Wisconsin Bankers ASSOCIATION

Compliance Journal

Special Focus

Website and Mobile Application Accessibility Under the ADA

Notice 2017-1

Accessibility to Financial institution Services for Customers with Disabilities

Title III of the Americans with Disabilities Act (ADA) requires places of "public accommodation" to allow people full and equal enjoyment of business services, regardless of disability. Financial institutions are places of public accommodation and as a result must comply with Title III of the ADA. The ADA requires more than simply providing customers physical access to a building. Recently, plaintiffs' law firms and disability advocacy groups have been filing lawsuits against places of public accommodation for failing to provide websites and mobile applications that are accessible to customers with disabilities.

Customers with disabilities frequently need websites and mobile applications to comply with certain technological standards in order for these customers to use websites and mobile applications effectively. For example, videos must be captioned properly for customers with hearing impairments, and pictures must have "alt tags" that describe the pictures with text in order to allow screen reader devices to describe the pictures for customers with visual impairments.

The State of the Law Regarding Website Accessibility

The Department of Justice (DOJ) has begun the process of creating regulations on website accessibility under the ADA. The DOJ issued an Advance Notice of Proposed Rulemaking in 2010 and gathered extensive commentary related to website accessibility under both Title II (which covers public entities such as state and local governments) and Title III of the ADA. The DOJ has decided to first issue website accessibility regulations under Title II of the ADA, and then issue regulations under Title III. The DOJ recently solicited additional comments regarding website accessibility under Title II. The comment period ended October 7, 2016, and thus it is likely that website accessibility regulations under Title II will not be available until 2017 at the earliest. The Title II regulations for website accessibility will likely impact the eventual Title III regulations that will apply to financial institutions. The DOJ has stated that proposed website accessibility regulations under Title III are not expected until 2018.

The lack of federal regulations regarding website accessibility for disabled individuals has not stopped lawsuits from being filed. Under existing Title III regulations, a place of public accommodation must "furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities," including communication through the internet. Case law on website accessibility has indicated that places of public accommodation can be liable under the ADA when their websites are not accessible to people with disabilities. A financial institution's website connects users to the institution's physical locations, and thus the institution's website would likely be considered a place of public accommodation given its strong nexus to the financial institution's physical locations. To meet obligations under the ADA, financial institutions must incorporate technology to ensure its websites and mobile applications are accessible to customers with disabilities.

Technological Standards for Web Content Accessibility

Web Content Accessibility Guidelines (WCAG 2.0) have been developed to make web content more accessible to people with disabilities. The DOJ often requires companies to comply with WCAG 2.0 in settlement and consent agreements. Therefore, a financial institution whose website and mobile applications comply with WCAG 2.0 has likely met its website accessibility obligations under the ADA. WCAG 2.0 is also one of the standards that the DOJ has considered using as a basis for eventual federal regulations.

Special Focus

WCAG 2.0 requires, among other things, perceivable content that provides text alternatives for non-text content and provides captions for multimedia. It also requires websites to make all functionality available from merely a keyboard. These guidelines also require websites to have easily readable text and tools that help users correct website accessibility errors. WCAG 2.0 also maximizes compatibility with current and future user tools. For more information on WCAG 2.0 see https://www.w3.org/WAI/intro/wcag.php.

Steps for Compliance with the ADA

Every financial institution should conduct an audit of its websites and mobile applications. WCAG 2.0 should be utilized as a clear standard for ADA compliance. Compliance audits may be conducted by third-party vendors or internally by the institution. However, internal audits will take significant employee time and may not be feasible for institutions with small information technology departments.

Next, financial institutions should work with the third-party vendors that administer the institution's websites and mobile applications. Financial institutions should consider requiring current and future vendors to comply with WCAG 2.0 and should exercise proper management by monitoring vendor compliance with the ADA. If a website is not accessible, the financial institution is liable, not the vendors. Institutions should be aware of this liability when negotiating vendor contracts and should select vendors who are capable of providing compliant websites and mobile applications. With proper diligence, financial institutions can ensure that all of their customers, including those with disabilities, have equal access to the institution's websites and mobile applications.

WBA wishes to thank Attys. Jennifer Mirus and Brian Goodman, Boardman & Clark, llp, for providing this article. ■

Regulatory Spotlight

Agencies Finalize Rules on Expanded Examination Cycles.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC) are jointly adopting as final and without change their interim final rules published in the *Federal Register* on 02/29/2016, that implemented section 83001 of the Fixing America's Surface Transportation Act (FAST Act). Section 83001 of the FAST Act permits FRB, FDIC, and OCC to conduct a full-scope, onsite examination of qualifying insured depository institutions with less than $1 billion in total assets no less than once during each 18-month period. Prior to enactment of the FAST Act, only qualifying insured depository institutions with less than $500 million in total assets were eligible for an 18- month on-site examination cycle. The final rules, like the interim final rules, generally allow well capitalized and well managed institutions with less than $1 billion in total assets to benefit from the extended 18-month examination schedule. Finally, FDIC is integrating its regulations regarding the frequency of safety and soundness examinations for State nonmember banks and State savings associations. The final rule is effective **01/17/2017**. The final rule may be viewed at: https://www.gpo.gov/fdsys/pkg/FR-2016-12-16/pdf/2016-30133.pdf. *Federal Register*, Vol. 81, No. 242, 12/16/2016, 90949-90952.

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Wisconsin Bankers ASSOCIATION

Compliance Journal

Special Focus

FFIEC Revises Uniform Interagency Consumer Compliance Rating System

Notice 2017-2

The Federal Financial Institutions Examination Council (FFIEC) has revised the Uniform Interagency Consumer Compliance Rating System (CC Rating System) to align the rating system with its current risk-based, tailored examination processes. The CC Rating System revisions reflect the regulatory, examination (supervisory), technological, and market changes that have occurred in the years since the original rating system was established in 1980. The revisions to the CC Rating System were not developed to set new or higher supervisory expectations for financial institutions and their adoption will represent no additional regulatory burden. WBA commented on the revisions while in the proposal stage. The revisions are effective **March 31, 2017**. This article provides an overview of the revisions.

The CC Rating System is composed of guidance and definitions. The guidance provides examiners with direction on how to use the definitions when assigning a consumer compliance rating to a financial institution. The definitions consist of qualitative descriptions for each rating category and include compliance management system (CMS) elements reflecting risk control processes designed to manage consumer compliance risk and considerations regarding violations of laws, consumer harm, and the size, complexity, and risk profile of an institution. The consumer compliance rating reflects the effectiveness of an institution's CMS to ensure compliance with consumer protection laws and regulations and reduce the risk of harm to consumers.

Principles of the CC Rating System

FFIEC developed the following four principles to serve as a foundation for creation of the CC Rating System.

1. Risk-based: recognize and communicate clearly that CMS vary based on the size, complexity, and risk profile of supervised institutions.
2. Transparent: provide clear distinctions between rating categories to support consistent application by the Agencies across supervised institutions. Reflect the scope of the review that formed the basis of the overall rating.
3. Actionable: identify areas of strength and direct appropriate attention to specific areas of weakness, reflecting a risk-based supervisory approach. Convey examiners' assessment of the effectiveness of an institution's CMS, including its ability to prevent consumer harm and ensure compliance with consumer protection laws and regulations.
4. Incent Compliance: incent the institution to establish an effective consumer compliance system across the institution and to identify and address issues promptly, including self-identification and correction of consumer compliance weaknesses. Reflect the potential impact of any consumer harm identified in examination findings.

Rating Scale

The CC Rating System is based upon a numeric scale of 1 through 5 in increasing order of supervisory concern. Thus, 1 represents the highest rating and consequently the lowest degree of supervisory concern, while 5 represents the lowest rating and the most critically deficient level of performance, and therefore, the highest degree of supervisory concern. The following represents the classification of each level in the CC Rating System's numeric scale:

1. A rating of 1 is assigned to a financial institution that maintains a strong CMS and takes action to prevent violations of law and consumer harm.
2. A rating of 2 is assigned to a financial institution that maintains a CMS that is satisfactory at managing consumer compliance risk in the institution's products and services and at substantially limiting violations of law and consumer harm.

3. A rating of 3 reflects a CMS deficient at managing consumer compliance risk in the institution's products and services and at limiting violations of law and consumer harm.

4. A rating of 4 reflects a CMS seriously deficient at managing consumer compliance risk in the institution's products and services and/or at preventing violations of law and consumer harm. "Seriously deficient" indicates fundamental and persistent weaknesses in crucial CMS elements and severe inadequacies in core compliance areas necessary to operate within the scope of statutory and regulatory consumer protection requirements and to prevent consumer harm.

5. A rating of 5 reflects a CMS critically deficient at managing consumer compliance risk in the institution's products and services and/or at preventing violations of law and consumer harm. "Critically deficient" indicates an absence of crucial CMS elements and a demonstrated lack of willingness or capability to take the appropriate steps necessary to operate within the scope of statutory and regulatory consumer protection requirements and to prevent consumer harm.

Rating Categories and Assessment Factors

The CC Rating System is organized under three categories, each with a set of four assessment factors. The first two categories, Board and Management Oversight and Compliance Program, are used to assess a financial institution's CMS. Examiners evaluate the assessment factors within those two categories commensurate with the institution's size, complexity, and risk profile. Meaning, while all financial institutions should maintain an effective CMS, the sophistication and formality of the CMS typically will increase commensurate with the size, complexity, and risk profile of the entity. Additionally, compliance expectations contained within the narrative descriptions of those two categories extend to third-party relationships into which the financial institution has entered. Examiners evaluate activities conducted through third-party relationships as though the activities were performed by the institution itself. Thus, examiners will review a financial institution's management of third-party relationships and servicers as part of its overall compliance program.

The third category, Violations of Law and Consumer Harm, includes assessment factors that evaluate the dimensions of any identified violation or consumer harm. Examiners weigh each of these four factors – root cause, severity, duration, and pervasiveness – in evaluating relevant violations of law and any resulting consumer harm. These categories and corresponding assessment factors are discussed more specifically below.

1. Board and Management Oversight. The examiner should assess the financial institution's board of directors and management, as appropriate for their respective roles and responsibilities, based on the following assessment factors:

   i. Oversight of and commitment to the institution's CMS;

   ii. Effectiveness of the institution's change management processes, including responding timely and satisfactorily to any variety of change, internal or external, to the institution;

   iii. Comprehension, identification, and management of risks arising from the institution's products, services, or activities; and

   iv. Self-identification of consumer compliance issues and corrective action undertaken as such issues are identified.

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2. Compliance Program. The examiner should assess other elements of an effective CMS, based on the following assessment factors:

   i. Whether the institution's policies and procedures are appropriate to the risk in the products, services, and activities of the institution;

   ii. The degree to which compliance training is current and tailored to risk and staff responsibilities;

   iii. The sufficiency of the monitoring and, if applicable, audit to encompass compliance risks throughout the institution; and

   iv. The responsiveness and effectiveness of the consumer complaint resolution process.

3. Violations of Law and Consumer Harm. As a result of a violation of law, consumer harm may occur. While many instances of consumer harm can be quantified as a dollar amount associated with financial loss, such as charging higher fees for a product than was initially disclosed, consumer harm may also result from a denial of an opportunity. For example, a consumer could be harmed when a financial institution denies the consumer credit or discourages an application in violation of the Equal Credit Opportunity Act, whether or not there is resulting financial harm. Examiners should analyze the following assessment factors:

   i. The root cause, or causes, of any violations of law identified during the examination;

   - The Root Cause assessment factor analyzes the degree to which weaknesses in the CMS gave rise to the violations. In many instances, the root cause of a violation is tied to a weakness in one or more elements of the CMS. Violations that result from critical deficiencies in the CMS evidence a critical absence of management oversight and are of the highest supervisory concern.

   ii. The severity of any consumer harm resulting from violations;

   - The Severity assessment factor of the Consumer Compliance Rating Definitions weighs the type of consumer harm, if any, that resulted from violations of law. More severe harm results in a higher level of supervisory concern under this factor. For example, some consumer protection violations may cause significant financial harm to a consumer, while other violations may cause negligible harm, based on the specific facts involved.

   iii. The duration of time over which the violations occurred;

   - The Duration assessment factor considers the length of time over which the violations occurred. Violations that persist over an extended period of time will raise greater supervisory concerns than violations that occur for only a brief period of time. When violations are brought to the attention of an institution's management and management allows those violations to remain unaddressed, such violations are of the highest supervisory concern.

   iv. The pervasiveness of the violations.

   - The Pervasiveness assessment factor evaluates the extent of the violation(s) and resulting consumer harm, if any. Violations that affect a large number of consumers will raise greater supervisory concern than violations that impact a limited number of consumers. If violations become so pervasive that they are considered to be widespread or present in multiple products or services, the institution's performance under this factor is of the highest supervisory concern.

Self-Identification of Violations of Law and Consumer Harm

The CC Rating System requires proactive, preventative, self-identifying, and corrective practices to achieve a 1 rating. FFIEC believes that self-identification and prompt correction of violations of law reflect strengths in an institution's CMS. The CC Rating System contemplates a strong compliance program as one that will prevent violations, facilitate early detection and prompt correction, including correction of programmatic weaknesses and full redress for injured parties to limit consumer harm and prevent future violations.

Evaluating Performance Using the CC Rating Definitions

The consumer compliance rating is derived through an evaluation of a financial institution's performance under each of the assessment factors described above. It is not based on a numeric average or any other quantitative calculation. Specific numeric ratings will not be assigned to any of the 12 assessment factors. Thus, an institution need not achieve a satisfactory assessment in all categories in order to be assigned an overall satisfactory rating. Conversely, an institution may be assigned a less than satisfactory rating even if some of its assessments were satisfactory. The relative importance of each category or assessment factor may differ based on the size, complexity, and risk profile of an individual institution. Accordingly, one or more category or assessment factor may be more or less relevant at one financial institution as compared to another institution, While the expectations for compliance with consumer protection laws and regulations are the same across institutions of varying sizes, the methods for accomplishing an effective CMS may differ across institutions.

In arriving at the final rating, examiners will balance potentially differing conclusions about the effectiveness of the financial institution's CMS over the individual products, services, and activities of the organization. Depending on the relative materiality of a product line to the institution, an observed weakness in the management of that product line may or may not impact the conclusion about the institution's overall performance in the associated assessment factor(s). For example, serious weaknesses in the policies and procedures or audit program of the mortgage department at a mortgage lender would be of greater supervisory concern than those same gaps at an institution that makes very few mortgage loans and strictly as an accommodation. Greater weight should apply to the financial institution's management of material products with significant potential consumer compliance risk.

An institution may receive a less than satisfactory rating even when no violations were identified, based on deficiencies or weaknesses identified in the institution's CMS. For example, examiners may identify weaknesses in elements of the CMS in a new loan product. Because the presence of those weaknesses left unaddressed could result in future violations of law and consumer harm, the CMS deficiencies could impact the overall consumer compliance rating, even if no violations were identified.

Similarly, an institution may receive a 1 or 2 rating even when violations were present, if the CMS is commensurate with the risk profile and complexity of the institution. For example, when violations involve limited impact on consumers, were self-identified, and resolved promptly, the evaluation may result in a 1 or 2 rating. After evaluating the institution's performance in the two CMS categories, Board and Management Oversight, and Compliance Program, and the severity dimensions of the Violations of Law and Consumer Harm category, the examiner may conclude that the overall strength of the CMS and the nature of observed violations viewed together do not present significant supervisory concerns.

Assignment of Ratings by Prudential Regulators, CFPB, and State Regulators

The prudential regulators will continue to assign and update, as appropriate, consumer compliance ratings for institutions they supervise, including those with total assets of more than $10 billion. As a member of the FFIEC, the Consumer Protection Financial Bureau (CFPB) will also use the CC Rating System to assign a consumer compliance rating, as appropriate, for institutions with total assets of more than $10 billion. The prudential regulators will take into consideration any material supervisory information provided by the CFPB, as that information relates to covered supervisory activities or covered examinations. Similarly, the CFPB will take into consideration any material supervisory information provided by prudential regulators in appropriate supervisory situations.

State regulators maintain supervisory authority to conduct examinations of state chartered depository institutions and licensed entities. As such, states may assign consumer compliance ratings to evaluate compliance with both state and federal laws and regulations. FFIEC expects States will collaborate and consider material supervisory information from other state and federal regulatory agencies during the course of examinations.

Conclusion

The Consumer Compliance Rating System is a supervisory policy for evaluating financial institutions' adherence to consumer compliance requirements. The revisions are designed to reflect FFIEC's current consumer compliance supervisory approaches and thus, do not present any additional regulatory burden. The revisions acknowledge that compliance management programs vary based on the size, complexity, and risk profile of supervised institutions. The new rating system also establishes incentives for institutions to promote consumer protection by preventing, self-identifying, and addressing compliance issues in a proactive manner. Additional information may be found in the final guidance at: https://www.gpo.gov/fdsys/pkg/FR-2016-11-14/pdf/2016-27226.pdf. ■

Wisconsin Bankers ASSOCIATION

Compliance Journal

Special Focus

Payable on Death Accounts in Wisconsin

Notice 2017-3

Chapter 705 of the Wisconsin Statutes governs Payable on Death (P.O.D.) accounts. A P.O.D. account is an account payable on request to one person during lifetime and on the person's death to one or more P.O.D. beneficiaries, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. beneficiaries. It includes an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. It includes a marital account for which a party named one or more P.O.D. beneficiaries for that party's interest; however, marital P.O.D. accounts are not discussed in this article.

Only natural persons can hold P.O.D. accounts. Deposit accounts held by certain trusts and business entities are not governed by chapter 705; therefore, a P.O.D. designation may not be made on such accounts. In fact, Wis. Stat. §705.01(1) specifically excludes the following from being defined as an "account": contracts established for the deposit of funds of a partnership, joint venture, or other association for business purposes, accounts controlled by one or more persons as the duly authorized agents or trustees for a corporation, limited liability company, unincorporated association, or charitable or civic organization, or regular fiduciary or trust accounts where the relationship is established other than by deposit agreement. However, a P.O.D. designation is permitted on a sole proprietor deposit account. Legally, a sole proprietorship is inseparable from the individual. That is, a sole proprietor account is an account held by an individual in his or her individual capacity even though the account is used for business purpose.

Creation of P.O.D. Account

Wis. Stat. §705.02 states the way one may create a P.O.D. account. P.O.D. accounts with a **single party** are created with the following language: THIS ACCOUNT/ CERTIFICATE OF DEPOSIT IS OWNED BY THE PARTY NAMED HEREON. UPON THE DEATH OF SUCH PARTY, OWNERSHIP PASSES TO THE P.O.D. BENEFICIARY(IES) NAMED HEREON.

P.O.D. accounts with **multiple parties** are created with the following language: THIS ACCOUNT/ CERTIFICATE OF DEPOSIT IS JOINTLY OWNED BY THE PARTIES NAMED HEREON. UPON THE DEATH OF ANY OF THEM, OWNERSHIP PASSES TO THE SURVIVOR(S). UPON THE DEATHS OF ALL OF SUCH PARTIES, OWNERSHIP PASSES TO THE P.O.D. BENEFICIARY(IES) NAMED HEREON.

Note the applicable language, stated above, creates a P.O.D. account when it is contained in a signature card, passbook, contract, or instrument evidencing an account, and is conspicuously printed or typewritten immediately above or adjacent to the place for the signatures of the parties to the account. WBA forms users will find the stated language within the WBA P.O.D. forms. If your institution is not a WBA forms user, consult with your forms vendor regarding the mentioned language.

Right of Survivorship

By a P.O.D. account's nature, institutions will eventually be tasked with paying beneficiaries upon the accountholder's death. While some situations will be straightforward, some will be more complex. Wis. Stat. §705.04(2) governs the right of survivorship. If there is one P.O.D. beneficiary and he/she survives the accountholder, the beneficiary is entitled to payment of all sums remaining on deposit. If there are 2 or more P.O.D. beneficiaries and they all survive, they are entitled to payment of the sums on deposit in accordance with any written instructions that the owner filed with the financial institution or, if the owner left no written instructions, to payment in equal shares. However, if 2 or more persons succeed to ownership of the account, there is no further right of survivorship unless the terms of the account expressly provide for survivorship or for the account's continuance as a joint account.

Subject to the rights of financial institutions under Wis. Stat. §705.06(1)(c), which will be discussed below, if any P.O.D. beneficiary predeceases the original payee (accountholder) or the survivor of 2 or more original payees, the amount to which the predeceased P.O.D. beneficiary would have been entitled passes to any of his or her issue (children, grandchildren, etc.) who would take under the Transfers at Death statute, Wis. Stat. § 854.06 (3). If there are no P.O.D. beneficiaries or predeceased P.O.D. beneficiary's issue, who would take under Wis. Stat. §854.06(3), the account belongs to the estate of the deceased sole owner or the estate of the last to die of multiple owners.

Protection of Financial Institutions

In accordance with the terms of an account, the Wisconsin Statutes gives financial institutions certain protections under Wis. Stat. §705.06. Specifically, Wis. Stat. §705.06(1)(c) allows financial institutions to pay sums on deposit in a P.O.D. account, on request, to the P.O.D. beneficiary upon presentation of proof of death, typically a certified death certificate, showing that the P.O.D. beneficiary survived all persons named as original payees of the account. Additionally, the protections afforded under Wis. Stat. §705.06 shields the institution from claims made by other individuals, identified in a will or other legally valid document.

If more than one P.O.D. beneficiary is named and at least one of them is predeceased, sums in the account may be paid to the surviving P.O.D. beneficiary or beneficiaries upon presentation of proof of death of the other beneficiary, without regard to claims by the issue of a predeceased beneficiary under Wis. Stat. §705.04(2)(d). As an example: John names Mary and Kate as beneficiaries of the account. Mary and Kate can take in equal shares, upon John's death. However, now assume that Mary died before John, and Mary's son, Don, has a claim to Mary's share of the P.O.D. account funds under Wis. Stat. §705.04(2)(d). In this situation, Wis. Stat. §705.06(1)(c) protects the institution when, upon John's death, it exclusively pays the P.O.D. account funds to Kate, the surviving beneficiary, after Kate has given the institution proof of Mary's death.

Following the previous example, the situation could get complex if Mary and Kate both died before the accountholder. In such situations, Wis. Stat. §705.06(1)(c) allows the institution to pay the sums in the account to the estate of the deceased sole owner or the estate of the owner who was the last to die of multiple owners, without regard to claims by the issue of a predeceased beneficiary. This removes the institution from being involved in the potential familial disputes that these situations often cause.

Frequently Asked Questions

P.O.D. accounts can result in a variety of situations and may lead to a diverse set of questions. Below, please find the answers to common questions related to P.O.D. accounts.

Q1: Can a checking account that already has a P.O.D. listed also name a successor P.O.D.?

A1: No. In Wisconsin Bankers Association's view, Wisconsin law does not permit the naming of contingent beneficiaries on accounts governed by subchapter 1 of Chapter 705 (e.g. most standard checking, savings, and CD accounts). The P.O.D. statute specifies who is entitled to payment on a P.O.D. account on the death of the last surviving accountholder. Under the first of two options, the funds are paid to the beneficiaries who survive the death of the last accountholder. If none of the beneficiaries survive, the funds are paid to the estate of the last accountholder who died. This option is outlined in Wis. Stat. §705.06(1)(c).

Q2: What if the Beneficiary is a minor?

A2: Wisconsin law requires payment of a P.O.D. account to a minor beneficiary to be made in accordance with provisions found in Chapter 54 of the Wisconsin Statutes. Chapter 54 includes Wisconsin's Uniform Transfer to Minors Act accounts (WUTMA) and guardianship provisions. This is required under Wis. Stat. §705.04(2)(f).

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Q3: Can a P.O.D. beneficiary transact on an account during the lifetime of the accountholder?

A3: No. As the name states, payable on death, the beneficiary receives the funds upon proof of the accountholder's death. The beneficiary has no right to conduct transactions on that account.

Q4: Is my LLC allowed to designate a P.O.D. beneficiary? What if my LLC is a "disregarded entity"?

A4: No. Only natural person depositors can establish P.O.D. accounts. Though an LLC may be treated as a "disregarded entity" for tax purposes, an LLC is still a non-natural depositor and therefore cannot establish a P.O.D. account.

Q5: Can an individual designate a P.O.D. beneficiary to a safe deposit box?

A5: A P.O.D. beneficiary cannot be designated for a safe deposit box. Safe deposit boxes are not an account, as defined under Wis. Stat. §705.01(1). Additionally, a safe deposit box lease is a contract for access to the box and does not confer ownership in the items placed in the box.

Q6: Can P.O.D. accounts be categorized as revocable trust accounts for FDIC insurance coverage purposes.

A6: Yes. In addition to other requirements, FDIC requires that the intention to pay funds to one or more beneficiaries, upon the owner's death, be manifested in the title of the account. The intent must be manifested in the title of the account by using commonly accepted terms such as, but not limited to, "in trust for," "as trustee for," "payable-on-death to," or any acronym, such as Wisconsin's use of P.O.D. In its definition of "title," FDIC includes the electronic deposit account records of the institution. That is, the FDIC would recognize an account as a revocable trust account even if the title of the account on the signature card does not designate the account as a revocable trust account, if the institution's electronic deposit account records identify (through a code or otherwise) the account as a revocable trust account. For more information, please see 12 C.F.R. §330.10(b) of FDIC's regulations.

Q7: Where can I find information about P.O.D. accounts?

A7: Chapter 705 of the Wisconsin Statutes is the primary source for P.O.D. inquires. As a resource to its members, Wisconsin Bankers Association's legal department provides information related to banking laws and regulations. Please email wbalegal@wisbank.com or call (608)441-1200. ■

Regulatory Spotlight

Agencies Request Comment on Risk-Based Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework.

The Board of Governors of the Federal Reserve System (FRB), Department of the Treasury (Treasury), Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) have issued a notice to announce they are seeking comment on the information collection titled Risk-Based Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework. The agencies are also giving notice that they have sent the collection to OMB for review. Comments are due **05/01/2017**. The notice may be viewed at: https://www.gpo.gov/fdsys/pkg/FR-2017-03-01/pdf/2017-03943.pdf. *Federal Register*, Vol. 82, No. 39, 03/01/2017, 12274-12276.

CFPB Requests Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process.

The Consumer Financial Protection Bureau (CFPB) has issued a notice seeking information about the use or potential use of alternative data and modeling techniques in the credit process. CFPB seeks to learn more about current and future market developments, including existing and emerging consumer benefits and risks, and how these developments could alter the marketplace and the consumer experience. CFPB also seeks to learn how market participants are or could be mitigating certain risks to consumers, and about consumer preferences, views, and concerns. Comments are due **05/19/2017**. The notice may be viewed at: https://www.gpo.gov/fdsys/pkg/FR-2017-02-21/pdf/2017-03361.pdf. *Federal Register*, Vol. 82, No. 33, 02/21/2017, 11183-11191.

Wisconsin Bankers ASSOCIATION
Compliance Journal
Special Focus

A Financial Institution's Guide to Wisconsin's Uniform Transfers to Minors Act.

Notice 2017-4

The Wisconsin Uniform Transfers to Minors Act is set forth in chapter 54 of the Wisconsin Statutes. Specifically, Wis. Stats. § 54.854 - 54.898. Collectively, these provisions govern Wisconsin's Uniform Transfers to Minors Act accounts (WUTMA accounts). WUTMA accounts enable financial institutions to open accounts, with a custodian, to hold funds gifted or otherwise transferred to a minor, for the benefit of a minor.

Creating a WUTMA Account

Wis. Stat. § 54.870 outlines the manner of creating custodial property and effecting transfer, the designation of an initial custodian, and control of a WUTMA account. An instrument in the following form creates and transfers custodial property:

I, ... (name of transferor or name and representative capacity if a fiduciary) hereby transfer to .... (name of custodian), as custodian for .... (name of minor) under the Wisconsin Uniform Transfers to Minors Act, the following: .... (insert a description of the custodial property sufficient to identify it).

Dated: ....

....

(Signature)

.... (name of custodian) acknowledges receipt of the property described above, as custodian for the minor named above under the Wisconsin Uniform Transfers to Minors Act.

Dated: ....

....

(Signature of Custodian)

In establishing a WUTMA account a financial institution is contracting with a custodian, who has the right to receive the property for the minor beneficiary. A transferor, as defined in Wis. Stat. § 54.854(14), may revocably nominate a custodian to receive the property for a minor by naming the custodian, followed in substance by the words: "as custodian for .... (name of minor) under the Wisconsin Uniform Transfers to Minors Act." The nomination may name one or more persons as substitute custodians to whom the property must be transferred, in the order named, if the first nominated custodian dies before the transfer or is unable, declines or is ineligible to serve. The nomination may be made in a will, a trust, a deed, an instrument exercising a power of appointment or a writing designating a beneficiary of contractual rights which is registered with or delivered to the payor, issuer or other obligor of the contractual rights. Wis. Stat. § 54.858(1).

The nomination of a custodian under this section does not create custodial property until the nominating instrument becomes irrevocable or a transfer to the nominated custodian is completed under Wis. Stat. § 54.870. Upon the creation of custodial property or the transfer to the nominated custodian is complete, the custodian has management and control of the WUTMA account.

Protection of Financial Institutions

While the WUTMA statutes outline the various powers and duties of a custodian, financial institutions are protected from liability, when certain criteria are met. Wis. Stat. § 54.884 outlines the exemption of third parties from liability. It provides that a 3rd person, in good faith and without court order, may act on the instructions of or otherwise deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian and, in the absence of knowledge, is not responsible for determining any of the following: (1) The validity of the purported custodian's designation; (2) The propriety of, or the authority under the Uniform Transfer to Minors Act for, any act of the purported custodian; (3) The validity or propriety under Uniform Transfer to Minors Act of any instrument or instructions executed or given either by the person purporting to make a transfer or by the purported custodian; (4) The propriety of the application of any property of the minor delivered to the purported custodian.

Selected Relevant WUTMA Provisions

Overall, the WUTMA statutes outline the intricacies of WUTMA accounts. Some provisions within chapter 54 have a direct impact on financial institutions and implicitly dictate how financial institutions should handle WUTMA accounts. Below, find examples of how some of these provisions impact financial institutions.

1. Wis. Stat. § 54.860 states: A person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor under Wis. Stat. § 54.870. This provision highlights an important characteristic of a WUTMA account that financial institutions must be aware of. That is, the custodian, not the minor, is with whom the financial institution is contracting. While the property technically belongs to the minor, it is in the control of the custodian for the benefit of the minor. So, an institution should carefully consider whether to give information to an inquiring minor. It may be best for a minor to discuss balances with the custodian. If a minor believes funds are being used inappropriately, the minor could petition the court.

2. The termination of a WUTMA custodianship depends upon the type of gift or transfer made to the custodian for the benefit of the minor. Wis. Stat. §54.892 states that the custodian must transfer, in an appropriate manner, the custodial property to the minor or the minor's estate upon the earlier of: (1) the minor's attainment of 21 years of age with respect to property transferred by gift under 54. 860, or under a provision in a will or trust under 54.862; (2) the minor's attainment of 18 years of age for property transferred by certain other fiduciaries under 54.864 or obligors under 54.866; or (3) upon the minor's death. While most WUTMA custodianships will terminate upon the minor reaching the age of 21, it is up to the custodian rather than the institution to make this determination. Regardless of his or her age, if the named minor on a WUTMA account asserts that he or she is entitled to access funds on deposit, the named minor should be directed to the custodian to discuss this matter, or to the court if named minor believes that the custodian is acting improperly.

3. Wis. Stat. § 54.892 states that upon a minor's death, the custodian shall transfer, in an appropriate manner, the custodial property to the minor's estate. Such a provision means that Payable on Death beneficiary designations are not allowed on WUTMA accounts.

Questions and Answers

As WUTMA accounts have unique qualities, it is understandable that such accounts may lead to questions about how WUTMA accounts may impact decisions at your financial institution. Below, please find common questions from financial institutions regarding WUTMA accounts.

Q1: Can a minor deposit their paycheck in a WUTMA account?

A1: No. A minor's paycheck should not be deposited in a WUTMA account, as it does not constitute a gift or transfer. Only funds that are gifts or transfers may be deposited to a WUTMA accounts.

Additionally, the WUTMA account is managed and controlled by the custodian. Consequently, the minor will not have access to the deposited funds. Allowing a minor to deposit non-WUTMA funds in to a WUTMA account may lead to unnecessary disputes and complaints.

Q2: If a minor cannot deposit their paychecks in a WUTMA account, what account should my financial institution open?

A2: While an institution is generally free to contract with whomever it wishes, a risk in contracting with a minor alone is that a minor can void most contracts into which they have entered, by raising a defense of incapacity to contract based upon their age. Thus, if an individual account is opened with only the minor, and the minor raises this

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defense, the bank would not be able to recoup, for example, any fees or charges, etc., assessed to the account. To avoid this situation, an institution should consider requiring a joint account, with joint and several liability, be opened between the minor and a parent, guardian or other individual who has reached the age of majority. If the minor raises the defense, in this type of account, the contract will remain valid with respect to the remaining party, and such party will still be liable for all fees and charges assessed on the account even if such fees and charges are attributable to the minor's activity on the account. Of course, an institution may also wish to consult with its own legal counsel regarding the risks and benefits of other accounts the institution may offer.

Q3: If a custodian dies but did not appoint a successor custodian, does a parent automatically become the new custodian?

A3: No. As stated in Wis. Stat. § 54.888(4), if a custodian is ineligible, dies or becomes incapacitated without having effectively designated a successor and the minor has attained the age of 14 years, the minor may designate as successor custodian, an adult member of the minor's family, a conservator of the minor, as defined in Wis. Stat. § 54.01(3), or a trust company. If the minor has not attained the age of 14 years or fails to act within 60 days after the ineligibility, death or incapacity, the conservator of the minor becomes successor custodian. If the minor has no conservator or the conservator declines to act, the transferor, the legal representative of the transferor or the custodian, an adult member of the minor's family or any other interested person may petition the court to designate a successor custodian.

So, a minor, who has reached the age of 14, may designate a new custodian, within 60 days, by executing and dating an instrument of designation before a subscribing witness other than the successor. If beyond 60 days, the minor's parent, or other person, as noted above, may petition the court to become the custodian. However, a parent does not automatically become the custodian, nor has the right to transact on a WUTMA account.

If the custodian had designated a successor custodian, at the time the custodian opened the WUTMA account, for instance, this type of issue could have been avoided.

Q4: What if a custodian wants to close out a WUTMA account with my financial institution? Do I write the check to the custodian? Do I write the check to the beneficiary?

A4: As the funds are still subject to the WUTMA provisions, it is best practice to write the check to [name of minor] by [name of adult custodian] under WUTMA. In using this language, another financial institution will know that the funds are subject to WUTMA and can accurately identify the minor beneficiary and the adult custodian.

As a resource to its members, Wisconsin Bankers Association's legal department provides information related to banking laws and regulations. For specific questions regarding WUTMA accounts, please email wbalegal@wisbank.com or call (608) 441-1200. ■

Wisconsin Supreme Court Enforces Jury Waiver Provision In Commercial Loan Note

In a recent case, the Wisconsin Supreme Court held that a jury waiver provision in a commercial loan note is enforceable against the borrower under Wisconsin law. According to the Supreme Court, the right of a person to waive his or her right to a jury trial is settled law under the Wisconsin Constitution. The Supreme Court also held that the bank does not need to provide proof in the case that the borrower knowingly and voluntarily agreed to the jury waiver provision. The borrowers were seeking a jury trial in the case, and the bank took the position that the borrowers waived their right to a jury trial pursuant to the jury waiver provision in the note. The name of the case is Taft Parsons, Jr. v. Associated Banc-Corp (2017 WI 37) and the decision was released by the Court on April 13, 2017. The WBA filed a legal brief in the case in support of Associated Banc-Corp and approval of the jury waiver provision.

This decision by the Supreme Court states a clear approval of a practice followed by some banks in Wisconsin of including jury waiver provisions in notes and other loan documents in commercial loan transactions. This decision provides reassurance to those banks which choose to include jury waiver provisions in their commercial loan documents, including the

Wisconsin Bankers ASSOCIATION
Compliance Journal
Special Focus

UDAAP: Wading Through Murky Waters

The threat of unintentionally engaging in an unfair, deceptive, or abusive act or practice (UDAAP) is enough to keep a diligent banker up at night. UDAAP violations are rightfully scary – UDAAP is broad and subjective, lacks in concrete guidance, and presents a serious reputational risk to a bank. Since the passage of the Dodd-Frank Act which granted the Bureau of Consumer Financial Protection (CFPB) new UDAAP authority, UDAAP has become a hot topic and growing concern in the banking industry. Though we would all benefit from further delineation of UDAAP, the regulatory guidance, along with recent enforcement actions and litigation, as described below, provide some direction to bankers seeking to successfully manage UDAAP risk.

By way of background, the Dodd-Frank Act prohibits banks and others from engaging in unfair, deceptive, or abusive acts or practices. In addition, Section 5 of the FTC Act prohibits banks and other persons from engaging in unfair or deceptive acts or practices. As you can see, the Dodd-Frank Act broadened the scope of the FTC Act by adding the term "abusive." Banks, whether federally- or state-chartered, are subject to both prohibitions.

Such prohibitions broadly cover all acts and practices in banking – from advertising to debt collection, consumer to business credit transactions, along with add-on products and third-party vendor relationships, to name a few. Thus, bankers should frequently question whether their actions, or those of a vendor, could amount to a violation of UDAAP.

So, what does amount to a UDAAP violation and what should bankers consider when examining their bank's acts and practices? Bankers should consider the following guidance issued by the banking regulatory agencies when evaluating an act or practice in the context of UDAAP:

Is the act or practice UNFAIR? An act or practice is unfair when:

It is likely to cause substantial injury to consumers;

Substantial injury may include a larger harm to one consumer or a small amount of harm to a large number of people. Typically, the injury involves monetary harm, though in certain circumstances, such as debt collection harassment, emotional harm could amount to substantial injury.

The injury is not reasonably avoidable by consumers; and

In other words, the consumer could not avoid the injury by taking actions that are practical and not unreasonably expensive. A consumer cannot reasonably avoid an injury if the act/practice interferes with or hinders their decision-making ability, like if material information about a product is withheld until after the consumer purchases a product, for instance.

The injury is not outweighed by countervailing benefits to consumers or to competition.

Such countervailing benefits may include, for example, lower prices or a wider availability of products/services. This was demonstrated in a 2016 CFPB enforcement action which found a bank's practice unfair wherein the bank advertised and charged customers for credit monitoring services that were not provided due to the bank's failure to receive proper customer authorization. Just two years earlier, the FDIC, along with the CFPB and the OCC, took enforcement action against a bank for similar practices, costing the bank over $50 million in civil money penalties and restitution.

Is the act or practice DECEPTIVE? A representation, omission, act or practice is deceptive when:

It misleads or is likely to mislead the consumer;

The FTC's "Four P's" Test provides guidance to determine if an action or omission is misleading:

1. Is the statement prominent enough for the consumer to notice it?
2. Is the information presented in an easy-to-understand format that is not contradicted elsewhere? Is information presented at a time when the customer is not distracted?
3. Is the information placed in a location where consumers are expected to look/hear?
4. Is the information in close proximity to the claim it qualifies?

Furthermore, misleading information may include an express or implied claim or promise (written or oral). Some examples of misleading information include: misleading cost or price claims, offering products or services that are unavailable, or omitting material limitations or conditions from an offer. To illustrate, in June 2014, FDIC took enforcement action against a bank for understating available interest rates on deposit-secured loans.

The consumer's interpretation of or reaction to the representation, omission, act or practice is reasonable under the circumstances; and

Banks should consider whether a reasonable member of the target audience would feel misled (e.g. if marketing is targeted to college students, the communication must be examined from the perspective of a reasonable college student).

The misleading representation, omission, act or practice is material.

Among others, the central characteristics of a product/service are presumed material: cost, benefits, and restrictions on use or availability. Outside of defined presumptions, a bank should look to whether the consumer's choice of, or conduct regarding, a product or service is impacted.

To demonstrate, CFPB took enforcement action against Santander Bank who, through its vendor, misled consumers into opting into overdraft services by misrepresenting the fees associated with opting in and the consequences of not opting-into the service, among others.

Additionally, the banking regulatory agencies settled an enforcement action in 2014 where the bank's efforts to market free checking accounts misled consumers, as the marketing did not properly disclose the minimum account activity required nor did it disclose the fact that the account would convert to a monthly-fee checking account after 90 days of inactivity.

Is the act or practice ABUSIVE? An abusive act or practice:

Materially interferes with the consumer's ability to understand a term or condition of a product or service; or

Unreasonably takes advantage of:

- a consumer's lack of understanding of the material risks, costs, or conditions of the product or service;
- a consumer's inability to protect his/her own interests in selecting or using a product or service; or
- a consumer's reliance on the Bank (or a representative of the Bank) to act in the consumer's interest.

A recent example of an abusive practice is the deceptive marketing of reverse mortgages to elderly populations.

Additional examples of recent UDAAP enforcement actions and litigation trends include:

- Refusing to release a lien after a consumer has paid in full;
- Failing to establish policies and procedures to prevent against fraudulent payment processing;
- Misrepresenting loan terms; and
- Misrepresenting the assessment of overdraft fees (assessed based on the available balance but contracts and marketing materials state such fees are assessed based on the actual balance).

Bankers should heed the regulatory guidance and glean lessons from recent mistakes of other financial institutions. Notably, UDAAP violations can be, and often are, assessed in conjunction with violations of other state and federal laws. For example, if a TRID disclosure significantly misrepresents closing costs, a UDAAP violation could be brought in addition to a Truth-in-Lending/Regulation Z violation. Additionally, as examples described above demonstrate, a bank is responsible for the actions of its vendors.

In order to combat UDAAP, bankers should take both a proactive and reactive approach. First, banks should integrate UDAAP reviews proactively into areas such as new product development, creation and revision of fee schedules, market-

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Special Focus

ing plans, and reviews of third-party vendor materials. In addition, UDAAP training should be provided to employees, as appropriate. Reactively, banks should ensure UDAAP is a part of regularly-scheduled audits (internal and external), and, importantly, a robust complaint management procedure should be in place. Such procedures should specify how the bank receives, monitors, and responds to customer complaints. Notably, regulators will often review consumer complaints in an effort to identify areas of the bank at risk for UDAAP violations.

In summary, UDAAP should be appropriately integrated into the organization. Penalties are high, litigation is costly, but the reputational hit is the highest price a bank can pay.

WBA wishes to thank Atty. Lauren C. Capitini, Boardman & Clark, llp for providing this article. ■

Regulatory Spotlight

CFPB Finalizes Rule on Prepaid Accounts under Regulation E and Regulation Z.

The Bureau of Consumer Financial Protection (CFPB) has issued a final rule to delay the 10/01/2017 effective date of the Prepaid Accounts Rule under Regulation E and Regulation Z by six months, to **04/01/2018**. The notice may be viewed at: https://www.gpo.gov/fdsys/pkg/FR-2017-04-25/pdf/2017-08341.pdf. *Federal Register*, Vol. 82, No 78, 04/25/2017, 18975-18981.

CFPB Updates Policy on Ex Parte Presentations in Rulemaking Proceedings.

CFPB has adopted an updated policy on ex parte presentations in rulemaking proceedings. The policy generally requires public disclosure of ex parte presentations made to CFPB decision-making personnel concerning pending rulemakings. The updates apply **05/22/2017**. The notice may be viewed at: https://www.gpo.gov/fdsys/pkg/FR-2017-04-21/pdf/2017-08096.pdf. *Federal Register*, Vol. 82, No. 76, 04/21/2017, 18687-18690.

CFPB Issues Proposed Rule on Regulation C.

CFPB has proposed amendments to Regulation C to make technical corrections and clarify certain requirements adopted by Regulation C's final rule, which was published in the *Federal Register* on **10/28/2015**. CFPB has also proposed a new reporting exclusion. Comments are due **05/25/2017**. The notice may be viewed at: https://www.gpo.gov/fdsys/pkg/FR-2017-04-25/pdf/2017-07838.pdf. *Federal Register*, Vol. 82, No. 78, 04/25/2017, 19142-19178.

FRB Finalizes Rule on Regulation A.

The Board of Governors of the Federal Reserve System (FRB) has adopted final amendments to Regulation A to reflect FRB's approval of an increase in the rate for primary credit at each Federal Reserve Bank from 1.25 percent to 1.50 percent. The secondary credit rate is increased from 1.75 percent to 2.00 percent. The amendments are effective **04/18/2017**. The notice may be viewed at:https://www.gpo.gov/fdsys/pkg/FR-2017-04-18/pdf/2017-07742.pdf. *Federal Register*, Vol. 82, No. 73, 04/18/2017, 18215-18216.

FRB Finalizes Rule on Regulation D.

FRB has issued a final rule amending Regulation D to revise the rate of interest paid on balances maintained to satisfy reserve balance requirements (IORR) and the rate of interest paid on excess balances (IOER) maintained at Federal Reserve Banks by or on behalf of eligible institutions. The final amendments specify that IORR is 1.00 percent and IOER is 1.00 percent, a 0.25 percentage point increase from their prior levels. The final rule is effective **04/18/2017**. The notice may be viewed at: https://www.gpo.gov/fdsys/pkg/FR-2017-04-18/pdf/2017-07743.pdf. *Federal Register*, Vol. 82, No. 73, 04/18/2017, 18216-18217.

FRB Issues Correction to Request for Comment on FRB Form FR 2028.

FRB incorrectly published in the 04/12/2017 *Federal Register* a document requesting public comment regarding FRB Form: FR 2028. FRB has issued a new notice that corrects and supersedes the previously published document. Comments are due **06/20/2017**. The notice may be viewed at: https://www.gpo.gov/fdsys/pkg/FR-2017-04-21/pdf/2017-08072.pdf. *Federal Register*, Vol. 82, No. 76, 04/21/2017, 18759-18762.

FDIC Issues Notice of Systemic Resolution Advisory Committee Charter Renewal.

The Federal Deposit Insurance Corporation (FDIC) has renewed the FDIC Systemic Resolution Advisory Committee. The Systemic Resolution Advisory Committee will continue to provide advice and recommendations on how the FDIC's systemic resolution authority, and its

Wisconsin Bankers ASSOCIATION
Compliance Journal
Special Focus

The Accidental Fiduciary: The Unexpected Reach of the New Fiduciary Rule

On June 9, 2017, after over forty years of "banking" on a simple understanding of the fiduciary rule, the initial phase of the Department of Labor's (the "DOL") new and controversial fiduciary rule was implemented. The new rule, applicable to financial service firms that manage retirement assets, expands the scope of who is a fiduciary under the Employee Retirement Income Security Act ("ERISA"), which in turn triggers a number of fiduciary investment advice responsibilities for such individuals. Under the new fiduciary rule, a fiduciary is required to put the client's best interest first, act in a prudent manner, avoid misleading clients, provide complete disclosures of all relevant information and avoid conflicts of interest.

Although the new fiduciary rule has been in the works since 2010, many financial institutions have been caught off guard by the application of the new rule to their employees and banking operations. In particular, the rule expands the types of situations where communications with customers may be deemed investment advice subject to the rule. Banks must carefully consider how the new rule will impact their operations in order to ensure that communications with customers will not inadvertently trigger the application of the fiduciary rule. In the alternative, financial institutions with trust departments, investment advisory and broker-dealer operations, and other wealth management lines of business will need to develop and execute plans to bring their operations into compliance with the new fiduciary rule.

History

Adopted in 1975, the old fiduciary rule created a strict five-part test that determined whether an individual was a fiduciary. Under the old rule, an individual would be deemed a "fiduciary" if he or she rendered advice: (1) as to the value of securities or other property, or made recommendations as to the advisability of investing in, purchasing or selling securities or other property; (2) on a regular basis; (3) pursuant to a mutual agreement, arrangement or understanding with the plan or the plan fiduciary; (4) that served as a primary basis for investment decisions with respect to plan assets; and (5) that was individualized based on the particular needs of the plan or IRA. To avoid application of the old rule, a person needed only to eliminate one (or more) of the five aforementioned elements from the customer relationship. For example, so long as the customer only received investment advice periodically (i.e. not on a regular basis), the old fiduciary rule would not have been triggered.

The 1975 regulation was adopted prior to the existence of wide-spread use of IRAs, participant-directed 401(k) plans, and the now commonplace rollover of plan assets from ERISA-protected plans to IRAs. This prior regulation also allowed some advisors, brokers and consultants to play a central role in shaping employee benefit plan and IRA investments without being subject to fiduciary obligations under ERISA or the Internal Revenue Code.

Fiduciary Rule

Effective June 9, 2017, the new fiduciary rule amends the regulatory definition of fiduciary investment advice to replace the limited five-part test with a new and much broader definition. The new rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships. The rule first describes the kinds of communications that constitute investment advice and then describes the types of relationships in which such communications give rise to fiduciary investment advice responsibilities.

What is investment advice under the rule?

A person gives investment advice if he or she provides, for a fee or other compensation (direct or indirect), the following types of advice:

- Recommendations regarding the advisability of buying, holding, selling, or exchanging securities or other investment property, including recommendations as to the investment of securities after the securities are rolled over or distributed from a plan or IRA;

- Recommendations as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide other investment advice or investment management services, and selection of investment account arrangements; or
- Recommendations with respect to rollovers, transfers, or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer, or distribution should be made.

The fundamental threshold element in establishing the existence of fiduciary investment advice is whether a "recommendation" has occurred. A recommendation is a communication that, based on its content, context and presentation, would reasonably be viewed as a suggestion that the recipient engage in or refrain from taking a particular course of action. According to the DOL's Frequently Asked Questions on the fiduciary rule, published in January 2017, the more selective and specifically tailored the advice, the more likely it is to be considered as a recommendation and, therefore, trigger the new fiduciary rule if it is coupled with a financial incentive.

In addition to a recommendation, there must be a fee or other form of compensation associated with the investment advice. Fees can be (i) direct, meaning any compensation or fees received from the customer that is explicitly connected to the investment advice given, or (ii) indirect, meaning any compensation or fees received from any other source in connection with the recommended transaction or service. Examples of the types of fees that trigger the fiduciary rule are: commissions; loads; finder's fees; revenue sharing payments; shareholder servicing fees; marketing or distribution fees; underwriting compensation; payments to firms in return for shelf space; recruitment compensation; gifts and gratuities; and expense requirements.

What is not covered under the rule?

Not all communications with financial advisors or employees will be covered by the new fiduciary rule. Specific examples of communications that would not rise to the level of a recommendation and therefore would not constitute fiduciary investment advice include:

- **Investment Education:** The DOL created exemptions from the definition of "recommendations" for certain educational information and materials. Delivery of such information or materials to a customer will not be considered "recommendations." Examples of such educational information include:
- Plan and investment information: information and materials that describe investment or plan alternatives without specifically recommending particular investments or strategies;
- General financial, investment, and retirement information: any general financial, investment, or retirement information is non-fiduciary as long as it does not cross the line of recommending a specific investment or investment strategy;
- Asset allocation models: financial institutions can provide materials on hypothetical allocations provided that they do not cross the line of making specific investment recommendations or referring specific products. These models must be based on generally accepted investment theories and explain the assumptions on which they are based; and
- Interactive investment materials: financial institutions can provide questionnaires, worksheets, software and similar materials that enable retail investors to estimate future needs. As with the asset allocation models, the investment materials cannot cross the

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line of making specific fiduciary investment recommendations or referring to specific models.

- **General Communications:** Examples of general communications that a reasonable person would not view as fiduciary investment advice include:
  - General circulation newsletters;
  - Commentary in publicly broadcasted talk shows;
  - Remarks and presentations in widely attended speeches and conferences;
  - Research or news reports prepared for general distribution;
  - General marketing materials; and
  - General market data, including data on market performance, market indices, or trading volumes, price quotes, performance reports, or prospectuses.

The Best Interest Contract Exemption

ERISA and the Internal Revenue Code generally prohibit fiduciaries from receiving payments from third parties and from acting on conflicts of interest, including using their authority to affect or increase their own compensation, in connection with transactions involving an employee benefit plan or IRA. For example, an advisor has a conflict of interest when the advisor recommends that a participant roll money out of an employer plan, such as a 401(k) plan, into an IRA that will generate ongoing fees for the financial institution.

In addition to adopting an amended definition of fiduciary, the DOL also implemented a new exemption from prohibited transactions, which is referred to as the Best Interest Contract Exemption ("BIC exemption"). According to the DOL, the BIC exemption is designed to promote the provision of investment advice that is in the best interest of retail investors, such as plan participants and beneficiaries, IRA owners and small plans. To facilitate continued provision of advice to such retail investors, the exemption allows investment advice fiduciaries, including investment advisors and broker-dealers, and their agents and representatives, to receive fees and compensation that, in the absence of an exemption, would not be permitted under ERISA and the Internal Revenue Code.

The BIC exemption permits financial advisors (i.e., individuals who are representatives of investment advisors, broker-dealers or banks or similar financial institutions) and the financial institutions that employ them to continue to rely on many current compensation and fee practices, as long as they meet specific conditions intended to ensure that financial institutions mitigate conflicts of interest, and they and their financial advisors, provide investment advice that is in the best interests of the customers. Specifically, in order to rely on the BIC exemption after December 31, 2017, a financial institution generally must:

- Acknowledge fiduciary status for itself and its advisors;
- Adhere to basic impartial conduct standards (described below);
- Commit to such impartial conduct standards in an enforceable contract when providing advice to an IRA owner;
- Implement policies and procedures reasonably and prudently designed to prevent violations of such impartial conduct standards;
- Refrain from giving or using incentives for financial advisors to act contrary to the customer's best interest; and
- Fairly disclose the fees, compensation, and material conflicts of interest associated with their recommendations.

Under the BIC exemption, a financial institution which provides fiduciary advice must maintain and regularly update a website that includes information about the financial institution's business model and associated material conflicts of interest; a schedule of a typical account fees; a model contract; a written description of the financial institution's policies and procedures that mitigate conflicts of interest; a list of all product manufacturers and other parties that provide third party payments with respect to specific investment products or classes of investments; a description of the third party arrangements, including a statement on whether and how these arrangements impact financial advisor compensation, and a statement on any benefits the financial institution provides in exchange for the payments; and disclosure of compensation and incentive arrangements with financial advisors. Individualized information about a particular advisor's compensation is not required to be on the website. All financial institutions relying on the BIC exemption also must notify the DOL in advance, and retain records that can be made available to the DOL and retirement investors for evaluating compliance with the exemption.

Furthermore, the exemption provides for enforcement of the standards it establishes in the form of a contract. When providing advice to an IRA owner, the financial institution must commit to the impartial conduct standards in an enforceable contract. In the contract a financial institution must acknowledge its fiduciary status and that of its financial advisors. ERISA investors can directly assert their rights to proper fiduciary conduct under

ERISA's statutory protections within the contract. If financial advisors and financial institutions do not adhere to the standards established in the exemption, retirement investors will have a way to hold them accountable—either through a breach of contract claim or under the provisions of ERISA.

Impartial Conduct Standards

Initially, the BIC exemption was supposed to be implemented in its entirety on June 9, 2017. However, during a transition period that will run until January 1, 2018, only the "Impartial Conduct Standards" provisions of the BIC exemption will be required of financial advisors and financial institutions that have fiduciary responsibilities. Specifically, during this transition period, in order to rely on the BIC exemption, financial advisors and financial institutions with fiduciary responsibilities must:

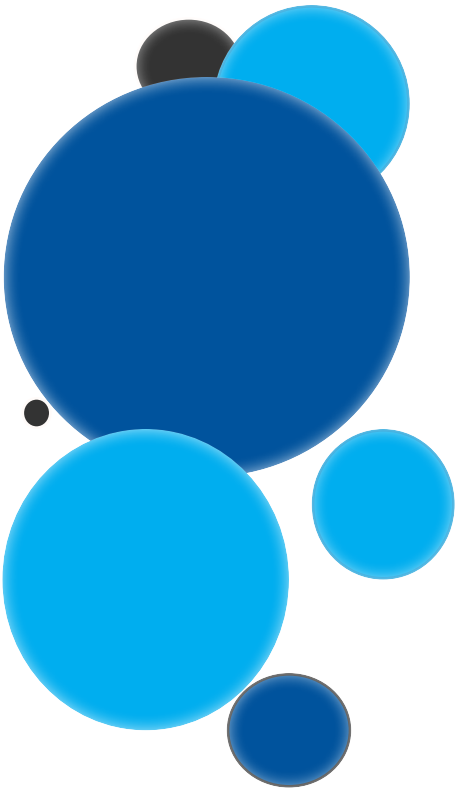
- Give investment advice that is in the "best interest" of the retirement investor. The best interest standard has two main components: prudence and loyalty.
    - **Prudence:** Recommendations must reflect the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity familiar with such matters would use in the conduct of an enterprise of a like character with like aims.
    - **Loyalty:** Recommendations must be based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, without regards to the financial or other interests of the investment advisor representative, employee, advisor, or any related entity or other party.
- Charge no more than reasonable compensation. The obligation of service providers to charge no more than reasonable compensation has long applied to advisors. The reasonableness of the fees depends on the facts and circumstances.
- Ensure that statements about services, recommended products and transactions, fees and compensation, material conflicts of interest and other relevant matters are not materially misleading at the time made.

Absent further action from the DOL, all other requirements of the BIC exemption will become effective on January 1, 2018. Although most aspects of the BIC exemption have not been implemented yet, financial institutions need to have policies in place to comply with the Impartial Conduct Standards and plan ahead for compliance with the rest of the rule at the beginning of next year.

Conclusion

As of June 9, 2017, financial institutions must fully understand (1) the new definition of a "fiduciary" and how to keep employees from inadvertently becoming a fiduciary, and (2) depending on what kind of services a financial institution offers, how to instruct their existing employees who do have a fiduciary duty to comply with the "Impartial Conduct Standards" of the BIC exemption. For most financial institutions, the goal will be to ensure that routine communications with the customers regarding retirement assets, such as advice regarding IRA accounts, do not trigger the fiduciary rule. For other financial institutions, the goal will be to implement an appropriate plan to ensure compliance with the fiduciary rule during the transition period and after the delayed effective date. Although this task may seem daunting at first, it is not impossible. Due to the fact that the majority of the BIC exemption has been delayed until January 1, 2018, now is the time for financial institutions to implement policies and procedures to meet the current requirements and plan ahead to ensure they are adequately prepared for the implementation of the remaining parts of the BIC exemption. A financial institution's policies and procedures should be thoughtfully drafted and include specific guidelines for employee conduct. Additionally, financial institutions should review their investment advisory agreements, brochures and compensation structures to ensure they do not create a potential conflict of interest.

WBA wishes to thank Attys. Kathryn Allen, and John Donahue, Godfrey and Kahn, SC for providing this article. ■



Wisconsin Bankers ASSOCIATION
Compliance Journal
Special Focus

Update on Loan Renewals in Wisconsin

WBA is commonly asked whether standard loan closing disclosures are required when a lender renews an existing consumer loan. This article is intended to update information regarding loan renewals in Wisconsin found in Notice 2008-2, which appeared in the February 2008 *WBA Compliance Journal*.

For purposes of this article, a renewal is an extension of the term of an existing closed end loan (without additional advances) by the lender that originally made the loan to the same consumer. Commonly, the interest rate may change to reflect market conditions at the time of renewal and the payment schedule may be modified to reflect the continuing amortization of the loan based on the new interest rate. The following summarizes disclosure requirements and their applicability to such loan renewals.

1. Truth-in-Lending and Regulation Z.

Under Reg Z, disclosures must be given at or prior to the consummation of a loan. This includes, for example, personal consumer loan disclosures and TRID disclosures. When a loan is renewed, must the lender give these disclosures again? New disclosures will be required only if the renewal is considered a refinancing, as defined in Reg Z. A refinancing occurs when an existing obligation is satisfied and replaced by a new obligation undertaken by the same consumer. If the renewal is not a refinancing as defined in Reg Z, (that is, the loan to the consumer has not been satisfied and replaced with a new obligation) new disclosures are not required. There are two exceptions. New disclosures are always required for a renewal if:

- a variable rate feature is added to the obligation at the time of the renewal; or
- the interest rate is increased based on a variable rate feature that had not been properly disclosed when the loan was made.

See the section below on **Taking Steps to Document a Renewal and Maintaining Priority**, for WBA recommendations to avoid having a renewal note characterized as a refinancing.

The last paragraph just concluded that if the loan is a refinancing – that is, the lender satisfies and replaces an obligation with a new obligation to the same consumer – new disclosures are required. Reg Z includes five exceptions to this rule. Even if the loan meets the definition of a refinancing, new disclosures are not required if the purpose of the new transaction is to:

- renew a single payment obligation with no change in the original terms;
- reduce the APR with a corresponding change in the payment schedule;
- enter into an agreement involving a court proceeding;
- enter into certain agreements resulting from default or delinquency; and
- renew optional insurance purchased by the consumer and added to an existing transaction if the initial purchase of insurance was properly disclosed.

In summary, subject to the two exceptions for adding a variable rate feature to the renewal or having incorrectly disclosed a variable rate feature initially, new consummation disclosures are not required unless the original obligation is satisfied and replaced by a new obligation undertaken by the same consumer. Further, even if the obligation is satisfied and replaced by a new obligation by the same consumer, new disclosures are not required if the new obligation falls within one of the five exemptions listed above.

The right of rescission, which applies to credit transactions in which a security interest is or will be taken in the consumer's principal dwelling, is not required for renewals. However, if the transaction is a refinancing or consolidation by the same creditor of an extension of credit secured by the dwelling, the right of rescission does apply to any new advance of money. Also, for purposes of rescission, if a security interest in a consumer's principal dwelling is added to the transaction, rescission will apply to the addition of the security

interest. Finally, a refinancing by a different lender is always considered a new loan, subject to all of the disclosures and the right of rescission under Reg Z.

2. RESPA.

Although certain disclosures previously required under RESPA are now incorporated into Truth-in-Lending/Reg Z (TRID disclosures), RESPA continues to require the provision of certain other disclosures – for example, the Homeownership Counseling Notice. Subject to certain specific exemptions, RESPA applies to loans secured by first or subordinate liens on residential real estate, including the refinancing of any loan secured by residential real estate. RESPA incorporates the basic Reg Z definition of refinancing. That is, if the loan is satisfied and replaced by a new obligation by the same borrower, the transaction is a refinancing and the RESPA rules applicable to refinancings apply. The RESPA disclosures do not apply if the loan is not satisfied and replaced by a new obligation by the same borrower.

3. HMDA and Regulation C.

A HMDA-reportable financial institution is required to report the renewal of a covered loan only to the extent that it is considered a refinancing. Under HMDA and Reg C, a refinancing means a new, dwelling-secured debt obligation that satisfies and replaces an existing dwelling-secured debt obligation by the same borrower. If the loan renewal does not satisfy and replace the existing debt obligation, the loan is not a refinancing. This is true under existing HMDA requirements, as well as the new HMDA rules expanding reportable loans which take effect January 1, 2018.

4. Equal Credit Opportunity Act and Regulation B.

Regulation B requires the provision of disclosures and notices, as well as the collection of certain information about applicants. The definition of application under Reg B can include a renewal of credit. As a result, if a consumer applies for the renewal of a loan, lenders must follow applicable Reg B provisions, including the requirement to provide applicants with the "Right to Receive A Copy of Appraisals" for first-lien, dwelling-secured loans for which the lender conducts a new appraisal or valuation on the property. Additionally, adverse action notice requirements must be followed.

Additionally, collection of government monitoring information under Reg B is only required and permitted for applications for the purchase or refinance of a principal dwelling, and not for loan renewals. Thus, monitoring information may only be collected on a renewal application if the renewal is considered a refinancing. As with Reg Z and HMDA, under Reg B, a renewal is not a refinancing unless the debt is satisfied and replaced by a new obligation to the borrower. Note that even in a refinancing, collection of government monitoring information is optional if it was obtained in an earlier transaction.

5. Privacy.

Privacy notices must be provided to individual customers not later than the time the customer relationship is established. Assuming the notice was properly provided in connection with the original loan (or earlier than that if the individual was already a bank customer), a loan renewal does not trigger the requirement to provide an initial privacy notice.

6. Flood Insurance.

Lenders may not renew any loan secured by improved real estate or a mobile home located in a special flood hazard area unless the property is covered by flood insurance. At the time of loan renewal, lenders must determine whether flood insurance must be placed. A lender should order an updated flood determination for loan renewals, unless it is able to rely on a previous determination. The lender may rely on a previous determination if the determination is not more than seven years old and the basis for determination was recorded on the Standard Flood Hazard Determination Form. Prior determination forms may not be relied upon if map revisions or updates show the property is in a special flood hazard area.

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Regardless of whether an updated flood determination is required at the time of renewal, lenders must provide the Notice of Flood Hazards and Availability of Disaster Relief Assistance to borrowers for any loan renewal secured by improved real estate or a mobile home located in a special flood hazard area.

Wisconsin Consumer Act.

- Tattletale Notice. Lenders must notify a non-applicant spouse of an extension of credit if the loan is governed by the Wisconsin Consumer Act (WCA). This disclosure is generally referred to as the tattletale notice. The tattletale notice is not required in connection with the renewal of a loan.

- Explanation of Personal Obligation. The WCA does not address disclosures for renewals. The WBA recommends that a lender provide an Explanation of Personal Obligation in connection with renewal notes to any person entitled to an Explanation of Personal Obligation in connection with the initial loan (or provide copies of the documents if that is the way the lender complies with the notice requirement, if applicable, under the WCA).

Taking Steps to Document A Renewal and Maintaining Priority.

When renewing loans, lenders strive to maintain priority on real estate collateral. To maintain priority, lenders want to treat a loan renewal as a continuation of an existing loan rather than a substitution and replacement of the initial loan with a new loan (a refinance). In general, the priority of an optional loan secured by real estate dates from the time of the loan. So, it is important that the date of a loan secured by real estate remain tied to the initial advance. The lender does not want a court to re-characterize a renewal as a new loan with a new advance date.

When renewing loans, the WBA recommends following procedures to avoid a re-characterization of a renewal loan as a refinancing or a new loan. These procedures include:

1. Clarifying the party's intent that the initial note is renewed by the renewal note and not replaced, by marking the initial note "renewed but not paid" and by retaining the initial note in the file until the obligation has been paid and satisfied.

2. Completing any provision in the renewal note that indicates that the loan renews a prior note by referring to the prior note(s).

3. Recognizing the risk that a loan may more likely be characterized as a refinancing rather than a renewal to the extent that the terms of the renewal note deviate from the terms of the initial obligation. Wisconsin cases have established a doctrine that a renewal of an existing note is not a discharge of an original obligation and the creation of a new obligation, unless it appears that the parties agreed that it should be destruction of the old and the creation of a new obligation. However, the cases address extension of the term, and do not specifically address other amendments made at the time of the renewal loan.

When the terms of the renewal note deviate from the initial note, the lender may decrease the risk of losing priority at the time of renewal by using title insurance to insure continuing priority. For example, an existing title insurance policy may be brought current with a date down endorsement or other update. Alternatively, a lender could consider obtaining a title search at the time of renewal to determine if there are junior creditors that the lender should consider contacting for consent or a subordination to lender's mortgage. Lenders may choose to be more or less conservative when priority could be affected by the determination of whether a loan is renewed or refinanced.

Charging a Renewal Fee.

Lenders may collect a fee paid in cash by the consumer as a condition to renewing a note. The lender should document the consumer's obligation to pay the fee in writing, perhaps by adding the consumer's agreement to additional provisions in the renewal note or via a separate agreement outside the note. Lenders considering financing renewal fees should consider the consequences. If a renewal fee is financed (rather than paid by the consumer in cash), the lender increases the loan amount. Lenders that increase the loan amount on a renewal note, including by financing fees, without treating the loan as a full refinancing, may have additional disclosure and priority issues and should obtain legal advice as to the consequences. ■

Wisconsin Bankers ASSOCIATION
Compliance Journal
Special Focus

FCRA Negative Information Demand Letters.

Notice 2017-5

WBA has been monitoring instances of financial institutions receiving potentially frivolous demand letters disputing negative information furnished to credit reporting agencies (CRAs). This article is intended to introduce the issue of the demand letters, provide information about the Fair Credit Reporting Act (FCRA) related to a consumer's ability to dispute negative information, and to request that financial institutions please contact WBA at wbalegal@wisbank.com if they receive any such demand letters so that we may continue to monitor the situation and determine whether additional action may be appropriate.

Demand Letters

WBA has been made aware that some financial institutions in Wisconsin have received a demand letter threatening legal action unless certain data that institution is reporting to a CRA is changed. In some cases, this data was reported correctly. Thus, these particular demand letters dispute the accuracy of information that the institution in fact reported accurately.

These letters often come from credit repair agencies. Examples of such organizations are those that offer to assist customers in repairing their credit. These agencies may send demands on behalf of customers disputing the accuracy of the information that financial institutions report to CRAs whether that information is accurate or not.

Past Actions Regarding Demand Letters

In 2014, a court order settled a complaint filed by the Federal Trade Commission that a credit repair agency violated the Credit Repair Organizations Act (CROA). The complaint alleged that a credit repair agency violated federal law by lying to CRAs and charging consumers up-front fees before providing its services. Part of the complaint involved the making of numerous false statements to CRAs disputing the accuracy of negative information in consumers' credit reports. The letters typically disputed all negative information in credit reports, regardless of the information's accuracy.

The credit repair agency continued to send these deceptive dispute letters to CRAs even after the company received detailed billing histories or signed contracts from creditors proving the credit reports were accurate. The agency also falsely told consumers that federal law allowed it to dispute accurate credit report information, and that CRAs must "prove it or remove it."

The court order barred the agency from violating any provision of CROA, and specifically from making untrue or misleading statements to consumer reporting agencies, and charging consumers advance fees for credit repair services. The order also prohibited the credit repair agency from sending letters to CRAs or creditors unless consumers review and attest to the accuracy of the letters.

FCRA Requirements

Section 623 of the FCRA describes the responsibilities of persons, such as financial institutions, that furnish information about consumers to CRAs. Section 312 of the Fair and Accurate Credit Transactions Act amended Section 623 of the FCRA by requiring the federal banking agencies to issue guidelines related to the accuracy and integrity of information about consumers that is furnished to CRAs and to prescribe regulations requiring furnishers to establish reasonable policies and procedures for implementing those guidelines.

The rules also require furnishers to investigate disputes concerning the accuracy of information contained in a consumer report based on a direct request by a consumer.

Section 623(a)(8)(D) of the FCRA provides that a consumer who seeks to dispute the accuracy of information shall provide a dispute notice that:

(1) Identifies the specific information that is being disputed;

(2) Explains the basis for the dispute; and

(3) Includes all supporting documentation required by the financial institution to substantiate the basis of the dispute.

The FCRA also lays out the requirements a financial institution must follow upon receiving a notice of dispute. Specifically, section 623(a)(8)(E) of the FCRA provides

that upon receiving the above notice a furnisher must:

(1) Conduct an investigation with respect to the disputed information;

(2) Review all relevant information provided by the consumer with the notice of dispute to a financial institution;

(3) Complete financial institution's investigation of the dispute and report the results of the investigation to the consumer before the end of similar 30-day period as is in place for disputes from CRAs; and

(4) If the investigation finds that the information reported was inaccurate, a financial institution must promptly provide the accurate information the CRA to which the financial institution furnished the inaccurate information.

Thus, if a financial institution that furnishes information to CRAs receives a demand letter meeting the above requirements it may trigger investigation requirements. However, there may be times when the dispute could be determined to be a frivolous dispute by the consumer which follows a different procedure. The standards for when a notice becomes frivolous can be also be found in section 623(a)(8)(E) of the FCRA.

In general, the investigation requirements shall not apply if the person receiving a notice of a dispute from a consumer reasonably determines that the dispute is frivolous or irrelevant, including:

(1) By reason of the failure of the consumer to provide sufficient information to investigate the disputed information; or

(2) The submission by a consumer of a dispute that is substantially the same as a dispute previously submitted by or for the consumer, either directly to the financial institution or through a CRA, with respect to which the financial institution has already performed the financial institution's duties to investigate and respond in accordance with FCRA rules.

If the financial institution has determined the consumer's dispute to be frivolous, the financial institution must send the consumer notice of such determination no later than 5 business days after making such determination. This notice must be sent by mail or any other means authorized by the consumer. The notice to the consumer must include the reasons for a financial institution's determination that the consumer's dispute was frivolous.

Conclusion

The FCRA lays out the procedures for how a financial institution must respond to a consumers notice disputing information reported to CRAs. It also provides that if the financial institution has determined the consumer's dispute to be frivolous, the financial institution must send the consumer notice of such determination. Thus, even if financial institution has determined the demand letters it is receiving are frivolous, such letters should not necessarily be ignored. The FCRA requirements should still be followed. The financial institution may, however, considering contacting the FTC if it believes the letters to be deceptive and in violation of the CROA.

WBA also requests that financial institutions receiving potentially deceptive demand letters from credit repair agencies or other organizations contact us at wbalegal@wisbank.com so that we may continue to monitor the situation. ■

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(D) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, but items with a value of less than $50 each may be reported in the aggregate.

(E) The date the property became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property.

(F) Other information that the Secretary of Revenue prescribes by rule as necessary.

If the financial institution holding abandoned property is a successor to other persons who previously held the property for the apparent owner or if the holder has changed his or her name while holding the property, the holder shall file with his or her report all known names and addresses of each previous holder of the property.

Apparent owner is defined in Wis. Stat. §177.01(2) to mean the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.

Per Wis. Stat. §177.17(4)(a), a financial institution must file the report before November 1 of each year. Each holder shall file a report covering the previous fiscal year. Fiscal year means the period beginning on July 1 and ending on the following June 30. On written request by any person required to file a report, the Secretary of Revenue may extend the deadline. Upon filing the report, the holder must pay or deliver to the Secretary of Revenue all abandoned property required to be reported.

Not more than 120 days before filing the report, the holder in possession of property presumed abandoned must send written notice to the apparent owner at his or her last-known address informing him or her that the holder is in possession of property subject to the UPA if all the following exist:

(A) The holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate;

(B) The statute of limitations does not bar the claim of the apparent owner; and

(C) The property has a value of $50 or more.

As a resource to its members, Wisconsin Bankers Association's legal department provides information related to banking laws and regulations. For questions regarding the UPA or other topics, please email wbalegal@wisbank.com or call (608) 441-1200. Additionally, the Wisconsin Department of Revenue provides numerous resources about the UPA. If you were not already aware of these resources, they may be found at: https://www.revenue.wi.gov/Pages/UnclaimedProperty/Home.aspx. ■

Equifax Data Breach: Consumer Resources

The Equifax data breach will affect millions of consumers, WBA offers the following tips for consumers who are not sure if their information has been compromised, as well as steps for consumers who know their information was stolen:

Not sure if your information has been compromised?

1. Visit www.equifaxsecurity2017.com to check if your information has been compromised.

2. Check all of your accounts via online services provided by your bank or credit card provider, you can also call the company directly for assistance in reviewing your accounts. Consumers should be looking for any discrepancies in their purchasing habits. Continue to monitor this in the coming months as criminals may not use your information immediately.

3. Monitor your accounts closely and frequently. Balance your checkbook monthly and match credit card statements with receipts. By checking throughout the month, you'll be able to identify possible problems sooner.

4. Review your credit report every three or four months. You are entitled to one free credit report from each of the three major credit bureaus per year. By staggering these requests, you will be able to monitor your credit throughout the year.

5. Register for eNotify from the Wisconsin Department of Motor Vehicles. This service will allow you to set up alerts confirming transactions regarding your drivers license. If you didn't request the transaction, this serves as an early alert system that someone is making unauthorized changes.

You know your information has been compromised:

1. Contact the security departments of your creditors or bank to close the compromised account(s). Explain that you are a victim of identity theft and this particular card or account has been compromised. Ask them to provide documentation that the account has been closed. You should also follow up with a letter to the agency documenting your request.

2. Contact the three major credit bureaus (Experian, Trans Union and Equifax) via phone immediately to request a fraud alert be placed on your file. Once again, explain that you are a victim of identity theft and ask that they grant no new credit without your approval. Again, follow up with a letter to the agency documenting your request.

3. File a report with your local police department and request a copy of the report. This is good documentation to have on hand to prove your identity has been stolen as you begin the process of restoring your credit and good name.

4. Document all of your actions and keep copies of everything.

On Wednesday, September 20 WBA partnered with the Wisconsin Department of Agriculture, Trade and Consumer Protection, and Madison's News 3 to hold a livestream with a panel of experts answering consumer questions about the data breach. This two-hour event is another resource available to those with questions and concerns regarding Equifax. The video of the full event is available at this link.

Contact information for the three major credit bureaus.

Experian:
Order credit report: 888-397-3742
Report fraud: 888-397-3742
www.experian.com

Trans Union:
Order credit report: 800-888-4213
Report fraud: 800-680-7289
www.tuc.com

Equifax:
Order credit report: 800-685-1111
Report fraud: 800-525-6285
www.equifax.com ■

Court Dismisses Most of CFPB's Claims in TCF Bank Lawsuit

In March, WBA joined 12 other state bankers associations by signing on to an amicus brief filed by the Minnesota Bankers Association (MBA) for a Consumer Financial Protection Bureau (CFPB) lawsuit against TCF Bank, based in Wayzata, Minnesota. The lawsuit challenged the way TCF Bank had implemented the Regulation E "Opt-in" rules, which addressed overdrafts caused by electronic transaction cards. Rather than settling the case, TCF Bank chose to fight the allegations, filing a motion to dismiss the CFPB's claims. Considering this lawsuit could have a far-reaching impact on overdraft programs and retroactive application of regulations, WBA felt it appropriate to lend support to TCF Bank and MBA's amicus brief.

On Friday, September 15, the United States District Court for the District of Minnesota issued an order, granting TCF Bank's motion to dismiss CFPB's claims that TCF Bank violated Regulation E.

Regulation E "Opt-in" rules required banks to take action not only for new customers, but it also applied to all of the banks' existing customers. That situation presented significant challenges for banks to maintain compliance.

The Regulation E claims were especially troubling for the banking industry as a whole; CFPB acknowledged that TCF Bank provided all the proper Regulation E Opt-in disclosures and notices. They acknowledged that every customer that opted-in to overdraft coverage for card transactions had given affirmative consent. But CFPB said that because "consumers rarely read written disclosures," CFPB would look beyond the written disclosures and consider the bankers' verbal explanations of the written disclosures.

Verbal explanations of the written disclosures are not required by Regulation E. In the amicus brief, the Court was urged to reject this new, unwritten requirement and to enforce Regulation E as it is written. Otherwise, this would set a new legal standard which would result in considerable uncertainty and new significant liability for all financial institutions. The Court agreed with these arguments, specifically stating that it appreciated the state bankers associations' amicus brief, concluding that the bank had in fact complied with Regulation E, and refused to read CFPB's additional, unwritten requirements into the regulations.

CFPB also filed claims against TCF Bank for deceptive acts or practices as to new customers, and abusive acts or practices as to new customers, which were not dismissed, but the Court did limit those claims. It dismissed the UDAAP claims that related to actions taken by the bank before the effective date of the Dodd-Frank Act, which created the "abusive" standard and the date that the CFPB became operational. Thus, avoiding the legal precedent of retroactively enforcing regulations on actions that occurred before the regulations existed.

With respect to the remaining, limited claims, the bank continues to believe that it has both the law and the facts on its side. All the issues discussed in the amicus brief that could widely impact the banking industry have been decided, all of which have followed the recommendations of the brief. ■

September 2017

Wisconsin Bankers ASSOCIATION

Compliance Journal

Special Focus

Wisconsin's Unclaimed Property Act

Notice 2017-6

The Unclaimed Property Act (UPA) is codified in the Wisconsin Statutes, Chapter 177. The UPA outlines the procedures concerning abandoned property and the procedures for reporting and delivery of abandoned property. While the UPA encompasses a comprehensive list of provisions, this article focuses on the most common provisions related to financial institutions. Relevant to financial institutions, the UPA applies to checks, drafts, cashier's checks, certified checks, money orders, travelers checks, property in a safe deposit box, and to any demand, savings, or matured time deposit. Each of the previously listed property items constitutes "intangible property." For a complete list of what is, and what is not, intangible property, see Wis. Stat. §177.01(10).

Wis. Stat. §177.02 outlines the general presumption for abandoned property. Subject to certain exceptions, all intangible property that has remained unclaimed by the owner for more than 5 years after it became payable or distributable is presumed abandoned. Such property includes any income or increment derived from it. Additionally, property is payable or distributable for the purpose of the UPA even if the owners fail to make demand or to present any instrument or document required to receive payment. As each type of property has its separate intricacies, the following discussion will focus on each individually. This article will then discuss the general procedures for reporting and delivery of abandoned property.

Checks, Drafts, and Similar Instruments Issued or Certified by Banking and Financial Organizations

Checks, drafts, and similar instruments issued or certified by financial institutions, that are not travelers checks or money orders, are governed by Wis. Stat. §177.05. Wis. Stat. §177.05 explains that any sum payable, on which a financial institution is directly liable, including a cashier's check and a certified check, which has been outstanding for more than 5 years after it was payable or after its issuance if payable on demand, is presumed abandoned unless the owner, within 5 years, has communicated in writing with the financial institution concerning it or has otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the financial institution.

Per Wis. Stat. §177.05(2), the holder of a check, draft or similar instrument issued or certified by a financial institution, may not deduct from the amount any charge imposed due to the failure to present the instrument for payment unless there is a valid and enforceable written contract between the issuer and the owner of the property. Additionally, the charge cannot be a charge that is not regularly imposed or a charge that would regularly be reversed.

Bank Deposits and Funds in Financial Organizations

Bank deposits and funds in financial institutions are governed by Wis. Stat. §177.06. Wis. Stat. §177.06(1) explains that any demand, savings, or matured time deposit with a financial institution, including deposits that are automatically renewable, and any funds paid toward the purchase of a share, a mutual investment certificate or any other interest in a banking or financial organization is presumed abandoned within 5 years unless the owner did one of the following:

(A) In the case of a deposit, increased or decreased the amount of the deposit or presented the passbook or other similar evidence of the deposit for the crediting of interest;

(B) Communicated in writing with the financial institution concerning the property;

(C) Otherwise indicated an interest in the property as evidenced by a memorandum or other record on file prepared by an employee of the financial institution;

(D) Owned other property to which (A), (B), or (C) above applies, and if the financial institution communicates in writing with the owner with regard to the property subject to §177.06(1) that would otherwise be presumed abandoned at the address to which communications regarding the other property regularly are sent; or

(E) Had another relationship with the banking or financial institution concerning which the owner has either: communicated in writing with financial institution; or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of financial institution.

Per Wis. Stat. §177.06(1m), any correspondence in writing from a financial institution to the owner, such as the mailing of a statement, report of interest paid or credited, or other written advice relating to a deposit, means that the owner has indicated an interest in the deposit unless the correspondence is returned to the financial institution for nondelivery and the financial institution maintains a record of all such returned correspondence.

Property in Safe Deposit Boxes

Property in safe deposit boxes is governed by Wis. Stat. §177.16. All tangible and intangible property held in a safe deposit box or any other safekeeping repository in Wisconsin in the ordinary course of the holder's business and proceeds resulting from the sale of the property permitted by other law, which remain unclaimed by the owner for more than 5 years after the lease or rental period on the box or other repository has expired, are presumed abandoned.

Travelers Checks and Money Orders

Typically, the presumption for abandoned property is 5 years. As discussed below, travelers checks and money orders deviate from the general presumption, as travelers checks require 15 years and money orders require 7 years. All travelers checks, money orders, and similar written instruments may not be considered unclaimed property in the state of Wisconsin unless they meet the requirements set forth in Wis. Stat. §177.04(4).

In summary, §177.04(4) states that for an instrument to be subject to the UPA, it must meet one of the following conditions:

(A) The records of the issuer show that the travelers check, money order or similar written instrument was purchased in this state;

(B) The issuer has its principal place of business in this state and the records of the issuer do not show the state in which the travelers check, money order or similar written instrument was purchased; or

(C) The issuer has its principal place of business in this state, the records of the issuer show the state in which the travelers check, money order or similar written instrument was purchased and the laws of the state of purchase do not provide for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

Wis. Stat. §177.04(1) explains that any sum payable on a travelers check that has been outstanding for more than 15 years after its issuance, is presumed abandoned unless the owner, within 15 years, communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the issuer.

Wis. Stat. §177.04(2) explains that any sum payable on a money order or similar written instrument, other than a 3rd−party bank check, that has been outstanding for more than 7 years after its issuance is presumed abandoned unless the owner, within 7 years, has communicated in writing with the issuer concerning it or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by an employee of the issuer.

Per Wis. Stat. §177.04(3), the holder of a money order, travelers check or similar written instrument, may not deduct from the amount any charge imposed due to the failure to present the instrument for payment unless there is a valid and enforceable written contract between the issuer and the owner of the property. Additionally, the charge cannot be a charge that is not regularly imposed or a charge that would be regularly reversed.

Reporting, Payment and Delivery of Abandoned Property

A financial institution holding tangible or intangible property presumed abandoned and subject to the UPA must report to Wisconsin's Secretary of Revenue concerning the property. The reporting requirements are found in Wis. Stat. §177.17. The report shall be verified and shall include the following:

(A) The name, if known, and last-known address, if any, of each person appearing from the records of the holder to be the owner of property with a value of $50 or more presumed abandoned.

(B) In the case of unclaimed funds of $50 or more held or owing under any life or endowment insurance policy or annuity contract, the full name and last-known address of the insured or annuitant and of the beneficiary per the records of the insurance company holding or owing the funds.

(C) In the case of the contents of a safe deposit box or other safekeeping repository or of other tangible property, a description of the property and the place where it is held and may be inspected by the Secretary of Revenue, and any amounts owing to the holder.

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(D) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, but items with a value of less than $50 each may be reported in the aggregate.

(E) The date the property became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property.

(F) Other information that the Secretary of Revenue prescribes by rule as necessary.

If the financial institution holding abandoned property is a successor to other persons who previously held the property for the apparent owner or if the holder has changed his or her name while holding the property, the holder shall file with his or her report all known names and addresses of each previous holder of the property.

Apparent owner is defined in Wis. Stat. §177.01(2) to mean the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.

Per Wis. Stat. §177.17(4)(a), a financial institution must file the report before November 1 of each year. Each holder shall file a report covering the previous fiscal year. Fiscal year means the period beginning on July 1 and ending on the following June 30. On written request by any person required to file a report, the Secretary of Revenue may extend the deadline. Upon filing the report, the holder must pay or deliver to the Secretary of Revenue all abandoned property required to be reported.

Not more than 120 days before filing the report, the holder in possession of property presumed abandoned must send written notice to the apparent owner at his or her last-known address informing him or her that the holder is in possession of property subject to the UPA if all the following exist:

(A) The holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate;

(B) The statute of limitations does not bar the claim of the apparent owner; and

(C) The property has a value of $50 or more.

As a resource to its members, Wisconsin Bankers Association's legal department provides information related to banking laws and regulations. For questions regarding the UPA or other topics, please email wbalegal@wisbank.com or call (608) 441-1200. Additionally, the Wisconsin Department of Revenue provides numerous resources about the UPA. If you were not already aware of these resources, they may be found at: https://www.revenue.wi.gov/Pages/UnclaimedProperty/Home.aspx. ■

Equifax Data Breach: Consumer Resources

The Equifax data breach will affect millions of consumers, WBA offers the following tips for consumers who are not sure if their information has been compromised, as well as steps for consumers who know their information was stolen:

Not sure if your information has been compromised?

1. Visit www.equifaxsecurity2017.com to check if your information has been compromised.

2. Check all of your accounts via online services provided by your bank or credit card provider, you can also call the company directly for assistance in reviewing your accounts. Consumers should be looking for any discrepancies in their purchasing habits. Continue to monitor this in the coming months as criminals may not use your information immediately.

3. Monitor your accounts closely and frequently. Balance your checkbook monthly and match credit card statements with receipts. By checking throughout the month, you'll be able to identify possible problems sooner.

4. Review your credit report every three or four months. You are entitled to one free credit report from each of the three major credit bureaus per year. By staggering these requests, you will be able to monitor your credit throughout the year.

5. Register for eNotify from the Wisconsin Department of Motor Vehicles. This service will allow you to set up alerts confirming transactions regarding your drivers license. If you didn't request the transaction, this serves as an early alert system that someone is making unauthorized changes.

You know your information has been compromised:

1. Contact the security departments of your creditors or bank to close the compromised account(s). Explain that you are a victim of identity theft and this particular card or account has been compromised. Ask them to provide documentation that the account has been closed. You should also follow up with a letter to the agency documenting your request.

Wisconsin Bankers ASSOCIATION
Compliance Journal
Special Focus

Another UCC Filing Bites the Dust in Wisconsin: This Time For An Extra Space in Debtor's Name

Shockingly, but correctly under the circumstances, a court in Wisconsin declared a filed UCC financing statement invalid because the secured creditor left too much space between certain parts of the debtor's name. Really! The name was spelled right but it just contained too much space between certain parts of the debtor's name. The Court held that the secured creditor had incorrectly stated the name of the debtor on the UCC financing statement as ISC, Inc . (note the additional space between Inc and the period following Inc). The name on the filing should have been ISC, Inc. with a period immediately following the Inc, without a space, as the debtor's correct legal name. Unbelievably, this small and surely unintended additional space between Inc and the period following Inc was too much for the Court based on Wisconsin's UCC laws. United States SEC v. ISC, Inc., 2017 WL 3736796, dated August 30, 2017, United States District Court for the Western District of Wisconsin.

Under Wisconsin UCC Statutes, a financing statement typically is effective even if it has a minor error, unless the error makes the financing statement "seriously misleading." A financing statement that fails to provide the name of the debtor in accordance with the requirements of Wisconsin UCC Statutes is legally deemed to be "seriously misleading". Therefore, the secured creditor normally loses if the debtor's name is incorrectly stated. Fortunately, Wisconsin's UCC law also creates a "safe harbor" that may save a UCC financing statement containing an incorrect debtor name if a searcher of the UCC filing records using the debtor's correct name can find the incorrect filing using DFI's official search logic. Under DFI's official search logic, the extra space following the word "Inc" and before the period after the "c" prevented the financing statement with this additional space in the debtor's name from coming up in a search when using the debtor's correct legal name, which is ISC, Inc., without a space between the "c" and the period. In other words, the search using the DFI's official search logic and the debtor's correct legal name (without the space) did not find the filing using the debtor's incorrect legal name (with the space). So, the "safe harbor" did not save this particular UCC financing statement with an incorrect debtor name.

Again, as we have learned in other cases, the simplest of mistakes regarding a debtor's name on a UCC filing can be costly to a creditor. In this case, the creditor will now participate in the distributions by the receiver in the case as an unsecured creditor because of the invalid UCC filing. A UCC financing statement prepared for filing with DFI should be carefully reviewed to determine not only that the name of the debtor is correctly spelled, but also that it does not have an inadvertent space within one of the names (in this case an additional space in "Inc."). An inadvertent space proved costly to the secured creditor. It may be appropriate for DFI to determine whether its official search logic could be modified to disregard inadvertent and inconsequential spaces and other punctuation for purposes of locating filed UCC financing statements. Apparently, some states have chosen to disregard spaces for purposes of their official search logic. This decision by the Court is another reminder that the effectiveness of a UCC financing statement where the debtor's name is incorrect for any reason will depend on the official search logic used by DFI to find the financing statement with the incorrect debtor's name. The best practice, of course, is to not make "any" mistake in the debtor's name.

WBA wishes to thank Atty. John Knight, Boardman & Clark, llp for providing this article. ■

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Wisconsin Bankers ASSOCIATION

Compliance Journal

Special Focus

Summary of Recently Enacted State Legislation

There are several recently enacted state legislative items which directly impact financial institutions. The following article highlights select provisions of the items. For more comprehensive information on these items, please review the applicable Act. This article also discusses various bills not yet passed that WBA is working on and monitoring.

State Budget a Win for the Industry

On February 8, 2017, Governor Scott Walker delivered his 2017-2019 budget address. The Wisconsin state legislature passed the budget (Assembly Bill 64) on September 15, 2017 and Governor Walker signed it on September 21, 2017. The state budget is often the single most important piece of legislation that will pass every two years. It is a document that sets the priorities of the state for not only the next two years, but often years into the future. The 2017-2019 budget invests heavily in public education while eliminating the state personal property tax, and increases state dollars going to health services. The average property tax payer will have a lower tax bill than in 2008. Despite the increases in spending, the 2017-19 budget put more money into the rainy-day fund and still ends with a projected $200 million balance. WBA reviewed the budget bill and monitored the process throughout its changes and reports that it is largely a win for the banking industry.

The 2017-2019 budget had a June 30 deadline, which was not met due to a stalemate. Despite unified Republican control of state government, the Governor and leaders of the Senate and Assembly could not come to agreement on key issues. When the budget finally passed in September, it was over two months after the previous budget had expired. While it is not unusual for the budget to pass after the June 30 deadline (only three budgets since 1977 have been on time), only two in the last 20 years have been passed later than the 2017-19 budget.

The primary issue surrounding the budget was transportation. Governor Walker and Senate Republicans sought further transportation bonding for additional projects while Assembly leadership wanted to increase bonding only if taxes and/or fees were raised. Ultimately, fees were raised on electric and hybrid vehicles with a lower increase in bonding than originally proposed.

Throughout the process WBA pushed for changes supporting the banking industry. With the finalization of the budget bill we saw several wins for the banking industry:

- The Budget Committee removed Governor Walker's plan to tax captive insurance companies.
- $75 million cut to the personal property tax (which is the start of the process of repealing the tax altogether across multiple future budgets).
- Repeal of the Alternative Minimum Tax.
- Removed overall program cap for the Historic Tax Credit and instituted a $5 million per project cap beginning July 2018.

Foxconn Incentive Package

The State Assembly passed the Foxconn incentive package for a second and final time on Thursday, September 14, 2017, and was signed into law by Governor Walker on September 18, 2017. The legislation relating to the Foxconn incentive package, while separate from the budget, will have a lasting impact on the budget process in years to come. On November 10, 2017, Governor Walker and Foxconn Chairman Terry Gau signed the contract that will begin the process of bringing the LCD manufacturer here to Wisconsin. Following the deal, should Foxconn create the 13,000 jobs and invest $10 billion in capital in Wisconsin, the state will be paying the Taiwanese LCD manufacturer over $300 million/year from 2022-2026. This will potentially add difficulty to future budgeting.

WBA's Tax Exemption Bill

While it did not make the 2017-19 budget, WBA made progress with an effort to create a tax exemption for income generated from commercial and agricultural loans. The price tag of $26 million per year was simply too high to get included in the budget after the Governor's budget proposed spending almost all new revenue in public education. However, the concept received a high level of support among leadership in both the administration and legislature, and was under consideration until the very end of the budget process.

WBA will continue to urge the administration to include it in the 2019-21 budget.

Financial Literacy Bill

On October 31, 2017, the WBA supported Financial Literacy Bill was passed unanimously by the Senate. The bill directs each school board in the state to "adopt academic standards for financial literacy and incorporate instruction in financial literacy into the curriculum in grades kindergarten to 12." While passed by the Senate, as of publication of this article, the bill has not yet been signed by Governor Walker.

Banking Omnibus Bill

WBA continues to support its omnibus banking bill which contains a number of provisions in support of the banking industry. In summary, the bill:

- Allows the Division of Banking to disclose certain financial information to a Federal Home Loan Bank when conducting financial institution examinations.
- Increases the limit on loans by a savings bank to a single person.
- Eliminates the requirement that financial institutions and mortgage bankers pay interest on escrow accounts for residential mortgage loans originated on or after the effective date of the bill.
- Specifies that the security that may be provided by a public depository to secure the repayment of public deposits includes an irrevocable letter of credit issued by a Federal Home Loan Bank or financial institution.
- Permits a state bank, with approval of the Division of Banking, to reduce its capital and distribute cash or other assets to its shareholders.
- Provides provisions applicable to collateral and other security interests of Federal Home Loan Banks in insurance company liquidation proceedings.
- Modifies an administrative rule of the Department of Workforce Development to conform the rule to a similar provision under the federal Fair Labor Standards Act.

Conclusion

WBA regards the 2017-2019 budget as a general win for the banking industry. Alongside this, the industry was able to accomplish passing of the Financial Literacy Bill and push forward with the commercial and agricultural loan tax exemption. WBA will continue to monitor existing bills and prepare for the upcoming legislative season. If you have any additional questions on any of the above bills, do not hesitate to contact us at wbalegal@wisbank.com. ■

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Wisconsin Bankers ASSOCIATION

Compliance Journal

Special Focus

FAQs on Wisconsin Consumer Act and Marital Property Act

The Wisconsin Consumer Act (WCA) and Marital Property Act (MPA) continue to be frequent topics for the WBA legal call program. We have compiled some of the most frequently asked questions on those two topics and present them in the article below. Note that this article is not, nor intended to be, a recital of all applicable State and Federal laws and regulations for specific transactions.

What transactions are governed by the WCA?

The WCA applies to consumer loans and credit sales to individuals for personal, family, or household purpose when the amount financed is $25,000 or less and the loan is not secured by a first lien real estate mortgage or equivalent security interest.

Does the WCA impose maximum rates of finance charges?

No. The creditor and customer may agree to a maximum finance charge per the terms of the contract. However, the rate may not be unconscionable.

Does the WCA restrict how interest is calculated?

No. However, if the 1/360th method is utilized, it must be disclosed conspicuously.

Does the WCA restrict rates after default?

Yes. The interest rate after the final scheduled maturity date may not exceed the greater of 12% per year or the annual rate of finance charge assessed on the transaction.

Does the WCA have requirements for delinquency charges?

Yes. For closed-end transactions, late charges are restricted to the lesser of $10 or 5% of the unpaid amount of the installment.

The Wisconsin Department of Financial Institutions has explained that an installment is considered current when a payment is made on its due date or within the 10 days following its due date, creating a grace period.

If an installment is received on or before its scheduled or deferred due date, no delinquency charge may be assessed for that payment even though an earlier installment or delinquency charge has not been paid in full.

A delinquency charge may be collected only once on any installment.

When assessing late charges, the WCA requires payments be applied first to current installments and then to delinquent installments.

Finally, if interest is charged after the final scheduled maturity date, no delinquency charge may be assessed on the final scheduled payment.

For open-end credit, there is no limit on the amount nor a grace period, but the charge must still be agreed to by contract.

What are some of the requirements for variable rate loans under the WCA?

There are two types of variable rate transactions under the WCA: approved index loans and non-approved index loans.

For approved index loans:

- Adjustments in rate are based upon changes in an approved index (e.g. Wall Street Journal Prime)
- Index approved by the Secretary of WDFI
- Index must be beyond control of creditor
- Index must be verifiable by consumer
- Limitations on decreases allowed only if similar limitations placed on increases
- No carry-over provision

For non-approved index loans:

- Index is set by the creditor and is not tied to an approved index
- Additional limitations and disclosure requirements, including:
  - May not increase rate during first 3 months following consummation of transaction
  - Rate increases may not exceed 2% per year

Are there subsequent notice requirements for variable rate closed-end loans under the WCA?

Yes. A creditor must mail or deliver a written notice of every rate change at least 15 days prior to the change in rate if implemented by a change in periodic payment, other than the final payment. The notice must be given no later than 30 days after any other change.

Notice is not required, however, for closed-end loans if the rate change is based on an approved index and there is no change in the periodic payment (other than the final payment).

Are there subsequent notice requirements for variable rate open-end loans under the WCA?

No notice is required if the adjustment is made in a variable rate transaction pursuant to an open-end credit plan that is based upon changes in an approved index.

Does the WCA require any notices to customers, co-signers, and guarantors?

Yes. The creditor must furnish the customer with an exact copy of each instrument, document, agreement and contract signed by the customer and which evidences the customer's obligation before any payment is due to the creditor. The creditor must also provide the customer with copies of every writing evidencing the customer's obligation to pay upon request of the customer. One such copy must be furnished at no charge to the customer. Subsequent copies must also be furnished, but the creditor may charge a reasonable fee for production and delivery.

Each person signing the guaranty or as co-signer in addition to signing the guaranty or note must receive either: copies of each instrument, document, agreement, and contract signed by the customer and which evidences the customer's obligation, or an explanation of personal obligation. A sample notice appears in the WCA and is reproduced on the WBA 156 or 156A (for open-end credit) Explanation of Personal Obligation forms.

In connection with open-end credit, if any subsequent change would increase or extend contingent liability of the guarantor or co-signer, an explanation of change must be provided conspicuously disclosing that if such person wishes to terminate liability with respect to future transactions, that person must notify the creditor in writing.

Who is covered by the Wisconsin MPA?

Married Wisconsin residents.

What is marital property under the MPA?

All property of spouses is marital property except that property which is classified otherwise (e.g. individual property). During marriage, all property of spouses is presumed to be marital property.

Who has management and control of property under the MPA?

A spouse acting alone may manage and control:

- That spouse's individual property
- Marital property held in that spouse's name alone
- Marital property held in the names of both spouses in the alternative (e.g. Jack "or" Jane)
- Marital property not specifically held in either spouse's name

In credit transactions, however, a spouse acting alone may generally manage and control all marital property for purposes of obtaining a "family purpose" debt. This does not include a right to grant a security interest or mortgage in marital property except to the extent the spouse may do so under the general management and control rules.

Are there special rules for homestead?

Yes. A conveyance of real property shall not be valid unless the conveyance is signed or joined in by separate conveyance, by or on behalf of each spouse, if the conveyance alienates any interest of a married person in a homestead. The only exceptions are for conveyances between spouses, and for a purchase money mortgage pledging that property as security (in this case, only the purchaser must sign the mortgage).

What is required for married Wisconsin residents during the application process?

If a married Wisconsin resident applies for family purpose credit, the creditor must consider all marital assets available to satisfy the obligation. There is no definition of "family purpose" but the presumption is that an obligation

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incurred by a spouse during marriage is presumed to be family purpose—that is to say the obligation is incurred in the interest of the family or marriage.

Note that Regulation B permits the creditor to inquire regarding the applicant's marital status (married, unmarried or legally separated) in a community property state such as Wisconsin. Similarly, the creditor may request any information concerning the applicant's spouse that may be requested about the applicant

Are there notice requirements for applicants who are married Wisconsin residents?

Yes. Two notices that generate the most questions are the marital agreement notice and the "tattletale" notice.

All written applications for credit governed by WCA must include a marital agreement notice. The notice must state that no provision of a marital property agreement, unilateral statement under Section 766.59 or court decree under Section 766.70, Wis. Stats., adversely affects the creditor unless the creditor is furnished a copy of the document prior to the credit transaction or has actual knowledge of its adverse provisions at the time the obligation is incurred. The marital agreement notice requirement does not apply to applications for renewals, extensions, or modifications of a credit transaction.

The MPA also requires creditors to provide the non-applicant spouse written notice of the extension of credit if the extension of credit is both for "family purpose" and governed by the Wisconsin Consumer Act. This is often referred to as a "tattletale notice." The notice requirement may be satisfied by providing a copy of the instrument, document, agreement, or contract evidencing the obligation to pay or any required credit disclosure which is given to the applicant spouse, or by providing a separate writing briefly describing the nature of the credit extended.

What is the purpose of the WBA 154 Spousal Consent to Guaranty form?

The Spousal Consent to Guaranty form is not required by law, but protects the creditor's ability to collect on the guaranty from all marital property belonging to the couple. The MPA generally limits gifts of marital property to third parties by one spouse acting alone to $1,000 per calendar year unless the spouses act together in making the gift. While WBA does not necessarily view payments on guaranties as gifts to the third party, in the event a court characterized the payment as a gift, by obtaining the non-guarantor spouse's consent to the guaranty, the creditor would then not be limited to the $1,000 per calendar year amount.

While spouses may act together to make a gift, WBA strongly cautions against requiring the signature of a guarantor's spouse. Regulation B prohibits a creditor from requiring the signature of a guarantor's spouse just as it prohibits requiring the signature of an applicant's spouse. Thus, a creditor cannot require the guarantor's spouse to sign the guaranty to protect its interest. Instead, the creditor should obtain the non-guarantor spouse's consent to the guaranty by execution of the WBA 154 form.

What is the purpose of the WBA 154A Spousal Consent to UCC Filing form?

This form is used if the creditor will be filing a UCC financing statement on collateral that is marital property. The UCC definition of "debtor" includes persons with an ownership interest in the property, even if they are not a borrower. For this reason, creditors need the consent of all debtors to file the financing statement. A creditor obtains the borrowing spouse's consent in the security agreement, and the Spousal Consent to UCC Filing can be used to obtain the consent of the non-borrowing spouse. If the financing statement is not authorized by each debtor, it is ineffective and the creditor's security interest may not be perfected.

Conclusion

While this article is not comprehensive in its consideration of all WCA and MPA issues, WBA hopes it will serve as a helpful guide to some of the more common questions we receive. For a full understanding of the applicable rules WBA recommends consulting Chapters 421 through 427 of the Wisconsin Statutes for the full scope of the WCA and Chapter 766 for the MPA. ■