally insured institution," and replace it with the requirement that such conduct be "against a federally insured financial institution or by a federally insured financial institution against an unaffiliated third person." This revision clarifies the circumstances under which banks involved in misconduct may be prosecuted. Certain federal courts have indicated that activity by a federally insured financial institution may be considered to be "affecting a financial institution" regardless of third party effects simply because an action taken by a financial institution affects that same institution. The revised language makes clear when such liability would exist.

The bill also would reduce the subpoena power of the Attorney General under Section 951 of FIRREA. Currently, FIRREA provides the Attorney General with subpoena power to require the attendance of witnesses and the production of documents or materials that the Attorney General deems relevant to an investigation. Under CHOICE Act 2.0, the Attorney General retains the power to summon witnesses and compel the production of relevant documents, but to do so must: (i) seek a court order, offering "specific and articulable facts" showing "reasonable grounds to believe that the information or testimony sought is relevant and material for conducting an investigation," or (ii) either personally, or through no lower than the Deputy Attorney General, issue and sign a subpoena for those materials, which must also be based on "specific and articulable facts" showing "reasonable grounds" to believe that the material sought would be relevant for the investigation. These more exacting standards may limit the investigative powers of federal prosecutors and establish an additional layer of scrutiny into prospective investigations.