CADWALADER

CABINET NEWS

Research and commentary on regulatory and other financial services topics

Boundaries of Banking and Markets

October 2, 2025

Table of Contents:

The European Central Bank Consults on Guidelines for Managing Legacy Non-Performing Exposures

October 2, 2025

By Alix Prentice
Partner | Financial Regulation

The European Central Bank (**ECB**) has issued a consultation on draft **guidelines on the supervisory approach by national competent authorities to coverage of non-performing exposures held by less significant supervised entities**, along with associated **FAQs** (together, the **Guidelines**).

The non-performing exposures (**NPEs**) involved are largely legacy NPEs held by less significant supervised entities (**LSIs**) (ie, banks not subject to direct supervision by the ECB itself), originated prior to 26 April 2019 and falling outside the deduction requirement applicable to NPEs under the Capital Requirements Regulation (**CRR**) that came into force for NPEs originated after that date. These legacy NPEs clearly represent long-term sources of potential future losses as well as restrictions on lending bandwidth. The Guidelines are therefore intended to introduce an additional element of resilience to shore-up against potentially adverse macroeconomic events and associated credit deterioration by aligning deductions for in-scope legacy NPEs with Pillar I requirements. However, unlike CRR requirements (which apply automatically), European regulators will assess this coverage on a case-by-case, individualised basis and repeat this exercise annually.

In order to conduct this assessment, the Guidelines specify the approach individual European regulators should take to obtain detailed data on the coverage of these exposures = this data is to be provided in a standardised template format. Important exceptions to exposures in scope of this exercise include the underlying exposures of traditional or synthetic securitisations, provided that the LSI has achieved either significant risk transfer or followed the full deduction approach.

While comments on the Guidelines are due by 27 October 2025, the resulting common approach to managing LSI NPEs will be phased in between 31 December 2025 and 31 December 2028.

National Bank Preemption Addressed by the First Circuit

October 2, 2025

By Mercedes Kelley Tunstall
Partner | Financial Regulation

The Supreme Court handed down an opinion last year regarding national bank preemption in the case ***Cantero v. Bank of America***, which we wrote about **here**. In that case, which involved a Second Circuit decision regarding a New York state law requiring the payment of interest on mortgage escrow balances, the Court reemphasized the preemption standard established in its ***Barnett Bank of Marion County v. Nelson* opinion**, which was enacted into law by Congress in Dodd-Frank (12 U.S.C. §25b). Specifically, state consumer protection laws should only be preempted "only if" the state law "(i) discriminates against national banks as compared to state banks; or (ii) 'prevents or significantly interferes with the exercise by the national bank of its powers.'"

We all expected that the Second Circuit would have been the first to circle back around to re-hear *Cantero* on remand, but instead, the First Circuit has stepped forward and applied the *Cantero* opinion to "substantively identical" facts, resulting **in an opinion issued on September 22, 2025** that has found that a Rhode Island state law requiring the payment of interest on mortgage escrow balances is **not** preempted by national bank powers.

Before we delve into the *Conti* decision and how useful it should be for the industry (i.e., very useful), we should step back and consider whether this is another "bite" into national bank powers. As a long-time practitioner who has been particularly focused on consumer protection laws in financial services, the *Conti* opinion (and *Cantero* for that matter) does not seem like new news. When Dodd-Frank was passed in 2010, many banks procured detailed opinions from law firms and lawyers like me regarding which state consumer protection laws could still be considered preempted and which could not. Accordingly, in the last fifteen years, the conservative approach has been to value national bank preemption powers so highly that most, if not all, state consumer protection laws should not be deemed to be preempted by a national bank. And, now the courts are beginning to underscore that that conservative approach is the intent of Congress, absent further direction from them on the topic of national bank preemption.

One of the things that is most useful about the First Circuit's opinion in *Conti* is that it has clearly conducted the "practical assessment of the nature and degree of the interference caused by a state law" required by the Supreme Court in *Cantero* and provided a template for how to parse through the several Supreme Court decisions that give greater contour to the national bank preemption question. In particular, *Conti* says that "national banking is subject to local restrictions when Congress has indicated as much, as well as in the absence of such express language." This last point is important because the national bank in question had argued that because the Truth In Lending Act requires payment of mortgage interest on some escrow accounts, but not all, that means that Congress intended that ONLY those escrow accounts should have mortgage interest paid by national banks. And, the First Circuit rejected that argument. Continuing onto another argument made by the national bank in *Conti*, the concept of field preemption was also rejected: "the Supreme Court and Congress have squarely rejected the notion that the National Bank Act 'occup[ies] the field in any area of [s]tate law.'"

Again, from the seat of this practitioner, *Cantero* and *Conti* are not surprising results and national banks, as well as the fintechs doing business with them in particular, are well advised to return to a much more circumspect and careful approach when deeming a consumer protection law to be preempted.

CFTC's Advisory on Exchange-Listed Sports Event Contracts

October 2, 2025

By Peter Y. Malyshev
Partner | Financial Regulation

On September 30, 2025, the Commodity Futures Trading Commission ("***CFTC***") staff issued an **advisory** (the "***Advisory***") in anticipation of the impending government shutdown. However, in essence, the Advisory has very little to do with the preparation for the government shutdown, but instead specifically addresses what CFTC-regulated market participants should consider in connection with "facilitating the trading and clearing of sport-related event contracts for customers, market participants, and clearing members." This guidance is very welcome given that to this date the CFTC has not opined on the topic of listed sports event contracts and a much-anticipated CFTC roundtable on sports event contracts did not take place on February 5, 2025 (see footnote 4 of the Advisory).

Indeed, much has changed since the beginning of this year. Several designated contract markets ("***DCMs***") have listed sports event contracts, derivatives clearing organizations ("***DCO***") are clearing these contracts, and many introducing brokers ("***IBs***") are introducing their customers to futures commission merchants ("***FCMs***") that facilitate the trading in these contracts on DCMs. In just a few months, this market has grown tremendously. All these contracts have been self-certified by the DCMs and not specifically approved by the CFTC.

Not surprisingly, a number of individual State attorneys general ("***AGs***") and Native American Tribes have sued at least one DCO where these contracts are primarily listed, claiming that these are illegal sports gambling contracts offered to their State residents in violation of State gambling laws and that these contracts are not automatically federally preempted under the Commodity Exchange Act ("***CEA***") even though they are listed on federally-registered DCMs. As these cases are making their way through the courts and the appellate process, it is becoming clear that some courts will be more sympathetic to the federal preemption arguments under the CEA, while others to the State sovereignty arguments that these contracts are illegal gambling contracts under individual State laws.

Given this growing uncertainty as to the eventual outcome of State and Federal litigation, the CFTC advised that DCMs, DCOs, FCMs, IBs and the National Futures Association (the "***NFA***") to caution that "State regulatory actions and pending and potential litigation, including enforcement actions, should be accounted for with appropriate contingency planning, disclosures, and risk management procedures" and specifically that these State actions may result in "termination of sports-related event contract positions." The Advisory goes on to state that "FCMs and DCOs should ensure that their customers and clearing members are aware of liquidation or close-out policies and procedures that the FCMs and DCOs may deploy for sports-related event contracts as well as how the FCM or DCO will handle any necessary disposition of customer or clearing member funds and property."

Politically, this Advisory is a very astute move on CFTC's part as it never took any action to either overtly sanction or prohibit sports-related event contracts and now is merely advising market participants of the events that are taking place in State and Federal courts. It appears, however, that the CFTC is becoming more uncomfortable with the blurring of the lines between commodity derivatives contracts and gambling. In fact, to this date the CFTC has not withdrawn its **proposed rulemaking** on gambling that was issued in May 2024, which is indicative that the CFTC is reserving for itself an opportunity to not only regulate, but potentially prohibit a category of event contracts under its Regulation § 40.11 and CEA § 5c(c)(5)(C)(i). Undoubtedly there will be a lot more to come on this topic.

Federal Reserve Announces Update for One Firm's Individual Capital Requirements

October 2, 2025

By Daniel Meade
Partner | Financial Regulation

As we previously **reported**, on August 29, the Federal Reserve Board ("FRB") **announced** the individual capital requirements for all large banks, effective on October 1. This announcement follows the **June announcement** on the results of the supervisory stress test (also known as the Dodd-Frank Act Stress Test or DFAST, as these tests are required by **Section 165** of the Dodd-Frank Act), which assesses whether banks are sufficiently capitalized to absorb losses during a severe recession.

We also noted that one bank was requesting reconsideration of its Stress Capital Buffer or SCB. On Sep. 30, the Federal Reserve **announced** that after that reconsideration, Morgan Stanley's SCB would be reduced from 5.1% to 4.3%, meaning Morgan Stanley's CET1 requirement for this year is 11.8%.

Federal Reserve Governor (and former Vice Chair of Supervision) Michael Barr released a statement along with the FRB's announcement stating "[c]onsistent with my view that the Board should use its inherent authority to set individualized capital requirements when appropriate, I support this modified capital requirement. I look forward to seeing the Board use its authority to adjust capital requirements when they are too low, as well as when they are too high, given the risks posed by individual firms."