Wisconsin Bankers Association

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Compliance Journal

Special Focus

FDIC Brokered Deposits and Interest Rate Restrictions

On December 15, 2020, the Federal Deposit Insurance Corporation (FDIC) finalized rules designed to modernize its existing brokered deposit rules. Brokered deposits are funds managed by a deposit broker. Meaning, an individual who accepts and places funds in investment instruments at financial institutions, on behalf of others.

The final rule establishes a new framework for determining who is a "deposit broker." It also amends the methodology for calculating the national rate, national rate cap, and the local market rate cap. Lastly, it explains when nonmaturity deposits are accepted and when nonmaturity deposits are solicited for purposes of applying the brokered deposits and interest rate restrictions. This article provides background information on what brokered deposits are, and focuses on two aspects of the final rule: the definition of "deposit broker" and interest rate restrictions.

Background

Significance of Regulation under Current Rules

Brokered deposits are a significant source of assets for some institutions. However, despite being a potential source of liquidity, many institutions avoid brokered deposits entirely due to FDIC's complex regulation which often renders them impractical despite their utility as a deposit tool.

Application of the brokered deposit regulation is sweeping and complex, including sub-categories such as sweep programs, reciprocal deposits, and general purpose prepaid cards. FDIC has broad discretion in application of its rules, which involves complex methodologies for determining and adjusting rates. Furthermore, during the period of rulemaking, FDIC issued nearly 100 interpretations, advisories, and studies attempting to clarify who is a deposit broker.

As technologies continue to evolve, and the financial industry follows those trends, the brokered deposit regulation, designed before the age of online banking, has become outdated. For example, the sweeping coverage of the regulation means institutions seeking deposits through the internet could be subject to interest rate caps.

At first glance, the regulation's rate cap limitations may only seem to harm community banks, but it is an issue that affects institutions both small and large. On the community bank side, FDIC bases the caps on what larger institutions offer. In reality, the result can easily become a cap based on factors beyond what the community bank may be able to offer. By rule, the rate caps only apply to less than well capitalized institutions. However, regulators have looked to the limits during exams, regardless of capital levels, pointing to potential volatility. Furthermore, under its 2009 calculation method, current rate caps lag behind what a customer may obtain from other sources, such as the Treasury.

Legal Background

As a matter of statutory framework, Section 29 of the Federal Deposit Insurance Act (FDI Act) restricts the acceptance of deposits by certain insured depository institutions (IDIs) from a deposit broker. In summary, the law's original restrictions include:

1. Limiting acceptance of brokered deposits to well capitalized IDIs.

2. Less than well capitalized institutions may only offer brokered deposits under certain circumstances, and with restricted rates.

The inception of brokered deposits came with the ability to transfer funds electronically. Technologies made it quick, easy, and cheap to access un-reached markets. With brokered deposits came greater bank liquidity and growth. After the 1980 financial crisis, FDIC's study of brokered deposits lead to rules written in 1989 and amended in 1991 as the product and its use was believed to be riskier than traditional core deposits.

In 2018, the Economic Growth, Regulatory Relief, and Consumer Protection Act amended Section 29 of the FDI Act to except a capped amount of certain "reciprocal deposits" from treatment as brokered deposits. On February 6, 2019, FDIC published an advance notice of proposed rulemaking and sought for comment on unsafe and unsound banking practices: brokered deposits and interest rate restrictions (ANPR). A proposed rule followed on February 10, 2020. WBA commented on both the ANPR and the proposed rule. FDIC has now issued a final rule. The final rule takes effect on April 1, 2021, with mandatory compliance by January 1, 2022.

Summary of Final Rule

The final rule establishes a new framework for analyzing certain provisions of the "deposit broker" definition, including "facilitating" and "primary purpose." In the final rule, FDIC designates certain business relationships as meeting the primary purpose exception and allows IDIs and third parties that wish to utilize the primary purpose exception but do not meet one of the designated exceptions to apply for a primary purpose exception.

The final rule's interest rate restrictions relate to less than well capitalized IDIs. Under the final rule, FDIC amended the methodology for calculating the national rate and national rate cap for specific deposit products. The national rate would be the weighted average of rates paid by all IDIs on a given deposit product, for which data are available, where the weights are each institution's market share of domestic deposits.

Definition of "Deposit Broker"

Section 29 of the FDI Act provides that a person is a "deposit broker" if they are engaged in the business of placing deposits, or facilitating the placement of deposits, of third parties with IDIs or the business of placing deposits with IDIs for the purpose of selling interests in those deposits to third parties. The definition also includes an agent or trustee who establishes a deposit account to facilitate a business arrangement with an IDI to use the proceeds of the account to fund a prearranged loan. The statute does not further define the categories that make up the definition of "deposit broker." The final rule defines "deposit broker" as follows:

- Any person engaged in the business of placing deposits of third parties with IDIs;
- Any person engaged in the business of facilitating the placement of deposits of third parties with IDIs;
- Any person engaged in the business of placing deposits with IDIs for the purpose of selling those deposits or interests in those deposits to third parties; and
- An agent or trustee who establishes a deposit account to facilitate a business arrangement with an IDI to use the proceeds of the account to fund a prearranged loan.

The discussion below elaborates on the first three bullet points of the final rule's definition of deposit broker.

Engaged in the Business of Placing Deposits

The amended definition provides that a person is engaged in the business of placing deposits of third parties if that person receives third party funds and places those funds at more than one IDI. FDIC considers a person to be engaged in the business of placing deposits if that person has a business relationship with its customers, and as part of that relationship, places deposits with IDIs on behalf of the customer. Thus, the final rule amended the first bullet point of the "deposit broker" definition by providing that the person must have a business relationship with its customers, and as part of that relationship, receive customer funds and place those funds with IDIs on behalf of the customer.

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Engaged in the Business of Facilitating the Placement of Deposits

The "facilitation" part of the definition refers to activities where the person does not directly place deposits on behalf of its customers with IDIs. Under the final rule, a person is engaged in the business of facilitating the placement of deposits of third parties with IDIs, by, while engaged in business, with respect to deposits placed at more than one IDI, engaging in one or more of the following activities:

- The person has legal authority, contractual or otherwise, to close the account or move the third party's funds to another IDI;
- The person is involved in negotiating or setting rates, fees, terms, or conditions for the deposit account; or
- The person engages in matchmaking activities.

The activities that result in a person being "engaged in the business of facilitating the placement of deposits" is intended to capture activities that indicate that the third party takes an active role in the opening of an account or maintains a level of influence or control over the deposit account even after the account is open. Having a certain level of influence over account opening or retaining a level of control over the movement of customer funds after the account is open, indicates that the deposit relationship is between the depositor and the person rather than the depositor and the IDI.

It is worth discussing a portion of the proposed rule to better understand why FDIC has finalized certain aspects of the rule as discussed above. Under the proposed rule, a number of entities, such as financial technology companies that partner with financial institutions through the regular course of business including data processing, web servicing, consulting, and advertising would have met the "deposit broker" definition. A number of groups, including WBA, commented that inclusion of such businesses would be inappropriate. In the final rule, FDIC agreed this was an unintended consequence.

Thus, under the final rule, any person that has an exclusive deposit placement arrangement with one IDI and is not placing or facilitating the placement of deposits at any other IDI, will not be "engaged in the business" of placing, or facilitating the placement of, deposits and therefore will not meet the "deposit broker" definition. FDIC notes that under these arrangements, the third party has developed an exclusive business relationship with the IDI and, as a result, is less likely to move its customer funds to other IDIs in a way that makes the deposits less stable.

Engaged in the Business of Placing Deposits with IDIs for the Purpose of Selling Interests

This part of the definition specifically captures brokered certificates of deposit (CDs). These are typically deposit placement arrangements where brokered CDs are issued in wholesale amounts by an institution seeking to place funds under certain terms and sold through a registered broker-dealer to investors, typically in fully insured amounts.

FDIC noted in the final rule that it intends that third parties that assist in the placement of brokered CDs, or any similar deposit placement arrangement with a similar purpose, will continue to be considered deposit brokers under this part of the deposit broker definition, regardless of any future innovations or re-structuring in the brokered CD market.

Exceptions to the Definition of "Deposit Broker"

FDI Act Section 29 provides nine statutory exceptions to the definition of deposit broker and FDIC has previously established one regulatory exception to the definition. Originally, FDIC had proposed revisions to the following two exceptions:

- The exception for an IDI, with respect to funds placed with that depository institution (IDI exception).
- The exception for an agent or nominee whose primary purpose is not the placement of funds with depository institutions (primary purpose exception).

The final rule takes a different approach than the proposed rule, as discussed below.

IDI Exception

The final rule did not adopt the proposed changes to the IDI exception. However, the final rule does provide some discussion with regard to why, including treatment of "dual-hatted" employees, which is worth noting.

The IDI exception excludes an IDI from the definition of deposit broker when it, or its employee, places funds at the institution. FDIC proposed changes to expand the IDI Exception to permit wholly owned subsidiaries that meet certain criteria to be eligible for the exception. As discussed above, the final rule's definition of deposit broker does not include third parties that have an exclusive deposit placement arrangement with one IDI. Thus, wholly owned subsidiaries that would have met the proposed IDI exception, will not meet the "deposit broker" definition under the final rule. Thus, FDIC determined that expansion of the IDI exception was no longer necessary.

However, FDIC did take a moment in the final rule to discuss applicability of the IDI exception to "dual-hatted" or "dual" employee. FDIC noted that the statutory "employee" exception applies solely to an "employee" who satisfies the definition of an employee provided by the statute. The statute defines an "employee" as any employee:

- Who is employed exclusively by the IDI;
- Whose compensation is primarily in the form of a salary;
- Who does not share such employee's compensation with a deposit broker; and
- Whose office space or place of business is used exclusively for the benefit of the IDI, which employs such individual.

FDIC stated that the exception does not apply to a contractor or dual employee because they are not employed exclusively by IDIs. The exception would, however, apply to "dual-hatted" employees that are employed exclusively by the institution so long as the employees meet each of the other statutory elements of the "employee" definition.

Primary Purpose Exception

Under the final rule, the primary purpose exception applies when, with respect to a particular business line, the primary purpose of the agent's or nominee's business relationship with its customers is not the placement of funds with depository institutions, and whether an agent or nominee qualifies for the primary purpose exception will be based on analysis of the agent's or nominee's relationship with those customers.

The final rule also identifies a number of specific business relationships, known as "designated business exceptions," as meeting the primary purpose exception. Additionally, businesses that do not qualify for a designated exception may submit an application to FDIC for consideration under the primary purpose exception. Please refer to the final rule for the full list of business relationships that qualify for the designated exceptions.

Interest Rate Restrictions

Under Section 29 of the FDI Act, well capitalized institutions are not subject to any interest rate restrictions. However, the statute imposes interest rate restrictions on IDIs that are less than well capitalized, as defined in Section 38 of the FDI Act. The statutory interest rate restrictions generally limit a less than well capitalized institution from offering rates on deposits that significantly exceed rates in its prevailing market.

Under current regulations, an institution that is not well capitalized generally may not offer deposit rates more than 75 basis points above the national rate for deposits of similar size and maturity. The national rate is currently defined as a simple average of rates paid by all IDIs and branches that offer and publish rates for specific products. If an institution believes that the posted national rates do not represent the actual rates in the institution's local market area, the institution may present evidence to FDIC that the prevailing rate in a particular market is higher than the national rate. If FDIC agrees with the evidence, the institution would be permitted to pay as much as 75 basis points above the local prevailing rate for deposits solicited in its local market area.

The final rule amends FDIC's methodology for calculating the national rate, the national rate cap, and the local rate cap. The final rule also provides a new simplified process for institutions that seek to offer a competitive rate when the prevailing rate in an institution's local market area rate exceeds the national rate cap. The following highlights changes made by the final rule.

National Rate Methodology and National Rate Cap

The final rule adopts the national rate methodology generally as proposed but revised it to include the rates offered by credit unions.

The national rate cap now is the higher of:

1. The national rate (weighted average of rates paid by all IDIs and credit unions on a given deposit product, where the weights are each institution's market share of domestic deposits), plus 75 basis points; or
2. 120 percent of the current yield on similar maturity U.S. Treasury obligations, plus 75 basis points, or in the case of nonmaturity deposits, the federal funds rate plus 75 basis points.

Local Market Rate Cap

The final rule adopts a local market rate cap of 90 percent of the highest offered rate in the institution's local market geographic area. A less than well capitalized institution would be permitted to provide evidence that any bank or credit union with a physical presence in its local market area offers a rate on a particular deposit product in excess of the national rate cap. The local market area could include the State, county, or metropolitan statistical area, in which the IDI accepts or solicits deposits.

The final rule also eliminates the current two-step process where less than well capitalized institutions request a high rate determination from FDIC and, if approved, calculate the prevailing rate within local markets. Instead, a less than well capitalized institution would be required to notify FDIC that it intends to offer a rate that is above the national rate cap and provide evidence that an IDI or credit union with a physical presence in the less than well capitalized institution's normal market area is offering a rate on a particular deposit product in its local market area in excess of the national rate cap.

Conclusion

The final rule represents long-awaited changes to brokered deposit rules. As discussed above, the final rule establishes a new framework for the definition of who is a "deposit broker" and methodology for calculating the national rate and national rate cap for certain deposit products.

The final rule is effective on April 1, 2021. The mandatory compliance date is January 1, 2022. Entities may begin relying upon the provisions of the final rule as of April 1, 2021, and will have to comply with any applicable reporting requirements. It is also worth noting that the mandatory compliance date of January 1, 2022, permits entities to continue reliance upon existing staff advisory opinions or other interpretations until that date. However, upon January 1, 2022, previous staff advisory opinions will be moved to inactive status.

It is also important to note that due to the recent change in the federal administration, it is possible a delay in the implementation of the final rule may occur as a result of the new administration reviewing the rule. The review of a rule that has been finalized but not yet published, or is not yet effective, is a routine review any time there is a change in administration. WBA will continue to monitor the status of this and other rules under review. The notice may be viewed at: www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/

The final rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-01-22/pdf/2020-28196.pdf ■

Regulatory Spotlight

Agencies Issue Final Rule on Regulatory Capital Requirements for Certain Investments of Unsecured Debt Instruments.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC) (collectively, the agencies) issued a final rule that applies to advanced approaches banking organizations with the aim of reducing both interconnectedness within the financial system and systemic risks. The final rule requires deduction from a banking organization's regulatory capital for certain investments in unsecured debt instruments issued by foreign or U.S. global systemically important banking organizations (GSIBs) for the purposes of meeting minimum total loss-absorbing capacity (TLAC) requirements and, where applicable, long-term debt requirements, or for investments in unsecured debt instruments issued

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SBA PPP Hold Codes and Unresolved Borrower Resolution Process for Second Draw PPP Loans.

WBA continues to field questions from lenders trying to process Paycheck Protection Program (PPP) loan applications. In particular, when submitting applications for Second Draw PPP Loans, questions arise regarding hold codes assigned to a First Draw PPP Loan and how to resolve a particular code. If a First Draw PPP Loan is under review pursuant to PPP rules, or if information in SBA's possession indicates that the borrower may have been ineligible for the First Draw PPP Loan it received or for the loan amount received by the borrower, the lender will receive notification from SBA when it submits an application for guaranty of a Second Draw PPP Loan. One of the steps that need be completed before the lender is able to proceed with the Second Draw Loan application is to clear a hold code(s) assigned by SBA. Below is a listing of hold codes, reasons for a hold, and suggested information lenders can collect from PPP borrowers and submit to SBA for resolution.

Code Name and Description

1 **Criminal Record:** Criminal record identified in public records – potential eligibility issue

Provide proof that the borrower (if an individual) and all individuals owning 20% or more of the equity of the borrower do not have a criminal record and/or provide information and documentation explaining the criminal record. If no criminal record exists, provide a statement from each individual, signed and dated, confirming that no criminal record exists or a background report that demonstrates that no criminal record exists. If a criminal record exists, provide a statement from the individual, signed and dated, that describes the specific charge, date of the offense, final disposition, and date of disposition and supporting court documentation.

2 **Bankruptcy:** Bankruptcy identified in public records – potential eligibility issue

Provide proof that either the borrower and/or owners of 20% or more of the equity of the borrower never filed for bankruptcy, or that the bankruptcy was discharged prior to the application date of the First Draw PPP Loan or filed after the disbursement date of the First Draw PPP Loan such as: court filings with filing date and discharge date (where applicable), additional court correspondence, bankruptcy forms and documents, or loan transcript showing disbursement date.

5 **Potential Decedent Application:** Owner or principal of borrower, as entered in ETRAN, appears to be deceased in public records

Provide proof that each owner and principal is not deceased such as an identity affidavit or current proof of identity including SSN.

6 **Inactive Business:** Borrower is no longer active according to Secretary of State (*e.g.*, DFI) filings or public records – potential eligibility issue

Provide proof that the borrower was in operation as of 02/15/2020, AND at the time of the application for the First Draw PPP Loan such as: Secretary of State (*e.g.*, DFI) information filing, filed copy of DBA documents (if a non-Wisconsin created business as Wisconsin does not require filing of DBA documents), 2020 tax returns, filed 2019 tax returns, current bank account statements, current business license verified by issuing municipal authority, current official entity verification certificate from state of registration, or copies of paid invoices before and after 02/15/2020.

7 **Mismatch of TIN (EIN/SSN)**: Taxpayer identification number of borrower or principal, as entered in ETRAN, appears to be inaccurate

Provide proof of correct TIN (EIN/SSN) such as: copy of 2019 tax return or other recently filed tax forms verifying the name and taxpayer identification number for the borrower or principal, IRS EIN document, or copy of social security number (SSN) card.

8 **Mismatch of Entity Name (Individual or Company) –** Entity/Individual name of borrower or principals, as entered in ETRAN, appears to be inaccurate

Provide proof linking borrower and principal names to TIN (EIN/SSN) such as: copy of 2019 tax return or other recently filed tax forms verifying the name and taxpayer identification number (TIN/EIN/SSN) for the borrower or principal, filed copy of DBA documents (if a non-Wisconsin created business as Wisconsin does not require filing of DBA documents), copy of a business license or state license registration, individual's driver's license or official identification, or copy of social security number (SSN) card.

9 **In Operation After 02/15/2020:** Public records indicate that borrower either came into existence after 02/15/2020, or business activity prior to 02/15/2020, was not detected – potential eligibility issue

Provide proof that the borrower was in operation as of 02/15/2020, AND at the time of the application for the First Draw PPP Loan such as: Secretary of State (*e.g.*, DFI) information filing, filed copy of DBA documents (if a non-Wisconsin created business as Wisconsin does not require filing of DBA documents), 2020 tax returns, filed 2019 tax returns, current bank account statements, current business license verified by issuing municipal authority, current official entity verification certificate from state of registration, or copies of paid invoices before and after 02/15/2020.

12 **SBA Franchise Directory Review:** Borrower identified as franchise in ETRAN but cannot be identified on Franchise Directory – potential eligibility issue

Provide proof either that the borrower is a franchise that is listed on the SBA Franchise Directory, or that the borrower is not a franchise, such as: SBA Franchise Identifier Code or evidence of operating agreements that demonstrate the business is not operating as a franchise.

15 **Potential Ineligible Business Size:** Based on information entered in ETRAN – potential ineligible business size for First Draw PPP Loan, number of employees greater than 500 – potential eligibility issue

Provide proof of the borrower's size eligibility for the First Draw PPP Loan such as: Form 941's for all four quarters in 2019, payroll tax data, payroll reports/documents, if borrower (including affiliates) has more than 500 employees, explanation of why the borrower is eligible, if borrower (including affiliates) has more than 500 employees, verification of NAICS code accuracy, or if borrower (including affiliates) has more than 500 employees, copies of most recent 3 years Federal Tax Returns.

16 **Large Number of Employees at Residential Business Address:** Borrower address entered in ETRAN is a residential address and number of employees of 100 or greater

Provide proof either that the borrower has an alternate business address that supports the number of employees or that the borrower's operations can be conducted from the current residential business address such as: proof of an alternate operating address such as a current utility bill, current lease/rental agreement, or mortgage note/mortgage statement, and an explanation of why the alternate operating address was not listed on the application form, signed statement by the borrower explaining how the borrower operations and number of employees can be supported from a residential address, payroll documentation validating number of employees, or proof that the borrower address entered in ETRAN is not a residential address.

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17 Internal SBA Research Holds: Not Publicly Available, SBA Review

WBA is aware that some lenders have had a Code 17 assigned to an application. WBA believes this is a hold placed when SBA is reviewing a particular application. SBA has not identified the code in any release instructions and has not provided instruction for how to clear the code. If Code 17 is assigned a particular application, WBA recommends lenders contact SBA for instruction regarding the application as perhaps the situation is one that does not neatly fall into a hold category and more individualized instruction may be necessary.

18 Aggregate Data Mismatch: Identification information provided in ETRAN cannot be verified or is found to be associated with a different entity or individual in public records – potential eligibility issue

Provide proof linking borrower and principal's names to TIN (EIN/SSN) such as: copy of 2019 tax return or other recently filed tax forms verifying the name and taxpayer identification number (TIN) for the borrower and principals, filed copy of DBA documents (if a non-Wisconsin created business as Wisconsin does not require filing of DBA documents), copy of business license or state license registration, individual's driver's license or official identification, or copy of social security number (SSN) card.

21 Employee Count Threshold: Employee Count indicative of concern – potential eligibility issue

Provide proof of employee count and size eligibility for the First Draw PPP Loan such as: Form 941's for all four quarters in 2019, payroll tax data, payroll reports/documents, if borrower (including affiliates) has more than 500 employees, explanation of why the borrower is eligible, if borrower (including affiliates) has more than 500 employees, verification of NAICS code accuracy, or if borrower (including affiliates) has more than 500 employees, copies of most recent 3 years federal tax return.

24 Business Address is Currently Vacant: Borrower address provided in ETRAN is currently vacant

Provide proof either that the borrower has an alternate business address that supports the active business or that the borrower's operations are being conducted from the current business address such as: proof of an alternate operating address such as a current utility bill, current lease/rental agreement, or mortgage note/mortgage statement, and an explanation of why the alternate operating address was not listed on the application form; or proof that the business address listed on the application is not vacant and business operations are being conducted there such as a current utility bill, current lease/rental agreement, or mortgage note/mortgage statement.

26 Compliance—Marijuana/Cannabis Sales: Borrower appears to be engaged in activities that are illegal under federal law (*e.g.*, marijuana/cannabis businesses), state or local law – potential eligibility issue

Provide proof that the borrower is not engaged in the marijuana/cannabis business such as: a description of the business activities, governing business documents: bylaws, partnership agreement, or corporate resolution, signed statement by borrower attesting that the business is not engaged in any activities that are illegal under federal law (including marijuana or cannabis) or under state or local law, or official corroborating documents such as business license and/or state license registration.

28 Compliance—Debarred Businesses: Borrower appears to be suspended or debarred from participation in federal programs – potential eligibility issue

Provide proof that the borrower is not debarred such as: documents validating business is not debarred or release of debarment.

29 Compliance—Defaulted SBA loan in the last 7 years: Borrower has defaulted and caused a loss on an SBA loan in the past 7 years – potential eligibility issue

Provide proof that the borrower has not defaulted on a direct or guaranteed business loan (including federal disaster loans) from SBA and caused a loss to the government in the last 7 years such as: current credit report(s) or proof of resolution.

30 Compliance—DOL OFCCP Violations: Borrower is suspended or debarred from participation in federal programs – potential eligibility issue

Provide proof that the borrower is not suspended or debarred from participation in federal programs such as: evidence of review/compliant, copies of investigation and recommendations if applicable, documents validating business is not debarred, or release of debarment.

31 NAICS 522—Credit Intermediation: Borrower appears to be engaged in lending – potential eligibility issue

Provide proof that the borrower is not involved in lending such as: verify NAICS Code, description of the business activities, governing business documents: bylaws, partnership agreement, or corporate resolution, tax return, company Annual Report, or company marketing information.

32 Payday Lender: Borrower appears to be engaged in lending – potential eligibility issue

Provide proof that the borrower is not involved in lending such as: verify NAICS Code, description of the business activities, governing business documents: bylaws, partnership agreement, or corporate resolution, tax return, company Annual Report, or company marketing information.

33 Potential Affiliation Issue: Borrower appears to have affiliates. Borrower, combined with its affiliates, appears to exceed size standards.

Provide proof that the borrower is either subject to a PPP affiliation exemption (*e.g.,* NAICS code 72, faith-based organization) or combined with affiliates does not exceed applicable size standard, such as: Addendum A or Faith-Based Addendum, SBA Form 3511 Affiliation Worksheet (see Paycheck Protection Platform Resources page for form).

34 Data Anomaly Issue: ETRAN data is incorrect

Confirm accuracy of borrower information such as: **c**orrect inaccurate loan information in ETRAN Servicing, tax return, IRS Forms matching the name and TIN (such as Form 941).

35 Research Duplicate 9 Digit Tax ID Issue: Borrower appears to have more than one First Draw PPP Loan

Confirm accuracy of borrower information such as: verify borrower information with information in ETRAN Servicing, tax return, or IRS Forms matching the name and TIN (such as Form 941).

37 SBA Potential Affiliation Issue: Borrower appears to have affiliates. Borrower, combined with its affiliates, appears to exceed size standards.

Provide proof that the borrower is either subject to a PPP affiliation exemption (*e.g.,* NAICS code 72, faith-based organization) or combined with affiliates does not exceed applicable size standard such as: Addendum A or Faith-Based Addendum or SBA Form 3511 Affiliation Worksheet (see Paycheck Protection Platform Resources page for form).

38 Foreign Country-related entities: Borrower appears to be owned by a foreign government – potential eligibility issue

Provide proof that the borrower is not owned by a foreign government such as: current tax return, IRS tax filing, Articles of Organization, Secretary of State (*i.e.*, DFI) filing, provide proof that the applicant is not a business concern or entity (a) for which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or a capital or profit interest in a limited liability company or partnership; or (b) that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China. The entities are ineligible for Second Draw PPP Loans.

39 State or Local Government: Borrower appears to be a State or Local Government – potential eligibility issue

Provide proof that the borrower is not a state or local government entity such as: current tax return, IRS tax filing, Articles of Organization/Incorporation, Secretary of State (*i.e.*, DFI filing).

40 Eligibility—Lobbying: Borrower appears to be a lobbyist – potential eligibility issue

Provide proof that the borrower is not involved in lobbying such as: CPA reviewed financial statements, tax return, or borrower disclosure of sources/amounts of revenue.

Special Focus

46 Do Not Pay—Death Sources: Owner or principal of borrower, as entered in ETRAN, appears to be deceased – potential eligibility issue

Provide proof that each owner and principal is not deceased such as: identity affidavit or current proof of identity including social security number (SSN).

47 Do Not Pay—SAM: Borrower appears to be on System for Award Management (SAM) exclusion list – potential eligibility issue

Provide proof that the borrower is not on the SAM Exclusion list such as: verification of ETRAN accuracy, documents validating business is not debarred, or release of debarment.

48 Do Not Pay—TOP and CAIVRS: Borrower listed in Do Not Pay for delinquent or has defaulted on federal debt and caused a loss within past 7 years – potential eligibility issue

Provide proof that the borrower has not defaulted on a direct or guaranteed business loan (including federal disaster loans) from SBA or any other federal agency and caused a loss to the government in the last 7 years, such as: screenshot of search on U.S. Department of Housing and Urban Development Credit Alert System (CAIVRS), verification of ETRAN accuracy, current credit report(s), or proof of resolution.

49 Do Not Pay—TOP Education: Borrower listed in Do Not Pay for delinquent federal debt – potential eligibility issue

Provide proof that the borrower is not delinquent on any federal debt, such as: verification of ETRAN accuracy, current credit report(s), or proof of resolution.

Additional Information

SBA has instructed it will provide information regarding unresolved issue(s) of a particular application and will provide guidance to the lender as to types of documentation that may assist with resolution. Lenders should work to respond in a timely fashion as SBA will need take time to review any newly submitted documentation to determine whether an unresolved issue(s) can be cleared. Lenders are instructed to work with borrowers to assess the situation. SBA has also instructed if the lender and borrower feel confident that the issue(s) can be resolved, the borrower should obtain the necessary documentation and the lender should submit it to the PPP platform. Once resolved by SBA, Second Draw Loan guaranty applications will be automatically submitted into the next stage of processing. Lenders will not have to re-enter the application. Lastly, SBA has instructed that if the borrower believes that there is an issue that cannot be resolved, the Second Draw PPP Loan application should be withdrawn by the lender in the platform. More resources regarding SBA's PPP may be viewed at the WBA COVID-19 related webpage at: https://www.wisbank.com/resources/coronavirus-covid-19/ ■

Regulatory Spotlight

Adjust CMPs for Inflation.

- The Bureau of Consumer Financial Protection (CFPB) issued a final rule to adjust for inflation the maximum amount of each civil money penalty (CMP) within its jurisdiction. The adjustments are required by the Federal Civil Penalties Inflation Adjustment Act, as amended by the Debt Collection Improvement Act and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act. The adjustments mandated by the Inflation Adjustment Act serve to maintain the deterrent effect of CMPs and to promote compliance with the law. The final rule is effective **01/15/2021**. The final rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-01-15/pdf/2021-00925.pdf. *Federal Register*, Vol. 86, No. 10, 01/15/2021, 3767-3769.

- The Board of Governors of the Federal Reserve System (FRB) issued a final rule to amend its rules of practice and procedure to adjust the amount of each civil money penalty provided by law within its jurisdiction to account for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. See the final rule for specific adjustments. The final rule is effective **01/13/2021**. The final rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-01-13/pdf/2021-00235.pdf. *Federal Register*, Vol. 86, No. 8, 01/13/2021, 2527-2529.

Beneficial Ownership Information Reporting Requirements

NDAA Title LXIV, Section 6403 establishes new beneficial ownership information reporting requirements. Under the new requirements, any reporting company that has been formed or registered before the effective date of implementing regulations, must report ownership information to FinCEN within two years after the effective date of the implementing regulation. Any reporting company that is formed or registered after the effective date of the new regulations must report beneficial ownership information to FinCEN at the time of formation or registration. If a reporting company has a change in information that is required to be reported, the reporting companies will be required to update the information, in a timely manner and not later than one year after the date of which there is a change in information.

A "reporting company" means a corporation, limited liability company (LLC), or similar entity. The term excludes a number of regulated businesses, including banks, bank holding companies, money transmitters, broker/dealers, stock exchanges, and small businesses of no more than 20 full-time employees if the small business meets additional conditions.

A reporting company reporting its beneficial ownership information to FinCEN may request a FinCEN Identifier which the company may then provide to a financial institution instead of disclosing beneficial ownership information.

Other BSA-Related Changes

NDAA also includes a host of other BSA-related changes. These include increasing penalties and creating new violations, requiring examiner training, creating an information exchange and FinCEN liaisons, updating the whistleblower program, and several new Government Accountability Office (GAO) reports.

Customer Due Diligence

As mentioned above, NDAA requires Treasury to revise its CDD rule for financial institutions to reduce any burdens on financial institutions and legal entity customers that are unnecessary or duplicative. In its efforts, Treasury is required to consider use of risk-based principles for requiring reports of beneficial ownership information; degree of reliance by financial institutions on information provided by FinCEN for obtaining and updating beneficial ownership information; strategies to improve accuracy, completeness, and timeliness of the information reported; and any other matter Treasury determines is appropriate.

Conclusion

While changes made by NDAA first need to be implemented through rulemaking by Treasury or FinCEN, financial institutions should take note that the new law does bring changes to the BSA and existing guidance. Future rulemakings will result in revisions to beneficial ownership requirements, CTR and SAR forms and reporting thresholds, and revised reporting procedures due to advancing technologies.

If financial institutions have questions regarding existing BSA requirements, be sure to contact WBA Legal at 608-441-1200 or at wbalegal@wisbank.com. WBA Legal will report on revised BSA-related rules as the agencies take steps to implement the changes made by NDAA. Financial institutions can finally look forward to some regulatory relief from the burden of BSA compliance. NDAA may be viewed at: https://www.govtrack.us/congress/bills/116/hr6395/text ■

Latest HPML Escrow Account Creates Another Exemption

The Bureau of Consumer Financial Protection (CFPB) has published its final rule to amend Regulation Z, which implements the Truth in Lending Act (TILA), as mandated by section 108 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). The amendments exempt certain creditors from the requirement to establish escrow accounts for certain higher-priced mortgage loans (HPMLs). The final rule is effective February 17, 2021. This article outlines the new exemption and its conditions.

Background

The rules requiring a creditor to establish an escrow account for HPMLs first began with the Board of Governors of the Federal Reserve System (FRB) before enactment of the Dodd-Frank Act as FRB considered HPMLs to be subprime. FRB's intention for the rule at the time was to reduce consumer and systemic risks by requiring the subprime market to structure loans and disclose pricing similarly to the prime market.

Then in 2010, Congress enacted the Dodd-Frank Act, which amended TILA and transferred TILA rulemaking authority and other functions from FRB to CFPB. The Dodd-Frank Act also added TILA section 129D(a), which adopted FRB's rule requiring that creditors establish an escrow account for HPMLs.

CFPB used its new authority to create an exemption from the escrow account requirement based on asset size and mortgage lending activity for creditors operating predominantly in rural or underserved areas. In 2015, CFPB revised the HPML escrow account requirements to incorporate necessary changes as Congress amended TILA again by striking the term "predominantly" for creditors operating in rural or underserved areas.

More recently, Congress enacted EGRRCPA in 2018. In section 108 of EGRRCPA, Congress directed CFPB to conduct rulemaking to create a new exemption, this one to exempt from TILA's escrow account requirement HPMLs made by certain creditors with assets of $10 billion or less that meet other criteria. CFPB's final rule implements the TILA change to Regulation Z. The final rule also removes obsolete text from the Official Interpretations to Regulation Z (commentary), corrects prior inadvertent deletions from the regulation, and corrects two scrivener's errors in existing commentary.

HPML Escrow Exemption

New Regulation Z section 1026.35(b)(2)(vi) exempts from the regulation's HPML escrow account requirement any loan made by an insured depository institution secured by a first-lien on the principal dwelling of a consumer if several conditions are met, including: institution asset size, a loan origination threshold, and certain existing HPML escrow account exemption criteria.

In particular, Section 1026.35(b)(2)(vi) has been created to provide that an escrow account need not be established for a transaction made by a creditor that is an insured depository institution if, at the time of consummation:

(A) As of the preceding December 31st, or, if the application for the transaction was received before April 1 of the calendar year, as of either of the two preceding December 31sts, the financial institution had assets of $10 billion or less;

(B) During the preceding calendar year, or, if the application for the transaction was received before April 1 of the current calendar year, during either of the two preceding calendar years, the creditor and its affiliates, together extended no more than 1,000 covered transactions secured by a first-lien on a principal dwelling; and

(C) The transaction satisfies the criteria in Regulation Z sections 1026.35(b)(2)(iii)(A) and (D).

The (b)(2)(iii)(A) criteria requires that during the preceding calendar year, or, if the application for the transaction was received before April 1 of the current calendar year, during either of the two preceding calendar years, the creditor extended a covered transaction, secured by a first-lien on a property that is located in an area that is either "rural" or "underserved." A covered transaction in this instance means a consumer credit transaction that is secured by a dwelling, other than a home equity line of credit or a mortgage transaction secured by a consumer's interest in a time share. The terms "rural" and "underserved" have the same meaning in the new exemption as the terms are otherwise used under existing HPML exemptions.

The (b)(2)(iii)(D) criteria requires that neither the creditor nor its affiliate maintain an escrow account of the type normally required for HPMLs under Regulation Z 1026.35(b) for any extension of consumer credit secured by real property or a dwelling that the creditor or its affiliate currently services, other than (1) escrow accounts established for first-lien HPMLs for which applications were received on or after April 1, 2020, and before June 17, 2021; or (2) escrow accounts established after consummation as an accommodation to distressed consumers to assist such consumers in avoiding default or foreclosure. Distressed consumers are consumers who are working with the creditor or servicer to attempt to bring the loan into a current status through a modification, deferral, or other accommodation to the consumer.

Special Focus

Escrow accounts established for first-lien HPMLs for which applications were received on or before April 1, 2010, and before June 17, 2021, are not counted for purposes of section 1026.35(b)(2)(iii)(D). Creditors, together with their affiliates, that continue to maintain escrow accounts established for first-lien HPMLs for which applications were received on or after April 1, 2020, and before June 17, 2021, still qualify for the new exemption so long as they do not establish new escrow accounts for transactions for which they receive applications on or after June 17, 2021, other than for the exemption under (b)(2)(iii)(D)(2) to accommodate a distressed consumer.

For applications received on or after June 17, 2021, creditors, together with their affiliates, that establish new escrow accounts for first-lien HPMLs other than under the exemption to accommodate a distressed consumer, do not qualify for the new Regulation Z section 1026.35(b)(2)(vi) exemption.

The term "affiliate" used within the new exemption means any company that controls, is controlled by, or is under common control with another company, as set forth in the Bank Holding Company Act, 12 U.S.C. 1841.

Lastly, the $10 billion asset threshold will be adjusted annually for inflation using the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each 12-month period ending in November.

Conclusion

CFPB has implemented the 2018 EGRRCPA Section 108 exemption from TILA's escrow account requirement for HPMLs. New Regulation Z section 1026.35(b)(2)(vi) exempts from the regulation's HPML escrow account requirement any loan made by an insured depository institution secured by a first-lien on the principal dwelling of a consumer if: (1) the institution has assets of $10 billion or less; (2) the institution and its affiliates originated 1,000 or fewer loans secured by a first-lien on a principal dwelling during the preceding calendar year; and (3) certain existing HPML escrow exemption criteria are met.

A condition under the new exemption is that the creditor and its affiliates not establish an escrow account for a first-lien HPML for which an application was received on or after June 17, 2021. Institutions for which the new exemption may apply, that wish to utilize the new exemption, need be mindful of the June 17, 2021 date so as to not be inadvertently disqualified from the new exemption if the practice has been to establish escrow accounts. The final rule, effective February 17, 2021, may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-02-17/pdf/2021-01572.pdf ■

Regulatory Spotlight

Agencies Issue Final Net Stable Funding Ratio.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC) (collectively, the agencies) issued a final rule to implement a stable funding requirement, known as the net stable funding ratio (NSFR), for certain large banking organizations. The final rule establishes a quantitative metric, the NSFR, to measure the stability of the funding profile of certain large banking organizations and requires the banking organizations to maintain minimum amounts of stable funding to support their assets, commitments, and derivatives exposures over a one-year time horizon. The final rule applies to certain large U.S. depository institution holding companies, depository institutions, and U.S. intermediate holding companies of foreign banking organizations, each with total consolidated assets of $100 billion or more, together with certain depository institution subsidiaries (together, covered companies). Under the final rule, the NSFR requirement increases in stringency based on risk-based measures of the top-tier covered company. U.S. depository institution holding companies and U.S. intermediate holding companies subject to the final rule are required to publicly disclose their NSFR and certain components of their NSFR every second and fourth calendar quarter for each of the two immediately preceding calendar quarters. The final rule also amends certain definitions in the agencies' liquidity coverage ratio rule that are also applicable to the NSFR. The final rule is effective **07/01/2021**. The final rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-02-11/pdf/2020-26546.pdf. *Federal Register*, Vol. 86, No. 27, 02/11/2021, 9120-9221.

Wisconsin Bankers ASSOCIATION

March 2021

Compliance Journal

Special Focus

National Defense Authorization Act FY 2021 Brings Changes to Bank Secrecy Act

The National Defense Authorization Act for Fiscal Year 2021 (NDAA), enacted on January 1, 2021, includes several provisions which impact the Bank Secrecy Act (BSA). This article is meant to provide an overview of the requirements set forth under the Act including future revisions to beneficial ownership requirements, currency transaction and suspicious activity reporting (CTRs/SARs), and BSA laws and guidance in general.

The changes made by NDAA first need be implemented through rulemaking by the Department of Treasury (Treasury) or Financial Crimes Enforcement Network (FinCEN). In most cases the agencies are to consult with federal and state prudential financial regulators and law enforcement agencies in the rulemaking process. Until rules are finalized, financial institutions need to maintain existing BSA policies and procedures—including existing customer due diligence (CDD) procedures.

Changes Made by National Defense Authorization Act

National Exam and Supervision Priorities

Pursuant to Section 6101 of NDAA Title LXI, Treasury is required to establish a national exam and supervision priorities no later than 180 days after enactment. Once established, the priorities are to be updated at least once every four years. Rules to implement these requirements are to be promulgated by FinCEN no later than 180 days after Treasury establishes the priorities.

Modernizing AML System

Many changes will come as a result of efforts to modernize the anti-money laundering (AML) system under NDAA. In particular, under Title LXII, section 6204, Treasury is required to undertake a formal review of CTR and SAR filings by financial institutions. This includes the processes used to submit reports under BSA, regulations that implement BSA, and related guidance. Treasury is required to propose changes to CTRs and SARs to reduce any unnecessarily burdensome regulatory requirements.

In those efforts, NDAA requires Treasury's review to include, whether:

- the circumstances under which an institution must file a continuing SAR, including insider abuse, or the process followed in determining whether to file such report should be streamlined or otherwise adjusted;
- the fields designated as critical on the SAR form, the fields on CTRs, and the number or nature of files on the forms should be adjusted;
- the categories, types, and characteristics of SARs and CTRs are of the greatest value to, and best support of, investigative priorities;
- increased use or expansion of exemption provisions to reduce CTRs that may be of little or no value to the efforts of law enforcement;
- there are appropriate ways to promote financial inclusion and address the adverse consequences of institutions de-risking categories of relationships, including charities, embassy accounts, and money service businesses;

- electronic submission of reports could be improved for all, including allowing greater integration between financial institutions' systems and the electronic filing system to allow for automatic population of report fields and the automatic submission of transaction data for SARs without bypassing the obligation of each institution to assess the specific risk of the transactions reported;

- there is an appropriate manner in which to ensure security and confidentiality of personal information;

- there can be improvements to cross-referencing of individuals or entities operating at multiple financial institutions and across international borders;

- there are ways to improve CTR aggregation for entities with common ownership;

- financial institutions should be permitted to streamline or otherwise adjust, with respect to particular types or customers or transactions, the process for determining whether activity is suspicious, or the information included in the SAR narrative; and

- any other matter Treasury determines is appropriate.

Section 6205 also requires Treasury to review thresholds for CTR and SAR filings to determine whether the dollar thresholds, including aggregate thresholds, should be adjusted. Included in Treasury's considerations must be the costs likely to be incurred or saved by financial institutions from any adjustment to the thresholds. No later than one year from date of enactment, Treasury is to publish a report of its review findings and to propose rulemakings to implement its findings and determinations.

Additionally, Section 6209 of Title LXII requires Treasury to issue a rule to specify what technology and related technology internal processes will be determined to facilitate compliance with BSA requirements. The standards will then be used by financial institutions to test the technology and related technology internal processes. The section sets forth specific criteria and standards in this context.

Treasury and the federal functional regulators are also required to undertake a formal review of the regulations that implement BSA and related guidance. The review is to identify those regulations and guidance that may be updated, redundant, or otherwise do not promote a risk-based AML compliance and counter the financing of terrorism.

BSA No-Action Letters

Treasury is to conduct an assessment on whether to establish a process for the issuance of no-action letters by FinCEN in response to inquiries from persons concerning the application of BSA, or other AML rule, and guidance.

Safe Harbor with Respect to Keep-Open Directives

Section 6306 of NDAA creates a new safe harbor. With respect to a customer account or customer transaction at a financial institution, if a federal law enforcement agency, after notifying FinCEN of the intent to submit a written request to an institution that the institution keep the account or transaction open, or if a state, Tribal, or local law enforcement agency with the concurrence of FinCEN submits a keep-open request, the financial institution shall not be liable under BSA for maintaining the account or transaction consistent with the parameters and timing of the request. Additionally, no federal or state department or agency can take adverse supervisory action with respect to the institution solely for maintaining the account or transaction consistent with the parameters of the request.

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Beneficial Ownership Information Reporting Requirements

NDAA Title LXIV, Section 6403 establishes new beneficial ownership information reporting requirements. Under the new requirements, any reporting company that has been formed or registered before the effective date of implementing regulations, must report ownership information to FinCEN within two years after the effective date of the implementing regulation. Any reporting company that is formed or registered after the effective date of the new regulations must report beneficial ownership information to FinCEN at the time of formation or registration. If a reporting company has a change in information that is required to be reported, the reporting companies will be required to update the information, in a timely manner and not later than one year after the date of which there is a change in information.

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Other BSA-Related Changes

NDAA also includes a host of other BSA-related changes. These include increasing penalties and creating new violations, requiring examiner training, creating an information exchange and FinCEN liaisons, updating the whistleblower program, and several new Government Accountability Office (GAO) reports.

Customer Due Diligence

As mentioned above, NDAA requires Treasury to revise its CDD rule for financial institutions to reduce any burdens on financial institutions and legal entity customers that are unnecessary or duplicative. In its efforts, Treasury is required to consider use of risk-based principles for requiring reports of beneficial ownership information; degree of reliance by financial institutions on information provided by FinCEN for obtaining and updating beneficial ownership information; strategies to improve accuracy, completeness, and timeliness of the information reported; and any other matter Treasury determines is appropriate.

Conclusion

While changes made by NDAA first need to be implemented through rulemaking by Treasury or FinCEN, financial institutions should take note that the new law does bring changes to the BSA and existing guidance. Future rulemakings will result in revisions to beneficial ownership requirements, CTR and SAR forms and reporting thresholds, and revised reporting procedures due to advancing technologies.

If financial institutions have questions regarding existing BSA requirements, be sure to contact WBA Legal at 608-441-1200 or at wbalegal@wisbank.com. WBA Legal will report on revised BSA-related rules as the agencies take steps to implement the changes made by NDAA. Financial institutions can finally look forward to some regulatory relief from the burden of BSA compliance. NDAA may be viewed at: https://www.govtrack.us/congress/bills/116/hr6395/text ■

Latest HPML Escrow Account Creates Another Exemption

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Immunity under Act 4 is in addition to, not in lieu of, other immunity granted by law, and nothing in the above section limits immunity granted under any other provision of law, such as worker's compensation laws, which, for example, generally provides an exclusive remedy for sick or injured workers. Also, as noted above, this immunity does not apply if the act or omission involves reckless or wanton conduct or intentional misconduct. Thus, financial institutions should continue to take steps to mitigate the risk of exposure to COVID-19. Financial institutions are reminded to remain mindful of state and local mandates, guidance, and recommended procedures. For example, considering the standards issued by the Centers for Disease Control and Prevention, the Occupational Safety and Health Administration, Wisconsin Department of Health Services, and local government issuances such as county orders. Banks should also consider consulting with its legal counsel for a fuller, more specific analysis of how it can obtain protections under Act 4.

Conclusion

WBA will continue to monitor existing bills and update the membership on any significant changes. If you have any additional questions on any of the above laws, do not hesitate to contact us at wbalegal@wisbank.com.

Additional Resources

2021 Wisconsin Act 1: https://docs.legis.wisconsin.gov/2021/related/acts/1

2021 Wisconsin Act 4: https://docs.legis.wisconsin.gov/2021/related/acts/4

WBA's Reopening Resource Center: https://www.wisbank.com/articles/2020/04/reopening-resource-center/

CDC Guidance for Businesses and Employers: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

OSHA Guidance on Preparing Workplaces for COVID-19: https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf

OSHA Updated Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace: https://www.osha.gov/coronavirus/safework

DHS Guidance for Employers: https://www.dhs.wisconsin.gov/covid-19/employers.htm ■

CTR Filing Required for Bank Cash Order Shipments Through Thillens

Through its Legal Call Program, WBA has learned of recent BSA examination findings by the FDIC Chicago Region which involves the filing of currency transaction reports (CTRs) when a bank's cash order shipment is fulfilled by the regional armored car service provider, Thillens, Inc. It is WBA's understanding the company provides cash delivery services for many financial institutions located in the central States, including Wisconsin.

The fact pattern is as follows, bank contracts with Thillens to handle its cash order shipments. According to the company's website, Thillens provides armored car services "to financial institutions, the video gaming business, ATM locations, Interactive Teller Machines at banks, and the retail market." The company's home base includes all of Wisconsin and Illinois.

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Special Focus

When the bank need order cash from the Federal Reserve, the bank places an order with Thillens. According to FDIC, Thillens will use cash of their own inventory, from its own account, to fulfill the bank's cash order request. In the event that Thillens does not have enough cash on hand, Thillens will purchase the cash from a regional bank to fulfill the order for the requesting bank.

It is FDIC's position, that because Thillens uses its own account to satisfy the bank's cash order request, Thillens is considered a money services business (MSB) under FinCEN's BSA rules. As an MSB, the bank need file CTRs for any cash transaction Thillens handled over the CTR reporting threshold.

WBA agrees, that technically, because funds are used from Thillens' own accounts rather than from the Federal Reserve or from the requesting bank's correspondent bank account, Thillens is an MSB and CTRs should be filed, accordingly. Any previously issued advisory from FinCEN regarding exemptions from CTR filings for armored couriers does not apply in this particular fact pattern; again, because Thillens uses its own account to satisfy banks' cash order requests.

WBA has been in contact with FDIC Chicago regarding the matter. FDIC Chicago agrees the BSA finding is technical in nature, presents little money laundering risk or safety and soundness risk to the bank, but believes it technically needs to identify the BSA finding under the current construct of the CTR rules.

FinCEN is aware of the situation. WBA will continue its advocacy efforts with FinCEN in an attempt to obtain an exemption from CTR filing for the fact pattern involving bank cash order shipments handled by Thillens fulfilled from their own account. The challenge, however, is that FinCEN is currently dealing with the implementation of provisions under the Anti-Money Laundering Act of 2020 as required under the National Defense Authorization Act for FY 2021, which have implementation and rulemaking timing requirements.

If not already filing CTRs for Thillens transactions as outlined above, WBA recommends banks, regardless of primary federal regulator, should immediately begin filing CTRs on all eligible Thillens transactions going forward as FinCEN has not issued an exemption from CTR filing for this situation.

While FinCEN has not directly instructed WBA how to complete CTR filings for cash shipments by Thillens, WBA recommends the bank identify Thillens as the transactor in Part 1 of the CTR form, checking box 2a "Person conducting transaction on its own behalf", and "check if entity". WBA also recommends the bank mark box 24 in Section II "Armored Car (FI Contract)", and for the bank in Part III to identify the branch(es) involved in the cash shipments. If a bank receives separate instruction directly from FinCEN, the bank need follow FinCEN's instruction. Unfortunately, FinCEN's instruction may not be accommodated for through existing electronic BSA filing systems, adding to the complexity and regulatory burden of the filing requirement.

WBA will update the membership accordingly as advocacy efforts with regulators continue. If you have any questions regarding filing CTRs or this topic, be sure to contact WBA Legal at wbalegal@wisbank.com ■

Regulatory Spotlight

Agencies Propose Interagency Private Flood Insurance Q&A.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), Farm Credit Administration (FCA), and National Credit Union Administration (NCUA) (collectively, the agencies) propose to supplement the *Interagency Questions and Answers Regarding Flood Insurance Guidance* with new questions and answers regarding the acceptance of flood insurance policies issued by private insurers pursuant to the agencies' private flood insurance final rule issued in February 2019. The questions and answers will assist lenders in meeting their responsibilities under the final rule and increase public understanding of the agencies' respective flood insurance regulations. Comments are due **05/17/2021**. The proposed rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-03-18/pdf/2021-05314.pdf. *Federal Register*, Vol. 86, No. 51, 03/18/2021, 14696-14707.

Wisconsin Bankers ASSOCIATION

April 2021

Compliance Journal

Special Focus

Summary of Recently Enacted State Legislation

The 2021 Wisconsin legislative session is off to a busy, and productive start. Two key pieces of legislation were recently enacted into law, which are discussed in this article. Both pieces of legislation were supported by WBA throughout the process that led to enactment. Each provides meaningful benefits to banks and their customers.

This article is focused on law that has been passed. At time of this article's publication, the legislature is still in session. WBA and its government relations team remain hard at work. Bills that are later signed into law will be discussed in future publications.

Tax Conformity and PPP Deductibility

On February 18, 2021, Governor Evers signed Assembly Bill 2 into law as 2021 Wisconsin Act 1 (Act 1). Act 1 contains various provisions which conform state tax law to recent federal changes. It includes a section which permits deductibility of business expenses paid for with Paycheck Protection Program (PPP) loan proceeds at the state level, just as they are at the federal level. Without this change, Wisconsin businesses which received PPP loans would have faced over $400 million in unexpected tax implications over the next three years.

To look at it more specifically, Wisconsin Statute section 71.05 provides for income tax computation for state and local revenues. Pursuant to Act 1, a provision has been added to that section which exempts from taxation certain allowances from the federal coronavirus relief fund, including grants to small businesses. Thus, Act 1 federalizes Wisconsin tax law with respect to treatment of certain economic support programs funded through the federal Coronavirus Aid, Relief, and Economic Security Act, including loans under the PPP, and deduction of expenses paid with funds from such loans. These provisions take effect for taxable years beginning after December 31, 2018.

COVID Premises Liability Protection

On February 25, 2021, Governor Evers signed Special Session Senate Bill 1 into law as 2021 Wisconsin Act 4 (Act 4). Act 4 provides immunity for entities from civil liability for a COVID-19-related injury or death, except in the case of reckless or wanton conduct or intentional misconduct. The immunity is retroactive to claims occurring on or after March 1, 2020, but does not apply to an action filed before its enactment.

Act 4 applies to "entities" which broadly includes partnerships, corporations, associations, governmental units, Tribal governments, schools, nonprofit organizations, and any employer covered by state unemployment insurance laws. The law also provides immunity beyond the employer-employee relationship and would apply, for example, to a business's customers, a school's students, or a nursing home facility's patients.

Thus, the civil liability protection created under Act 4 allows entities, including financial institutions, to continue operation or begin opening their doors with immunity from claims of liability for acts or omissions resulting in exposure to COVID-19. This is a significant piece of legislation as Wisconsin's financial institutions continue to be on the economic frontlines of the crisis and have been since its inception.

More specifically, Wis. Stat. sec. 895.476 provides that beginning March 1, 2020, an entity is immune from civil liability for the death of or injury to any individual or damages caused by an act or omission resulting in or relating to exposure, directly or indirectly, to the novel coronavirus identified as SARS−CoV−2 or COVID−19 in the course of or through the performance or provision of the entity's functions or services.

Immunity under Act 4 is in addition to, not in lieu of, other immunity granted by law, and nothing in the above section limits immunity granted under any other provision of law, such as worker's compensation laws, which, for example, generally provides an exclusive remedy for sick or injured workers. Also, as noted above, this immunity does not apply if the act or omission involves reckless or wanton conduct or intentional misconduct. Thus, financial institutions should continue to take steps to mitigate the risk of exposure to COVID-19. Financial institutions are reminded to remain mindful of state and local mandates, guidance, and recommended procedures. For example, considering the standards issued by the Centers for Disease Control and Prevention, the Occupational Safety and Health Administration, Wisconsin Department of Health Services, and local government issuances such as county orders. Banks should also consider consulting with its legal counsel for a fuller, more specific analysis of how it can obtain protections under Act 4.

Conclusion

WBA will continue to monitor existing bills and update the membership on any significant changes. If you have any additional questions on any of the above laws, do not hesitate to contact us at wbalegal@wisbank.com.

Additional Resources

2021 Wisconsin Act 1: https://docs.legis.wisconsin.gov/2021/related/acts/1

2021 Wisconsin Act 4: https://docs.legis.wisconsin.gov/2021/related/acts/4

WBA's Reopening Resource Center: https://www.wisbank.com/articles/2020/04/reopening-resource-center/

CDC Guidance for Businesses and Employers: https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

OSHA Guidance on Preparing Workplaces for COVID-19: https://www.osha.gov/sites/default/files/publications/OSHA3990.pdf

OSHA Updated Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace: https://www.osha.gov/coronavirus/safework

DHS Guidance for Employers: https://www.dhs.wisconsin.gov/covid-19/employers.htm ■

CTR Filing Required for Bank Cash Order Shipments Through Thillens

Through its Legal Call Program, WBA has learned of recent BSA examination findings by the FDIC Chicago Region which involves the filing of currency transaction reports (CTRs) when a bank's cash order shipment is fulfilled by the regional armored car service provider, Thillens, Inc. It is WBA's understanding the company provides cash delivery services for many financial institutions located in the central States, including Wisconsin.

The fact pattern is as follows, bank contracts with Thillens to handle its cash order shipments. According to the company's website, Thillens provides armored car services "to financial institutions, the video gaming business, ATM locations, Interactive Teller Machines at banks, and the retail market." The company's home base includes all of Wisconsin and Illinois.

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Special Focus

CFPB Delays Mandatory Compliance Date for Revised General QM and Temporary GSE QM Loan Definitions

The Bureau of Consumer Financial Protection (CFPB) has once again issued a final rule regarding the general Qualified Mortgage (QM) definition under Regulation Z, Truth in Lending. CFPB last revised the general QM definition in December 2020 (December 2020 Final Rule). The latest final rule extends the mandatory compliance date of the December 2020 Final Rule. This article provides a recap of the December rule, outlines the new mandatory compliance date, and provides considerations for implementation.

General ATR/QM Rule Background

Under Regulation Z, the Ability-to-Repay/Qualified Mortgage Rule (ATR/QM Rule) requires a creditor to make a reasonable, good faith determination of a consumer's ability to repay a residential mortgage loan according to its terms. Loans that meet the ATR/QM Rule's requirements for QMs obtain certain protections from liability. The ATR/QM Rule defines several categories of QMs, including the General QM category.

General QMs must comply with the ATR/QM Rule's prohibitions on certain loan features, its points-and-fees limits, and its underwriting requirements. When first promulgated, the General QM rule required the consumer's debt-to-income (DTI) ratio not exceed 43 percent. In addition, the ATR/QM Rule required that creditors calculate, consider, and verify debt and income for purposes of determining the consumer's DTI ratio using the standards contained in appendix Q of Regulation Z.

Late last year, CFPB issued final rules to revise certain requirements of the original General QM Regulation Z requirements. The primary reason to revise the General QM rule is because of conditions related to another QM category referred to as the Temporary GSE QM. The Temporary category of QMs defined in the ATR/QM Rule consists of mortgages that (1) comply with the same loan-feature prohibitions and points-and-fees limits as General QMs and (2) are eligible to be purchased or guaranteed by the GSEs (*i.e.*, Fannie Mae and Freddie Mac) while under the conservatorship of the Federal Housing Finance Agency (FHFA). Unlike for General QMs, the ATR/QM Rule does not prescribe a DTI limit for Temporary GSE QMs. Thus, a loan can qualify as a Temporary GSE QM even if the consumer's DTI ratio exceeds 43 percent, as long as the loan is eligible to be purchased or guaranteed by either of the GSEs and satisfies the other Temporary GSE QM requirements. In addition, for Temporary GSE QMs, the ATR/QM Rule does not require creditors to use appendix Q to determine the consumer's income, debt, or DTI ratio.

On October 20, 2020, CFPB issued a final rule to amend Regulation Z to replace the January 10, 2021, sunset date of the Temporary GSE QM loan definition with a provision stating that the Temporary GSE QM loan definition will be available only for covered transactions for which the creditor receives the consumer's application before the mandatory compliance date of final amendments to the General QM loan definition in Regulation Z. The extension of the sunset date was meant to help ensure consumers remain able to have access to mortgage loan products with as little disruption to the marketplace as possible.

December 2020 Revised General QM Rule

In December 2020, CFPB amended Regulation Z to replace the existing General QM loan definition with its 43 percent DTI ratio limit with a price-based General QM loan definition. Under the December 2020 Final Rule, a loan meets the revised General QM loan definition in Regulation Z section 1026.43(e)(2) only if the annual percentage rate (APR) exceeds the average prime offer rate (APOR) for a comparable transaction by less than 2.25 percentage points as of the date the interest rate is set. The December 2020 Final Rule provides higher thresholds for loans with smaller loan amounts, for certain manufactured housing loans, and for subordinate-lien transactions. The thresholds are not repeated in this article but may be found in the December 2020 edition of the *WBA Compliance Journal*.

The December 2020 Final Rule requires that the creditor consider the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, debt obligations, alimony, child support, and DTI ratio or residual income. A creditor must maintain written policies and procedures for how it will take into account these factors.

A creditor must also retain documentation showing how it met the ability-to-repay determination, including how it applied its policies and procedures, in order to meet the requirement to consider and thereby meet the requirements for a QM under the General QM category. The documentation may include, for example, an underwriter worksheet or a final automated underwriting system certification, in combination with the creditor's applicable underwriting standards and any applicable exceptions described in its policies and procedures, that shows how these required factors were taken into account in the creditor's ability-to-repay determination.

In addition to removing the 43 percent DTI ratio limit, the December 2020 Final Rule removed appendix Q. A creditor, however, is still required to verify the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan and the consumer's current debt obligations, alimony, and child support. A creditor is only required to verify the income or assets the creditor relies on to evaluate the consumer's repayment ability. For example, if a consumer's application states that the consumer earns a salary and is paid an annual bonus and the creditor relies on only the consumer's salary to evaluate the consumer's repayment ability, the creditor need verify only the salary.

The December 2020 Final Rule provides that a creditor may verify a consumer's income using an Internal Revenue Service (IRS) tax-return transcript, which summarizes the information in a consumer's filed tax return, another record that provides reasonably reliable evidence of the consumer's income, or both. A creditor may obtain a copy of a tax-return transcript or a filed tax return directly from the consumer or from a service provider. A creditor need not obtain the copy directly from the IRS or other taxing authority.

To assist with the verification process in light of the removal of appendix Q, CFPB included in the December 2020 Final Rule several sources that may be used by creditors. The list is not repeated in this article but may also be found in the December 2020 *WBA Compliance Journal.*

Under the revised General QM definition, to qualify for General QM treatment, a loan still cannot have negative amortization, interest-only, balloon-payment features, a term that exceeds 30 years, or points and fees that exceed specified limits. The final rule does not affect QM definitions that apply to Federal Housing Administration, U.S. Department of Veterans Affairs, U.S. Department of Agriculture, or Rural Housing Service loans.

Delay of Mandatory Compliance Date

On April 30, 2021, CFPB issued a final rule (April 2021 Final Rule) to postpone the mandatory compliance date of the December 2020 Final Rule from July 1, 2021 until **October 1, 2022**. For covered transactions for which creditors receive an application on or after March 1, 2021, but prior to October 1, 2022, creditors will have the option of complying with either the original debt-to-income based General QM definition (*i.e.*, 43 percent DTI rule), or the revised, price-based General QM loan definition as outlined above. Under the April 2021 Final Rule, only the revised, price-based General QM loan definition will be available for applications received on or after the **October 1, 2022**, mandatory compliance date.

The April 2021 Final Rule also delays the mandatory compliance date of the Temporary GSE QM loan mentioned above. In October 2020, CFPB issued a final rule stating the Temporary GSE QM loan definition is available only for covered transactions for which the creditor receives the consumer's

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application before the mandatory compliance date of the General QM final rule. Under the October final rule, the Temporary GSE QM loan definition would have expired on the earlier of July 1, 2021, or the date the applicable GSE exits federal conservatorship. Now, under the April 2021 Final Rule, the Temporary GSE QM loan definition will expire upon the earlier of **October 1, 2022**, or the date the applicable GSE exits federal conservatorship. However, please see the discussion below regarding recent actions by the GSEs as the actions impact what loans will be purchased starting July 1, 2021, despite the April 2021 Final Rule's October compliance date.

Considerations for Implementation

With a delay of the mandatory compliance date for both the revised General QM loan and Temporary GSE QM loan definitions, creditors utilizing either QM definition have greater flexibility to determine how best to proceed under the revised General QM definition and the sunset of the Temporary GSE QM option.

The first option to consider is whether either definition is applicable to the bank's current QM underwriting policy, processing procedures, and a creditor's overall consumer residential lending policy. For example, as mentioned above, the revised General QM final rule definition does not apply to Federal Housing Administration, U.S. Department of Veterans Affairs, U.S. Department of Agriculture, or Rural Housing Service loans. As a result, creditors making FHA, VA, USDA and Rural Housing residential mortgage loans are not impacted by the December 2020 Final Rule for loans made under those programs and therefore do not need make or implement changes.

Additionally, residential mortgage loans made by creditors under the Small Creditor Exemption of Regulation Z are not impacted by the December 2020 Final Rule. The Small Creditor Exemption is not affected by the final rule.

If a creditor sells residential mortgage loans to either Fannie Mae or Freddie Mac, the creditor will need to adjust its loan underwriting, processing procedures and consumer residential lending policy as the Temporary GSE QM loan category will expire. Impacting the procedures of both GSEs are recent actions by the Department of Treasury and FHFA in revisions of the Preferred Stock Purchase Agreements (PSPAs) which govern the terms of conservatorships of the GSEs.

As a result of the terms within the PSPA, the GSEs will require mandatory compliance with the December 2020 Final Rule starting **July 1, 2020**. Loans sold to the GSEs will not have the benefit of the extended mandatory compliance date of the April 2021 Final Rule.

Freddie Mac will require all mortgages with application received dates on or after July 1, 2021, and all mortgages with settlement dates after August 31, 2021, subject to the December 2020 Final Rule to be originated under that rule's revised QM rules and to continue to meet other Freddie Mac Guide requirements. Mortgages originated using the Temporary GSE rule may not be sold to Freddie Mac if they are subject to the December 2020 Final Rule. Mortgages originated using the original DTI General QM definition (*i.e.*, using appendix Q for underwriting) will not be eligible for purchase by Freddie Mac.

Fannie Mae has similar requirements. Fannie Mae will no longer acquire loans that are Temporary GSEs that do not meet the December 2020 Final Rule. To be eligible for purchase by Fannie Mae, such loans must have application dates on or before June 30, 2021, and be purchased as whole loans on or before August 31, 2021, or in MSB pools with an issue date on or before August 1, 2021.

Creditors impacted by the requirements of Fannie Mae and Freddie Mac will need to determine what tools will be used to *consider* the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan, debt obligations, alimony, child support, and DTI ratio or residual income. Also, what tools will be used to *verify* the consumer's current or reasonably expected income or assets other than the value of the dwelling (including any real property attached to the dwelling) that secures the loan and the consumer's current debt obligations, alimony, and child support. The preamble to the December 2020 Final Rule includes discussions regarding the concepts of "consider" and "verify" which is helpful in deciding how to maneuver from the current Temporary GSE QM loan definition.

WBA will be creating a toolkit to further assist creditors with identifying areas to consider in making decisions as a result of the December 2020 Final Rule and actions by Fannie Mae and Freddie Mac. The following is a list of resources, including Fannie Mae and Freddie Mac Guides addressing the impact of PSPA.

Resources

The April 2021 Final Rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-04-30/pdf/2021-09028.pdf

The December 2020 Final Rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2020-12-29/pdf/2020-27567.pdf

Past *WBA Compliance Journals*, including the December 2020 edition may be viewed at: https://www.wisbank.com/resources/wba-publications/

Freddie Mac, Bulletin 2021-13: Updates in Response to the Amended Senior Preferred Stock Purchase Agreement (PSPA) – Government Loans and the CFPB Revised General QM Definition Rule: https://guide.freddiemac.com/app/guide/bulletin/2021-13

Fannie Mae: Lender Letter (LL-2021-09): Introduction of Changes to Loan Eligibility Due to the Preferred Stock Purchase Agreement and Qualified Mortgage Rule https://singlefamily.fanniemae.com/media/25566/display ■

The End of LIBOR

Globally, the London Interbank Offered Rate (LIBOR) is one of the most widely used interest rate benchmarks. However, the one-week and two-month LIBOR will no longer be published after **December 31, 2021**, and the one-day, one-month, six-month, and one-year LIBOR will no longer be published on **June 30, 2023**, necessitating a transition away from LIBOR. This article briefly discusses the reasons why LIBOR is expected to end and then concentrates on how financial institutions should prepare for this eventuality.

LIBOR is calculated as the average of interest rates that a panel of large London banks report that they would charge other banks to borrow unsecured for a specified period of time. Despite LIBOR's widespread use as a reference rate by financial institutions, its reliability and sustainability have been called into question in recent years for a number of different reasons.

Concerned that LIBOR was becoming less stable and reliable, the Financial Conduct Authority (FCA), the United Kingdom's financial regulator, announced in May 2017 that by the end of 2021, it would no longer compel banks to report their interest rates to the LIBOR administrator. The FCA also explained that although it would no longer require banks to submit their rates to the administrator, it would not prohibit banks from continuing to submit their LIBOR data after 2021. LIBOR's administrator had previously stated that it will continue to calculate LIBOR as long as at least five banks continue to submit their information. This brought fears that LIBOR would continue to exist after the cessation of LIBOR but the rate would no longer be representative of the inter-bank interest rate offered and accepted by major financial institutions. There were also fears that this number would be more volatile. This occurrence has been referred to as the "zombie LIBOR."

In an update on the timeline on the cessation of LIBOR, on March 5, 2021, the FCA and ICE Benchmark Administration announced that the one-week and two-month LIBOR will cease being published on **December 31, 2021**. The remaining tenors will cease to be published on a representative basis on **June 30, 2023**. With this, LIBOR's administrator announced that a large number of its panel banks communicated that they would not be willing to continue contributing to the LIBOR tenors after these dates. Therefore, LIBOR's administrator announced that as a result, it would stop publishing the relevant LIBOR rates on the announced dates unless the FCA exercised powers to require it to publish LIBOR on a synthetic basis. The FCA has stated that in circumstances where the synthetic rate may be compelled, it would not be representative of underlying markets.

In November 2020, the Board of Governors of the Federal Reserve System (FRB), the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) issued a joint statement encouraging banks to stop using LIBOR as a reference rate in any new contracts as soon as practicable, and in any event by **December 31, 2021**. The statement emphasized that LIBOR's continued use after this date would create safety and soundness risks that examiners would be instructed to examine accordingly. Further, the joint statement stressed that new contracts entered into before **December 31, 2021** should either utilize a reference rate other than LIBOR or include robust fallback language identifying a replacement rate.

The FCA's announcements have made the future of LIBOR uncertain but clarified the increasing risk associated with continued reliance on LIBOR. With these announcements, it is clear that financial institutions must prepare for the end of LIBOR.

Resources

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The FCA's announcements have made the future of LIBOR uncertain but clarified the increasing risk associated with continued reliance on LIBOR. With these announcements, it is clear that financial institutions must prepare for the end of LIBOR.

Special Focus

Transition from LIBOR to SOFR

Based on the potential problems with LIBOR in 2021, market participants and regulators have worked to identify the best alternative reference rate to replace LIBOR and implement plans to transition to that reference rate. FRB convened the Alternative Reference Rates Committee (ARRC) to identify a more robust reference rate and to facilitate the transition away from LIBOR. The ARRC is composed of many private-sector entities that have a presence in markets that are impacted by LIBOR. Further, several federal regulators, including FDIC, FRB, OCC, and the Bureau of Consumer Financial Protection (CFPB), serve as non-voting, ex officio members of the ARRC.

In 2017, the ARRC identified the Secured Overnight Financing Rate (SOFR) as its recommended best alternative to LIBOR. SOFR is based on transactions in the U.S. Treasury repurchase market, measuring the cost of borrowing cash overnight collateralized U.S. Treasury securities in the market. Because of the size and liquidity of the market underlying SOFR, the ARRC believes that the index is more robust and resilient than LIBOR. To support the transition to SOFR, the ARRC has begun implementing steps to help SOFR gain momentum. As a part of this work, in April 2018, the New York Federal Reserve Board began publishing SOFR in conjunction with the Office of Financial Research.

Following the selection of SOFR as its alternative reference rate, the ARRC also published a Paced Transition Plan that outlines specific steps and timelines to promote the adoption of SOFR. These steps focus on updating existing contracts that cite LIBOR as the reference rate and encouraging the issuance of new products that use SOFR. The ARRC has supported the issuance of SOFR-linked products and securities. Recognizing the importance of updating existing contracts that use LIBOR as a reference rate, the ARRC has developed guiding principles for fallback contract language. Following this, the ARRC released recommended fallback contract language for several products including adjustable-rate mortgages and floating-rate notes.

On November 15, 2019, Fannie Mae and Freddie Mac announced their support of the ARRC's fallback language and their plan to incorporate the recommended language into its uniform notes and other legal documents for adjustable rate mortgages (ARMs). They also announced their plan to offer new SOFR-based index and ARM products and have now become regular issuers of SOFR-indexed debt. Similarly, on February 5, 2020, Fannie Mae and Freddie Mac announced that they had incorporated the ARRC's fallback language into their existing standard ARM notes and riders. Further, they announced that, by the end of 2020, they will no longer acquire loans indexed to LIBOR.

In November 2020, FRB, OCC, and FDIC released a joint statement explaining that they would not be endorsing a specific replacement rate for LIBOR loans because institutions should select a reference rate that they determine is appropriate based on their funding model and customer needs.

Planning for the End

Given either the upcoming end or instability of LIBOR, financial institutions should prepare for 2022 and June 2023. Institutions should ensure they have comprehensively assessed their risks and develop an action plan to mitigate those risks. It might be best to appoint one person to head the financial institution's strategy and implementation. First, financial institutions should review their existing agreements that use LIBOR as a reference rate. The existing agreements should be divided into those in which a third party is involved, *i.e.*, trust preferred securities or swap agreements, and those in which the financial institution and the other contracting party are the only parties to the transaction (the In-House Contracts).

Any financial institutions that have issued debt securities (such as subordinated debt or trust preferred securities) at the holding company or bank level should check the documentation governing those issuances. Typically, those contracts provide for the substitution of a comparable rate. Financial institutions should confirm the substitution language and also review the procedures for substituting the rate. If the issuance involves an institutional trustee, such as Wilmington Trust Company for many outstanding trust preferred securities, it may be necessary or advisable to contact the institutional trustee far in advance of the LIBOR end to discuss the process of changing rates.

The In-House Contracts should be further subdivided by the LIBOR rate that is used (one-week, two-month, 12-month, etc.). In-House Contracts using one-week and two-month LIBOR as a reference rate should be subdivided into those whose term ends prior to the end of 2021 and those whose maturity is after 2021. In-House Contracts using the other LIBOR tenors should be subdivided into those whose term ends prior to the end of 2023 and those whose maturity is after 2023.

Next, financial institutions should ensure that existing In-House Contracts are able to substitute a comparable rate. Then, the financial institution should determine whether it will substitute a new rate and a new margin and at what point the change will be made. Consideration should be given to the stability of a new rate and a new margin. The decision on a new rate and a new margin may involve several committees and personnel at the financial institution as different considerations of interest rate risk, stability, competition and other factors will influence the ultimate substitute reference rate the financial institution will utilize. In assessing a rate, financial institutions should consider their funding costs and their customers' needs. With respect to variable rate consumer loans, financial institutions should consider their notice requirements under the contract and disclosure requirements under Regulation Z. For variable rate consumer loans, financial institutions should ensure that they select a rate that is considered comparable to LIBOR. Financial institutions should note that the Prime Rate will continue to be available unaffected by the impending demise of LIBOR.

After a decision has been made on the financial institution's new reference rate, it may be advisable to educate the financial institution's LIBOR customers on the new rate, especially if it is a rate that customers may not be familiar with. Although a customer may not have the right to contest the new reference rate, educating the customer may alleviate the customer's anxiety about the new reference rate.

Finally, the financial institution should determine how the new reference rate will be implemented. The financial institution should consider whether it will draft amendments to existing loan documents to implement the new reference rate or whether it will simply notify the other party to the contract of the new reference rate. Financial institutions should contact their legal counsel for advice on this issue.

The WBA forms distributed through FIPCO™ currently contain a provision that if the index rate a lender uses with respect to a particular loan becomes unavailable then the lender may substitute a comparable index rate. To alleviate concerns with the zombie LIBOR, FIPCO™ has created the LIBOR Addendum. This Addendum allows the lender to replace LIBOR if a "Replacement Event" occurs. The Addendum is drafted to define a Replacement Event to include a situation in which LIBOR would continue to exist in a zombie state. The LIBOR Addendum can be used for new loans that use LIBOR as the index rate. The form could also be used for existing loans, but the borrower is required to sign the LIBOR Addendum.

Financial institutions should stop using LIBOR as a reference rate in new contracts as soon as practicable, and, in any event by **December 31, 2021**. When making new loans that use LIBOR as a reference rate, financial institutions should ensure that any new contracts include robust fallback language that will allow for an easy transition to a new reference rate. Consideration should be given to using the LIBOR Addendum to In-House Contracts. Additionally, financial institutions should consider incorporating the fallback language adopted by Fannie Mae and Freddie Mac to any residential real estate mortgages using LIBOR intended to be sold on the secondary market.

Taking the steps outlined above will help financial institutions mitigate their risks in the post-LIBOR market.

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

Update on Wisconsin's Hemp Pilot Program Transition

In Wisconsin, hemp production continues to be legal under existing state programs. While there remain no hemp-related rules specific to banking, as the regulatory landscape for the industry continues to shift, it is important for banks to be aware of how various changes affect their customers. This article is designed to provide an update on the rules governing the growing and production of hemp in Wisconsin.

The first section of this article provides a procedural overview in order to frame the hemp industry in Wisconsin from a legal perspective. This section provides a background on the legality of hemp, as well as a timeline going forward. The second section provides practical considerations, which is designed to help banks understand how this procedural timeline impacts their customers and bank operation.

Procedural Overview

While the procedural history of hemp in Wisconsin is long and complex, it's helpful to review in order to understand how the program currently operates, when it will transition, and how this will impact banks working with hemp-related businesses.

Next, financial institutions should ensure that existing In-House Contracts are able to substitute a comparable rate. Then, the financial institution should determine whether it will substitute a new rate and a new margin and at what point the change will be made. Consideration should be given to the stability of a new rate and a new margin. The decision on a new rate and a new margin may involve several committees and personnel at the financial institution as different considerations of interest rate risk, stability, competition and other factors will influence the ultimate substitute reference rate the financial institution will utilize. In assessing a rate, financial institutions should consider their funding costs and their customers' needs. With respect to variable rate consumer loans, financial institutions should consider their notice requirements under the contract and disclosure requirements under Regulation Z. For variable rate consumer loans, financial institutions should ensure that they select a rate that is considered comparable to LIBOR. Financial institutions should note that the Prime Rate will continue to be available unaffected by the impending demise of LIBOR.

After a decision has been made on the financial institution's new reference rate, it may be advisable to educate the financial institution's LIBOR customers on the new rate, especially if it is a rate that customers may not be familiar with. Although a customer may not have the right to contest the new reference rate, educating the customer may alleviate the customer's anxiety about the new reference rate.

Finally, the financial institution should determine how the new reference rate will be implemented. The financial institution should consider whether it will draft amendments to existing loan documents to implement the new reference rate or whether it will simply notify the other party to the contract of the new reference rate. Financial institutions should contact their legal counsel for advice on this issue.

The WBA forms distributed through FIPCO™ currently contain a provision that if the index rate a lender uses with respect to a particular loan becomes unavailable then the lender may substitute a comparable index rate. To alleviate concerns with the zombie LIBOR, FIPCO™ has created the LIBOR Addendum. This Addendum allows the lender to replace LIBOR if a "Replacement Event" occurs. The Addendum is drafted to define a Replacement Event to include a situation in which LIBOR would continue to exist in a zombie state. The LIBOR Addendum can be used for new loans that use LIBOR as the index rate. The form could also be used for existing loans, but the borrower is required to sign the LIBOR Addendum.

Financial institutions should stop using LIBOR as a reference rate in new contracts as soon as practicable, and, in any event by **December 31, 2021**. When making new loans that use LIBOR as a reference rate, financial institutions should ensure that any new contracts include robust fallback language that will allow for an easy transition to a new reference rate. Consideration should be given to using the LIBOR Addendum to In-House Contracts. Additionally, financial institutions should consider incorporating the fallback language adopted by Fannie Mae and Freddie Mac to any residential real estate mortgages using LIBOR intended to be sold on the secondary market.

Taking the steps outlined above will help financial institutions mitigate their risks in the post-LIBOR market.

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

Update on Wisconsin's Hemp Pilot Program Transition

In Wisconsin, hemp production continues to be legal under existing state programs. While there remain no hemp-related rules specific to banking, as the regulatory landscape for the industry continues to shift, it is important for banks to be aware of how various changes affect their customers. This article is designed to provide an update on the rules governing the growing and production of hemp in Wisconsin.

The first section of this article provides a procedural overview in order to frame the hemp industry in Wisconsin from a legal perspective. This section provides a background on the legality of hemp, as well as a timeline going forward. The second section provides practical considerations, which is designed to help banks understand how this procedural timeline impacts their customers and bank operation.

Procedural Overview

While the procedural history of hemp in Wisconsin is long and complex, it's helpful to review in order to understand how the program currently operates, when it will transition, and how this will impact banks working with hemp-related businesses.

Special Focus

On December 20, 2018, the Agriculture Improvement Act of 2018 (2018 Farm Bill) was signed into law. The 2018 Farm Bill clarifies the legality of hemp, and sets all pilot programs established under the 2014 Farm Bill to expire on October 31, 2020. In 2019, the United States Department of Agriculture (USDA) published an interim final rule specifying regulations governing the production of hemp in accordance with the 2018 Farm Bill. Wisconsin also responded with 2019 Wisconsin Act 68 (Act 68) to make several changes to its laws governing industrial hemp. USDA's rule establishes a Federal program governing hemp production nationally. It also outlines provisions under which states may submit their own plan for approval under the Federal program. Thus, states are automatically subject to the Federal program, unless their program is approved.

Transition of Wisconsin's Pilot Program

Currently, the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) regulates the growing and production of hemp under Wisconsin's Hemp Pilot Research Program (pilot program), which operates under the authority of the Agricultural Act of 2014 (2014 Farm Bill) and 2017 Wisconsin Act 100. DATCP's prior rule implementing the pilot program expired on July 1, 2020. Before expiration, on June 27, 2020, DATCP issued EmR2016 to maintain the program until October 31, 2020, when the pilot program terminated. In September 2020, DATCP submit a proposed state plan to USDA for review. However, in October 2020, the Continuing Appropriations Act was signed into law which permits states to extend their hemp pilot research programs until September 30, 2021.

Earlier this year, USDA issued a final rule to establish a domestic hemp production program, which became effective on March 22, 2021. However, based upon the above, Wisconsin continues operating under its pilot program. Accordingly, on May 3, 2021, DATCP issued EmR2111 which operates under the authority of the 2014 Farm Bill. DATCP is expected to issue further rulemaking prior to September 30, 2021, when authority to operate hemp research programs ends. Furthermore, to continue primary jurisdiction over hemp programs, DATCP must have a plan approved by USDA before December 31, 2021.

Practical Considerations

As discussed above, Wisconsin will continue to operate under the pilot program (as revised by emergency rule) until **September 30, 2021**. While this means that there is no need for immediate, significant revision of bank policies, there are some aspects to consider. At a minimum, it will be important for banks to evaluate existing procedures in relation to the upcoming transition. Additionally, DATCP issued EmR2016 last year, which included certain adjustments to the pilot program resulting from Act 68.[1] Similarly, EmR2111, in addition to extending the program, makes certain adjustments which are important for banks to be aware of.

EmR2111 incorporates some flexibility derived from USDA's new final rule. This includes an option for hemp growers to remediate their crop if an initial regulatory THC test identifies that the crop exceeds the regulatory limit of 0.3% total delta-9 THC. This is a significant change for growers, who previously might have been required to destroy crops if they tested over the 0.3% limit. Thus, the emergency rule provides a pathway for retesting, and remediation in the event of a failed test. It also raises the level of total delta-9 THC that constitutes a negligent violation from 0.5% to greater than 1.0%.

While the rule still does not require banks to monitor the THC content of hemp grown by their customers, from a Bank Secrecy Act (BSA) and overall know-your-customer standpoint, it is important to be aware of the extent to which hemp can be grown legally in Wisconsin. As such, banks that have policies and procedures related to monitoring the sampling and testing of their customer's crops should consider this new flexibility in relation to any requirements associated with their account relationships.

WBA continues to receive calls from members and non-members regarding the availability of financial services for hemp-related businesses. As the industry is still relatively new, there continues to be new business trends. Potential customers may be growers, sellers, retailers, or have other, more unique prospects. It is important that banks consider the extent to which their potential customers are engaged in the industry, in order to determine what it requires to open and maintain an account relationship. At a minimum, banks should start with whether the business is licensed, from a BSA standpoint. Some financial institutions may also wish to obtain certifications from their customers. For banks looking to use this method, WBA has created a hemp questionnaire and certification available through FIPCO™, which has been designed with DATCP's program requirements in mind. Banks should also consider that their policies and procedures will likely need to be revisited later this fall, when DATCP is expected to issue a new rule transitioning from the existing program.

Conclusion

Wisconsin's pilot program, under which currently licensed growers and processors now operate, has been extended to **September 30, 2021**. Hemp-related businesses may continue to operate under the existing program, but later this year, DATCP will provide new information on a transition to a new program under the USDA interim final rule. While WBA does not anticipate the new program will place any new requirements on banks, it is important to be aware of the changes when they occur from a know-your-customer standpoint for both the business and BSA considerations discussed above. WBA will report upon the details of the new program when they become available.

Additional Resources

DATCP Release: https://content.govdelivery.com/attachments/WIDATCP/2021/05/03/file_attachments/1797060/20210503 HempEmergencyRule

DATCP Emergency Rule Summary: https://datcp.wi.gov/Documents2/HempERSummary.pdf

WBA July 2020 Update on Hemp: https://www.wisbank.com/articles/2020/07/an-update-on-hemp/

[1]For more information on EmR2016 refer to the July 2020 *WBA Compliance Journal*. ■

Regulatory Spotlight

Agencies Issue Proposed Rule to Establish Tax Allocation Agreements.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC) (collectively, the agencies) seek comment on a proposed rule under section 39 of the Federal Deposit Insurance Act that would establish requirements for tax allocation agreements between institutions and their holding companies in a consolidated tax filing group. The proposal would promote safety and soundness by preserving depository institutions' ownership rights in tax refunds and ensuring equitable allocation of tax liabilities among entities in a holding company structure. Under the proposal, national banks, state banks, and savings associations that file tax returns as part of a consolidated tax filing group would be required to enter into tax allocation agreements with their holding companies and other members of the consolidated group that join in the filing of a consolidated group tax return. The proposal also would describe specific mandatory provisions in the tax allocation agreements, including provisions that address the ownership of tax refunds received. If the agencies were to adopt the proposal as a final rule, the agencies would rescind the Interagency Policy Statement on Tax Allocation Agreements that was issued in 1998 and supplemented in 2014. Comments are due **07/09/2021**. The proposed rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-05-10/pdf/2021-09047.pdf. *Federal Register*, Vol. 86, No. 88, 05/10/2021, 24755-24770.

Agencies Seek Comment Regarding Model Risk Management Principles to Support Compliance with BSA/AML and OFAC Requirements.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), Office of the Comptroller of the Currency (OCC), Financial Crimes Enforcement Network (FinCEN), and National Credit Union Administration (NCUA) (collectively, the agencies), seek comment on the extent to which the principles discussed in the Interagency Supervisory Guidance on Model Risk Management (MRMG) support compliance by banks with Bank Secrecy Act/Anti-Money Laundering (BSA/AML) and Office of Foreign Assets Control (OFAC) requirements. The agencies seek information to enhance their understanding of bank practices and to determine whether additional explanation or clarification may increase transparency, effectiveness, or efficiency. The agencies have concurrently issued a statement to clarify that the risk management principles discussed in the MRMG are appropriate considerations in the context of the BSA/AML statutory and regulatory requirements. Comments are due **06/11/2021**. The notice may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-04-12/pdf/2021-07428.pdf. *Federal Register*, Vol. 86, No. 68, 04/12/2021, 18978-18982.

Additional Resources

CFPB Warns Mortgage Servicers to Prepare for Surge in Homeowners Needing Assistance: https://www.consumerfinance.gov/about-us/newsroom/cfpb-compliance-bulletin-warns-mortgage-servicers-unprepared-is-unacceptable/

CFPB Proposes Mortgage Servicing Changes to Prevent Wave of COVID-19 Foreclosures: https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-mortgage-servicing-changes-to-prevent-wave-of-covid-19-foreclosures/

CFPB Reports Detailing Mortgage Borrowers' COVID-19 Challenges: https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-reports-detailing-mortgage-borrowers-continuing-covid-19-challenges/

Interagency Joint Statement on Supervisory and Enforcement Practices Regarding Mortgage Servicing Rules in Response to COVID-19: https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_mortgage-servicing-rules-covid-19.pdf ■

Recently Updated HR-Related Guidance to Consider as Pandemic Recovery Continues

The Centers for Disease Control and Prevention (CDC) recently released updated public health recommendations for fully vaccinated people. The update has resulted in employers having to consider whether to update pandemic-related polices or practices. As an employer, other guidance need also be taken into consideration regarding such matters, including guidance issued by the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) and the U.S. Equal Employment Opportunity Commission (EEOC). This article outlines guidance updates made by OSHA and EEOC as a result of CDC's recent update.

CDC Guidance

On May 28, 2021, CDC updated its COVID-19 guidance to provide that fully vaccinated people can:

- Resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance;
- Resume domestic travel and refrain from testing before or after travel or self-quarantine after travel; refrain from testing before leaving the U.S for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the U.S.;
- Refrain from testing following a known exposure, if asymptomatic, with some exceptions for specific settings;
- Refrain from quarantine following a known exposure if asymptomatic; and
- Refrain from routine screening testing if feasible.

For purposes of the CDC guidance, people are considered fully vaccinated for COVID-19 two weeks after they have received the second dose in a 2-dose series, or two weeks after they have received a single-dose vaccine. There is currently no post-vaccination time limit on fully vaccinated status.

The updated guidance also includes prevention measures that apply to all travelers, including those who are vaccinated. In particular, the CDC guidance requires all travelers to wear a mask on all planes, buses, trains, and other forms of public transportation into, within, or out of the U.S. and in U.S. transportation

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hubs such as airports and stations. The updated guidance also instructs that for now fully vaccinated persons should continue to get tested if experiencing COVID-19 symptoms and to follow CDC and health department travel requirements and recommendations.

As a result of the release of CDC's updated guidance, vaccinated bank personnel and customers across Wisconsin had the opportunity to resume activities without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.

OSHA Guidance

In addition to the CDC guidance, banks need consider any guidance issued by OSHA which may impact bank personnel. OSHA is a federal agency whose rules and requirements impose on employers the obligation to maintain safe and healthful workplaces free from known hazards. OSHA establishes specific workplace safety standards for particular types of workplace hazards.

On June 10, 2021, OSHA updated its COVID-19 related guidance titled, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*. In the update, OSHA encourages COVID-19 vaccination and added links to the guidance with the most up-to-date content.

In its guidance, OSHA has followed the updated instruction of CDC by stating that unless otherwise required by federal, state, local, tribal, or territorial laws, rules, and regulations, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure. OSHA updated its guidance to focus on protecting unvaccinated or otherwise at-risk workers in their workplaces (or well-defined portions of the workplace).

The revised guidance sets forth a number of steps employers could take to protect unvaccinated or otherwise at-risk workers in their workplaces, or well-defined portions of workplaces. The list may be found at the OSHA link provided at the end of this article. OSHA stated it plans to update its guidance over time to reflect developments in science, best practices, and standards. As such, banks should continue to monitor OSHA's Coronavirus safework webpage.

EEOC Guidance

The EEOC is another federal agency that employers need be familiar with as the agency is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age (40 or older), disability or genetic information. Most employers with at least 15 employees are covered by EEOC laws. EEOC laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. Throughout the pandemic, banks have had to consider EEOC requirements in their employee pandemic mitigation efforts to ensure any medical information learned about an employee remains confidential and to ensure no workplace harassment may arise as result of the COVID-19 pandemic.

EEOC has had COVD-19 guidance throughout the pandemic titled, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Law*, to which EEOC has periodically updated or added new questions and answers (Q&A) to the guidance. Each Q&A includes a date as reference to when it was added or updated.

EEOC sets forth in its guidance that the availability of COVID-19 vaccinations raises questions under the federal equal employment opportunity (EEO) laws, including the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and Title VII of the Civil Rights Act, as amended by the Pregnancy Discrimination Act (Title VII). The "K. Vaccination" section of the EEOC guidance was originally released on December 16, 2020, and was clarified and supplemented on May 28, 2021.

Below is a listing of the newly added or updated questions and the heading each may be found under within the guidance. In the interest of space for this publication, the answers to each question may be viewed in the guidance itself; a link to which may be found at the end of this article.

<u>COVID-19 Vaccinations: EEO Overview</u>
K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19?

K.2. What are some examples of reasonable accommodations or modifications that employers may have to provide to employees who do not get vaccinated due to disability; religious beliefs, practices, or observance; or pregnancy?

K.3. How can employers encourage employees and their family members to be vaccinated without violating the EEO laws, especially the ADA and GINA?

General
K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA?

Mandatory Employer Vaccination Programs
K.5. Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability? (12/16/20, updated 5/28/21)

K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do? (12/16/20, updated 5/28/21)

K.7. If an employer requires employees to get a COVID-19 vaccination from the employer or its agent, do the ADA's restrictions on an employer making disability-related inquiries or medical examinations of its employees apply to any part of the vaccination process? (12/16/20, updated 5/28/21)

Voluntary Employer Vaccination Programs
K.8. Under the ADA, are there circumstances in which an employer or its agent may ask disability-related screening questions before administering a COVID-19 vaccine without needing to satisfy the "job-related and consistent with business necessity" standard? (12/16/20, updated 5/28/21)

K.9. Under the ADA, is it a "disability-related inquiry" for an employer to inquire about or request documentation or other confirmation that an employee obtained the COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic? (12/16/20, updated 5/28/21)

K.10. May an employer offer voluntary vaccinations only to certain groups of employees?

K.11. What should an employer do if an employee who is fully vaccinated for COVID-19 requests accommodation for an underlying disability because of a continuing concern that he or she faces a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated?

Title VII and COVID-19 Vaccinations
K.12. Under Title VII, how should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (12/16/20, updated 5/28/21)

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? (12/16/20, updated 5/28/21)

GINA and COVID-19 Vaccinations
K.14. Is Title II of GINA implicated if an employer requires an employee to receive a COVID-19 vaccine administered by the employer or its agent? (12/16/20, updated 5/28/21)

K.15. Is Title II of GINA implicated when an employer requires employees to provide documentation or other confirmation that they received a vaccination from a doctor, pharmacy, health agency, or another health care provider in the community? (12/16/20, updated 5/28/21)

Employer Incentives For COVID-19 Voluntary Vaccinations Under ADA and GINA
ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Under the ADA, may an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community?

K.17. Under the ADA, may an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent?

GINA: Employer Incentives for Voluntary COVID-19 Vaccinations
K.18. Under GINA, may an employer offer an incentive to employees to provide documentation or other confirmation that they or their family members received a vaccination from their own health care provider, such as a doctor, pharmacy, health agency, or another health care provider in the community?

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent?

K.20. Under GINA, may an employer offer an incentive to an employee in return for an employee's family member getting vaccinated by the employer or its agent?

K.21. Under GINA, may an employer offer an employee's family member an opportunity to be vaccinated without offering the employee an incentive?

Conclusion

The CDC recently released updated public health recommendations for fully vaccinated people. The update has resulted in employers having to consider whether to update pandemic-related polices or practices. Employers also need take into consideration guidance issued by OSHA and the EEOC.

When updating HR-related policies or procedures, there are many factors to consider and before a bank implements revised COVID-19 related employee policies and procedures, senior management and bank's counsel need be involved in the discussion, planning, and decision-making process to help ensure the bank is protected against an inadvertent violation of an employment law. The resources outlined in this article and the links listed below should provide helpful background information and insight into topics to consider, and examples of possible steps to incorporate.

Resources

CDC: *Interim Public Health Recommendations for Fully Vaccinated People*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html

CDC: *Guidance for Unvaccinated People, How to Protect Yourself and Others*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html

OSHA: *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID in the Workplace*, https://www.osha.gov/coronavirus/safework

EEOC: *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws ■

Wisconsin Bankers ASSOCIATION

June 2021

Compliance Journal

Special Focus

Reminder: Borrowers in Forbearance May Require Assistance

As the pandemic's impact lingers, and forbearance options under the CARES Act will begin expiring soon, consumers may require assistance from their servicers to prevent avoidable foreclosures. Wisconsin banks are reminded to consider preparing for a surge of borrowers in need of help by ensuring they have a response prepared, monitoring in place, and resources and staff available to handle and process borrower requests.

The Consumer Financial Protection Bureau (CFPB) recently released two reports in May 2021, detailing challenges faced by mortgage borrowers during the pandemic. Data within the report indicates a significant number of borrowers are behind in their mortgage. An analysis of 662,200 mortgage loans reported an estimated 4.7% of owner-occupied properties were in forbearance as of March 2021, and 0.5% were more than 60 days delinquent. In another report, CFPB indicated that the volume of mortgage origination and servicing complaints peaked in March, at the highest it's been in three years.

How to Prepare

WBA expects distressed homeowners will need help from their servicers in the coming months. Regulators are also aware of the situation, and WBA expects that examiners should not criticize those banks that take steps to assist distressed borrowers. In a recent bulletin, CFPB indicated that in its oversight, it will pay particular attention to how well servicers are:

- Being proactive. Servicers should contact borrowers in forbearance before the end of the forbearance period so they have time to apply for help.
- Working with borrowers. Servicers should work to ensure borrowers have all necessary information and should help borrowers in obtaining documents and other information needed to evaluate the borrowers for assistance.
- Addressing language access. CFPB stated it will look carefully at how servicers manage communications with borrowers with limited English proficiency and maintain compliance with the Equal Credit Opportunity Act and other laws.
- Evaluating income fairly. Where servicers use income in determining eligibility for loss mitigation options, servicers should evaluate borrowers' income from public assistance, child-support, alimony or other sources in accordance with the Equal Credit Opportunity Act's anti-discrimination protections.
- Handling inquiries promptly. CFPB also stated it will closely examine servicer conduct where hold times are longer than industry averages.
- Preventing avoidable foreclosures. CFPB stated it expects servicers to comply with foreclosure restrictions in Regulation X and other federal and state restrictions in order to ensure that all homeowners have an opportunity to save their homes before foreclosure is initiated.

Communication will be a critical component. Each situation will be different, and banks should consider its customers, and how they are impacted. It will be important to communicate with distressed borrowers to understand their current condition and get a better idea for their situation going forward. Not only as a matter of assessment, but also to make a determination and provide options to a borrower clearly and promptly. Also, in an analysis, consider whether bank has a strong understanding of the borrower's financial condition, accurate risk-rating, and whether the credit rating is appropriate for the level of risk.

Conclusion

Banks should consider their existing lines of business, how the end of various forbearance programs will affect their borrowers, and prepare accordingly. While regulators will continue to rely upon the existing pandemic supervisory and enforcement practices, they are likely to consider a bank's preparedness for working with distressed borrowers, and evaluation of its response.

Additional Resources

CFPB Warns Mortgage Servicers to Prepare for Surge in Homeowners Needing Assistance: https://www.consumerfinance.gov/about-us/newsroom/cfpb-compliance-bulletin-warns-mortgage-servicers-unprepared-is-unacceptable/

CFPB Proposes Mortgage Servicing Changes to Prevent Wave of COVID-19 Foreclosures: https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-mortgage-servicing-changes-to-prevent-wave-of-covid-19-foreclosures/

CFPB Reports Detailing Mortgage Borrowers' COVID-19 Challenges: https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-reports-detailing-mortgage-borrowers-continuing-covid-19-challenges/

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Wisconsin Bankers Association

July 2021

Compliance Journal

Special Focus

Final Regulation X Loss Mitigation Temporary Procedures for Borrowers Experiencing COVID-19 Related Hardships

On June 28, 2021, the Consumer Financial Protection Bureau (CFPB) issued a final rule to amend Regulation X to establish temporary procedural safeguards for borrowers seeking loss mitigation options, permit mortgage servicers to offer certain loan modifications made available to borrowers experiencing a COVID-19-related hardship based on the evaluation of an incomplete application, and amend current early intervention and reasonable diligence obligations (Final Rule). This article provides a background and summary of the Final Rule which is effective **August 31, 2021**.

Background

Mortgage relief programs have been established throughout the last 16 months of the pandemic, including forbearances made available by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and various Federal and State foreclosure moratoria. The protections have begun to phase out over the summer, leaving some borrowers at potential risk of foreclosure. CFPB issued the Final Rule to provide borrowers with ways to resume making payments and avoid foreclosure.

CFPB's mortgage servicing rules implemented under Regulation X establish procedures that mortgage servicers generally must follow in evaluating loss mitigation applications and requires certain communication efforts with delinquent borrowers. The mortgage servicing rules also provide certain protections against foreclosure based on the length of the borrower's delinquency and the receipt of a complete loss mitigation application. For example, Regulation X generally prohibits a servicer from making the first notice or filing required for foreclosure until the borrower's mortgage loan is more than 120 days delinquent.

In June of 2020, CFPB issued an interim final rule (IFR) to amend Regulation X. With certain exceptions, Regulation X prohibits servicers from offering a loss mitigation option to a borrower based on evaluation of an incomplete application. The IFR amended Regulation X to allow servicers to offer certain loss mitigation options to borrowers experiencing financial hardships due, directly or indirectly, to the COVID–19 emergency based on an evaluation of an incomplete loss mitigation application.

Following the IFR, having considered comments received, CFPB issued the Final Rule which includes five key amendments to Regulation X. The amendments are summarized below.

As reference, the amendments are found in Regulation X sections 1024.39 and 1024.41 and corresponding official commentary sections. For small servicers, the Final Rule generally does not apply. However, small servicers are reminded the pre-foreclosure review period in section 1024.41(f)(1) does apply to small servicers.

Final Rule

The Final Rule amends the mortgage servicing rules to assist borrowers affected by the COVID-19 emergency. The Final Rule includes temporary provisions that require a servicer to meet special COVID-19 mitigation procedures, provides servicers the ability to offer a streamlined loan modification without a complete loss mitigation application, requires reasonable diligence by the servicer to complete loss mitigation applications in COVID-19 hardship situations, and establishes certain servicer timing requirements to renew reasonable diligence efforts.

Under the Final Rule, a COVID-19 related hardship means a financial hardship due, directly or indirectly, to the national emergency for the COVID-19 pandemic declared in Proclamation 9994 on March 13, 2020 (beginning on March 01, 2020) and continued on February 24, 2021, in accordance with section 202(d) of the National Emergencies Act.

Temporary Special COVID-19 Procedural Safeguards

As mentioned earlier, generally, a servicer may not make a foreclosure referral under Regulation X until the borrower is more than 120 days delinquent. Currently, there exists additional waiting periods, criteria, notifications, and determinations the servicer must make before proceeding. The Final Rule temporarily adds procedural safeguards which apply from August 31, 2021 through December 31, 2021.

To give a borrower a meaningful opportunity to pursue loss mitigation options, a servicer must ensure one of the following new temporary procedural safeguards have been met before making the first notice or filing required by law for any foreclosure process (collectively, foreclosure referral) because of a delinquency under Regulation X if: (a) the borrower's mortgage loan obligation became more than 120 days delinquent on or before March 1, 2020; and (b) the statute of limitations applicable to the foreclosure action being taken in the laws of the State where the property securing the mortgage loan is located expires on or after January 1, 2022.

1. The borrower was evaluated based on a complete loss mitigation application and existing foreclosure protection conditions are met. To meet the safeguard, the servicer must confirm that:

    - The borrower submitted a complete loss mitigation application, and the servicer evaluated the application.
    - The borrower remained delinquent at all times since submission of the loss mitigation application.
    - The foreclosure protection conditions in the existing mortgage servicing rules are met such that the servicer is permitted to make the foreclosure referral.

2. The property is abandoned. To meet the safeguard, applicable state or local law must consider the property securing the mortgage abandoned when the servicer makes the foreclosure referral.

3. The borrower is unresponsive to servicer outreach. To meet the safeguard, the servicer must not have received any communications from the borrower for at least 90 days before the servicer makes the foreclosure referral. Additionally, the servicer must confirm:

    - It made good faith efforts to establish live contact with the borrower after each payment date, during the 90-day period before making the foreclosure referral.
    - It has provided the early intervention 45-day written notice required by the mortgage servicing rules. The servicer must have sent the notice at least 10 but no more than 45 days before it makes the foreclosure referral.
    - It has complied with all loss mitigation notice requirements in the mortgage servicing rules during that 90-day period before making the foreclosure referral.
    - The borrower's forbearance program, if applicable, ended at least 30 days before making the foreclosure referral.

COVID-19-Related Streamlined Loan Modifications

The mortgage servicing rules, with certain exceptions, require servicers to evaluate a complete loss mitigation application for all loss mitigation options available to the borrower. The Final Rule offers certain COVID-19-related streamlined loan modification options based on the evaluation of an incomplete application. To qualify for the exception, the loan modification program must:

1. Limit loan term extensions. The loan modification must not extend the loan term more than 40 years from the date the modification is effective.

2. Limit periodic payment increases. The loan modification must not increase the borrower's monthly principal and interest payment beyond the monthly principal and interest payment required prior to the modification.

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3. Prohibit interest accrual on delayed amounts. If the loan modification allows the borrower to delay payment of any portion of the amount owed until the property is sold, the mortgage is refinanced, the modification matures, or, for Federal Housing Administration (FHA) insured loans until the mortgage insurance terminates, then the loan modification must not allow interest to accrue on those amounts. Such amounts could include, for example, forborne periodic payments.

4. Be made available to borrowers experiencing a COVID-19-related hardship.

5. End (or be designed to end) any pre-existing delinquency. The loan modification must end any pre-existing delinquency when the borrower accepts the modification offer. If a trial period applies, the loan modification must be designed to end any pre-existing delinquency when the borrower satisfactorily completes any trial period requirements and accepts a permanent loan modification.

6. Not include certain fees. The servicer must not charge any fee in connection with the loan modification, and must promptly waive all existing late fees, penalties, stop payment fees, or similar charges that were incurred on or after March 1, 2020.

When using this option, under certain circumstances, the servicer may be required to resume reasonable diligence efforts to obtain a complete loss mitigation application. More details are provided in the Final Rule in the link below.

COVID-19-Related Reasonable Diligence

The Final Rule prescribes when the servicer must exercise reasonable diligence efforts to complete a loss mitigation application made available to borrowers experiencing a COVID-19-related hardship, when that program was offered based on an evaluation of an incomplete application. For such borrowers, if the borrower remains delinquent, the servicer is required to contact the borrower no later than 30 days before the scheduled end of the forbearance period to determine if they wish to complete the loss mitigation application. If the borrower chooses to do so, the servicer must reinstate reasonable diligence efforts to complete the loss mitigation application before the end of the forbearance period.

Additional Temporary COVID-19-Related Live Contact Information

The mortgage servicing rules require certain good faith efforts with respect to contacting delinquent borrowers, during which the servicer must inform the borrower about the availability of loss mitigation options. The rules also require servicers to maintain policies and procedures that, among other things, ensure the servicer personnel assigned to a delinquent borrower can identify all loss mitigation options available from the owner or assignee of the borrower's mortgage, and the actions the borrower must take to be evaluated for those options.

The Final Rule temporarily requires a servicer to provide some delinquent borrowers with specific, additional information. This requirement applies until October 1, 2022. For borrowers that are not in a forbearance program at the time live contact is established under the existing rules, if the owner or assignee of the mortgage provides forbearance programs for borrowers experiencing a COVID-19-related hardship, then promptly after establishing live contact, the servicer must inform the borrower of the following:

1. A program availability statement that forbearance programs are available for borrowers experiencing a COVID-19-related hardship. For example, the servicer could say, "We wanted to let you know that forbearance programs are available for borrowers that are having difficulty making their payments because of the COVID-19 emergency."

2. List and describe applicable programs. Unless the borrower states that they are not interested in receiving information about such programs, the servicer must then list and briefly describe to the borrower the applicable programs and the actions the borrower must take to be evaluated. The servicer is only required to list forbearance programs available at the time the live contact is established and does not need to include any programs that have already expired.

3. Homeownership counseling services. The servicer must tell the borrower of at least one way that they can find contact information for homeownership counseling services, such as referencing the borrower's periodic statement.

For borrowers in a forbearance program made available to those experiencing a COVID-19-related hardship at the time live contact is established, the servicer must provide additional information during the live contact that occurs 10 to 45 days before the scheduled end of the borrower's program. When live contact is established, the servicer must inform the borrower of the following:

1. Scheduled end date. When the forbearance program is scheduled to end.

2. List and describe applicable programs. List and briefly describe any loss mitigation programs, including forbearance extensions and repayment options, that are available through the owner or assignee of the mortgage, and how the borrower can apply for those options. The servicer is only required to list loss mitigation options available at the time the live contact is established and does not need to include any options that have already expired.

3. Homeownership counseling services. The servicer must tell the borrower of at least one way that they can find contact information for homeownership counseling services, such as referencing the borrower's periodic statement.

Nothing in the Final Rule or mortgage servicing rules prevents servicers from sharing additional information with borrowers beyond these requirements when making live contact. For example, servicers may also share information about eligibility criteria or discuss how investor review standards, such as waterfalls, may impact which available options may be offered to the borrower.

Conclusion

The Final Rule establishes temporary procedural safeguards to help ensure that borrowers have a meaningful opportunity to be reviewed for loss mitigation before the servicer can make the first notice or filing required for foreclosure on certain mortgages. In addition, the Final Rule would temporarily permit mortgage servicers to offer certain loan modifications made available to borrowers experiencing a COVID-19-related hardship based on the evaluation of an incomplete application. Lastly, the Final Rule incorporates certain temporary amendments to the early intervention and reasonable diligence obligations that Regulation X imposes on mortgage servicers.

The Final Rule can be found here: https://www.govinfo.gov/content/pkg/FR-2021-06-30/pdf/2021-13964.pdf ■

Governor Evers Signs 2022-2023 State Budget

On July 8th, at an elementary school in Whitefish Bay, Governor Evers signed the 2022-23 state budget into law as 2021 Wisconsin Act 58. The state budget process, which began with agency budget requests back in the Fall of 2020, is now complete. This means the WBA Government Relations team has successfully defended against threats to the banking industry being included in the budget through their lobbying and advocacy efforts.

Through his partial veto authority, the Governor made 50 changes to the budget before signing off on most of what the GOP-controlled Legislature sent to his desk. This is fewer than the 78 partial vetoes he made to the previous budget bill two years ago.

The Governor made two notable vetoes. First, he vetoed a provision requiring the Department of Revenue to update the state's individual income tax withholding tables to reflect the rates, brackets, and sliding scale standard deduction for tax year 2022. This will have a $700 million impact over the biennium.

Second, Governor Evers vetoed a $550 million transfer to the state's "rainy day" fund and requested the Legislature work with him to made necessary investments with the dollars. The $550 million will remain in the state's general fund.

The tax cuts Republicans included in the budget they passed largely remained intact after the Governor's action. Therefore, earners in the third tax bracket will see about a $2 billion individual income tax cut through a rate reduction, and property owners will see about a $1 billion decrease in the property tax burden.

The 2022-23 budget sets aside backfill funding for municipalities for lost revenue associated with the repeal of the state's personal property tax. Standalone legislation to formally repeal the personal property tax's statutory language gained bipartisan support and passed both houses of the Legislature. However, the Governor vetoed that bill; and therefore, the personal property tax will remain in place, at least for the time being. Governor Evers stated he wants the Legislature to send him a cleaner bill that properly addresses concerns about out-of-state manufacturing expenses. The WBA Government Relations team lobbied in favor of the legislation and is part of a coalition pushing repeal of the personal property tax. WBA also sent a letter to the Governor urging him to sign the repeal

1. Scheduled end date. When the forbearance program is scheduled to end.

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A copy of the 2022-2023 Wisconsin State Budget may be viewed at: https://docs.legis.wisconsin.gov/2021/related/acts/58.pdf

A copy of the Governor's full veto message on the state budget may be viewed at: https://content.govdelivery.com/attachments/WIGOV/2021/07/08/file_attachments/1873805/Gov.%20Evers%202021-23%20Veto%20Message.pdf

The Governor's personal property tax veto message may be viewed at: https://content.govdelivery.com/attachments/WIGOV/2021/07/08/file_attachments/1874361/191.pdf ■

Judicial Spotlight

Recent WI Supreme Court Cases Affirm DNR Authority to Place Permit Restrictions on Farms and High-Capacity Wells

The Wisconsin Supreme Court (Court) recently decided two cases to allow the Wisconsin Department of Natural Resources (DNR) to place permit restrictions on large livestock farms and high-capacity wells as a way to protect Wisconsin's water. The issue in both cases is whether DNR had the authority under Wisconsin law to issue permits with conditions.

In both cases, the Court looked to language used in Sec. 227.10(2m) Wis. Stats. and determined that (1) agencies' actions under administrative law need be supported by explicit, not specific, statutory or regulatory authority; and (2) that explicit authority can be broad in scope. As a result of the two decisions, DNR was given broader authority than many believed was permissible since enactment of 2011 Wisconsin Act 21 (Act 21) because the agency actions authorized by the Court are not specifically stated in the statute sections in question. The following is a summary of the two cases.

Kinnard Farms

In the first case, Kinnard operates a large, concentrated animal feeding operation (CAFO). Kinnard wanted to expand its dairy operations by building a second site and adding 3,000 dairy cows. The expansion required Kinnard to apply to DNR for reissuance of its Wisconsin Pollutant Discharge Elimination System (WPDES) permit to include both the original site and the proposed expansion. DNR approved the application and reissued Kinnard's WPDES permit.

Persons (petitioners) living near the CAFO sought review of the reissued WPDES permit because of their proximity to the farm, had private drinking wells, and were concerned the proposed expansion would exacerbate current groundwater contamination issues. The petitioners alleged that the reissued WPDES permit was inadequate because, among other things, it did not set a "maximum number of animal units" or "require monitoring to evaluate impacts to groundwater."

DNR granted the petitioners a contested case hearing and the matters were referred to an administrative law judge (ALJ). Kinnard filed for summary judgment alleging DNR lacked statutory authority to impose the conditions, citing Act 21. The ALJ denied the motion and conducted a four-day evidentiary hearing during which community members who lived or worked near the CAFO testified about contamination of well water and the impact the contamination had on their businesses, homes, and daily lives. Based upon evidence presented by residents and experts, the ALJ determined that DNR had "clear regulatory authority" to impose the two conditions disputed upon Kinnard's reissued WPDES permit.

Ultimately the matter was argued to the Court. The issue in the case involved sec. 227.10(2m), Wis. Stats., which dictates that "[n]o agency may implement or enforce any standard, requirement, or threshold…unless that standard, requirement, or threshold is *explicitly required or explicitly permitted by statute or by a rule* that has been promulgated in accordance with this subchapter." (emphasis

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Special Focus

CFPB Issues Interpretive Rule on Impact of Juneteenth Holiday on Certain Closed-end Mortgage Requirements Under Reg Z

On August 5, the Bureau of Consumer Financial Protection (CFPB) issued an interpretive rule (Rule) to provide guidance on certain Regulation Z requirements related to rescission of closed-end mortgages and the TILA/RESPA Integrated Disclosures (TRID). The timing requirements discussed in the Rule are based on the definition of "business day" that excludes days that are designated as legal public holidays under federal law. The Rule explains timing requirements in light of recent legislation that designated "Juneteenth National Independence Day, June 19" (Juneteenth) as a federal legal public holiday. While the guidance was issued several weeks after June 19, it does provide a helpful analysis of the impact the new federal holiday has on the delivery of certain disclosures. The following is a recap of the Rule.

Background

On June 17, 2021, federal law at 5 U.S.C. 6103(a) was amended to add Juneteenth to the list of federal legal public holidays (federal holidays). Various regulatory provisions cross-reference or otherwise refer to the federal holidays listed in 5 U.S.C. 6103(a), including the Regulation Z definition of "business day."

In Regulation Z, "business day" is defined in section 1026.2(a)(6) generally to mean "a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions." However, for purposes of certain specified Regulation Z provisions, section 1026.2(a)(6) defines business day to mean: "[A]ll calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a), such as New Year's Day, the Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, and Christmas Day." This is referred to as the "specific business day" definition.

The legislation that made Juneteenth a federal holiday took effect immediately. Therefore, June 19 became a federal holiday on June 17, 2021. By virtue of the cross-reference to 5 U.S.C. 6103(a) in section 1026.2(a)(6), the days that are considered federal holidays under the specific business day definition in Regulation Z also changed on June 17, 2021.

As the making of Juneteenth into a federal holiday occurred only two days before the actual observance date, this resulted in interpretive questions and compliance challenges for the mortgage industry. Of particular concern was the treatment for transactions that either (1) closed on or before June 17, 2021, but for which consumers' rescission periods had not yet expired, or (2) were close to the planned closing date on June 17, 2021, and subject to certain disclosure timing requirements of TRID provisions. The Rule provides guidance in the two situations.

Rule

Generally, CFPB issued the Rule to clarify that the version of the specific business day definition that applies to rescission of closed-end mortgages and some TRID provisions is the version of the definition in effect when the relevant period begins. Accordingly, in the context of the Juneteenth holiday and affected closed-end rescission and TRID provisions, if the relevant period began on or before June 17, 2021, then June 19, 2021, is a business day for purposes of the specific business day definition. If the time period began after June 17, 2021, then June 19, 2021, is a federal holiday for purposes of the specific business day definition. Keep in mind, nothing under the Rule would prohibit a creditor from providing longer time periods. Creditors would also be compliant if they considered June 19, 2021, a federal holiday for purposes of rescission and TRID disclosure requirements.

Determining the Applicable Specific Business Day Definition

Rescission

Regulation Z section 1026.23(a)(3)(i) provides that, for closed-end transactions covered by the right of rescission, the consumer may exercise the right to rescind until midnight of the third business day following the last of (1) delivery of all material disclosures;[1] (2) consummation of the loan;[2] and (3) delivery of the notice of the right to rescind to each consumer entitled to rescind.[3] Pursuant to section 1026.23(b)(1)(v), the notice must include the date the rescission period expires.

Under the Rule, for purposes of section 1026.23(a)(3)(i), the rescission period is determined based on the version of the specific business day definition in effect when the rescission period begins. Similarly, for purposes of section 1026.23(b)(1)(v), the rescission period expiration date disclosed on the notice of the right to rescind is determined based on the version of the specific business day definition in effect when the rescission period begins. Therefore, under the Rule, if the rescission period began on or before June 17, 2021, for purposes of determining the rescission period and the disclosed rescission period expiration date, Saturday, June 19, 2021, is a business day notwithstanding the addition of Juneteenth as a federal holiday.

> *Example*: Assume the rescission period began on Wednesday, June 16, 2021. Consistent with the version of the specific business day definition in effect when the rescission period began, the creditor disclosed June 19, 2021, as the rescission period expiration date on the notice of the right to rescind. Because the rescission period began on or before June 17, 2021, Saturday, June 19, 2021, is a business day for purposes of determining the rescission period and the disclosed rescission period expiration date. In this example, the rescission period expired on Saturday, June 19, 2021; the original rescission period expiration date did not change as a result of the addition of Juneteenth as a federal holiday. For purposes of compliance with sections 1026.23(a)(3)(i) and (b)(1)(v), a creditor may provide a longer rescission period.

Loan Estimate

Regulation Z section 1026.19(e)(1)(iii)(B) provides that creditors generally must deliver or place in the mail the Loan Estimate to consumers no later than seven business days before consummation of the transaction.[4] Consistent with the guidance described above, CFPB concludes that the seven-business-day waiting period in section 1026.19(e)(1)(iii)(B) is determined based on the version of the specific business day definition in effect on the date the creditor delivers the Loan Estimate or places it in the mail.

> *Example*: If a creditor delivered or placed the Loan Estimate in the mail on Monday, June 14, 2021, the creditor complied with section 1026.19(e)(1)(iii)(B) if consummation occurred on or after Tuesday, June 22, 2021, because the Loan Estimate was delivered or mailed seven business days (including June 19, 2021) before consummation. CFPB notes, however, that it would also be compliant for creditors to have considered June 19, 2021, a federal holiday for purposes of section 1026.19(e)(1)(iii)(B) because creditors may provide the Loan Estimate earlier than seven business days before consummation.

Mailbox Rules

CFPB also addressed mailbox rules. In particular, sections 1026.19(e)(1)(iv), (e)(4)(ii), and (f)(1)(iii) provide that if the Loan Estimate or Closing Disclosure, as applicable, is not provided to the consumer in person, the consumer is considered to have received the Loan Estimate or Closing Disclosure three business days after it is delivered or placed in the mail when determining compliance with the disclosure timing requirements in those sections.[5] This timing delivery is referred to herein as "mailbox rules." CFPB concludes that, for purposes of sections 1026.19(e)(1)(iv), (e)(4)(ii), and (f)(1)(iii), the three-business-day period is determined based on the version of the specific business day definition in effect on the date the creditor delivers the disclosures or places them in the mail.[6]

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> *Example*: If a creditor did not provide the Loan Estimate or Closing Disclosure to the consumer in person but delivered or placed it in the mail on Thursday, June 17, 2021, the consumer is considered to have received the Loan Estimate or Closing Disclosure on Monday, June 21, 2021. It would also be compliant for creditors to have considered June 19, 2021, a federal holiday for purposes of the mailbox rules in sections 1026.19(e)(1)(iv), (e)(4)(ii), and (f)(1)(iii).

CFPB takes a similar approach with its interpretation regarding the receipt of a revised Loan Estimate and Closing Disclosure prior to consummation. Regulation Z section 1026.19(e)(4)(ii) provides, in part, that the consumer must receive any revised Loan Estimate no later than four business days prior to consummation.[7] Section 1026.19(f)(1)(ii)(A) provides that the creditor must ensure that the consumer receives the Closing Disclosure no later than three business days before consummation. Unlike section 1026.19(e)(1)(iii)(B), 1026.19(e)(4)(ii) and (f)(1)(ii)(A) timing requirements begin when the disclosures are received by the consumer and not when they are delivered or placed in the mail. However, as noted above, sections 1026.19(e)(4)(ii) and (f)(1)(iii) provide that if the revised Loan Estimate or Closing Disclosure is not provided to the consumer in person, the consumer is considered to have received the revised Loan Estimate or Closing Disclosure three business days after it is delivered or placed in the mail.

Thus, CFPB concludes that the four- and three-business-day timing requirements in sections 1026.19(e)(4)(ii) and (f)(1)(ii)(A), respectively, are determined based on the version of the specific business day definition in effect on the date the creditor either provides the required disclosures to the consumer in person or, if not provided in person, the date the creditor delivers or places the required disclosures in the mail.

> *Example*: If a creditor provided the Closing Disclosure to the consumer in person on Thursday, June 17, 2021, the creditor complied with section 1026.19(f)(1)(ii)(A) if consummation occurred on or after Monday, June 21, 2021, because the Closing Disclosure was delivered in person no later than three business days (including June 19, 2021) before consummation. CFPB once again notes, however, that it would also be compliant for creditors to have considered June 19, 2021, a federal holiday for purposes of sections 1026.19(e)(4)(ii) and (f)(1)(ii)(A) because creditors may provide the revised Loan Estimate or Closing Disclosure earlier than required.

Operational Considerations

To help identify any compliance risks given that CFPB issued the Rule, banks should consider how their own treatment of rescission and TRID disclosure delivery for loan transactions impacted by the new federal holiday align with the guidance provided in the Rule.

For example, for closed-end loans that closed on or before June 17, but for which the consumers' rescission period had not yet expired, based upon the guidance set forth in the Rule, the original rescission period expiration date did not change as a result of the addition of Juneteenth as a federal holiday. Banks should confirm it had correctly calculated the rescission period. Additionally, if the bank provided a longer rescission period, as many did out of an abundance of caution and lack of CFPB or regulator guidance at that time, such additional time is permissible. In both scenarios, the bank has no additional compliance risk.

Banks should also identify which closed-end loans involving rescission closed after June 17, to confirm whether the bank treated June 19, 2021, as a federal holiday for purposes of rescission timing and disclosure contents. Treating Juneteenth as a federal holiday under the specific business day definition for these loans complies with the guidance provided in the Rule. Also, for the TRID disclosure timing rules outlined above, bank should review its closed-end loans to determine whether timing complies with the guidance set forth in the Rule.

If for some reason there is a loan transaction for which the bank did not treat June 19 as a federal holiday under the specific business day definition for which it should have under the Rule, the bank should document its rationale for how it proceeded. For example, the consumer claimed a bona fide personal financial emergency, or that the consumer claimed to suffer detrimental harm if a residential mortgage transaction were to be postponed, at the last minute, an additional day.

Surprisingly, the Rule does not address open-end credit. WBA believes this was an oversight by CFPB and additional clarification from CFPB regarding open-end credit is expected. WBA believes it reasonable for banks to apply the same approach outlined in the Rule to open-end credit.

Conclusion

CFPB issued the Rule to provide guidance on certain Regulation Z timing requirements related to rescission and TRID disclosures in light of Juneteenth becoming a federal legal public holiday. Through its Rule, CFPB clarified that the version of the specific business day definition under Regulation Z that applies to rescission of closed-end mortgages and some TRID provisions is the version of the definition in effect when the relevant period begins.

Accordingly, in the context of the Juneteenth holiday and affected closed-end rescission and TRID provisions, if the relevant period began on or before June 17, 2021, then June 19, 2021, is a business day for purposes of the specific business day definition. If the time period began after June 17, 2021, then June 19, 2021, is a federal holiday for purposes of the specific business day definition. Nothing under the Rule prohibits a creditor from providing longer time periods; creditors would also be compliant if they considered June 19, 2021, a federal holiday for purposes of rescission and TRID disclosure requirements.

The Rule: https://files.consumerfinance.gov/f/documents/cfpb_juneteenth-holiday_interpretive-rule_2021-08.pdf ■

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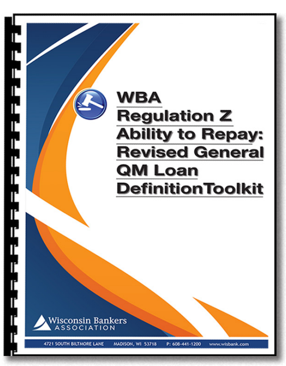
[1]The material disclosures are the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and the disclosures and limitations referred to in §§1026.32(c) and (d) and 1026.43(g). *See* 12 CFR 1026.23(a)(3)(ii).
[2]"Consummation" is defined in § 1026.2(a)(13) as the time that a consumer becomes contractually obligated on the credit transaction. Per comment 2(a)(13)-1, when a contractual obligation is created is determined by State law.
[3]A creditor is required to provide two copies of the notice of the right to rescind to each consumer entitled to rescind (one copy to each if the notice is delivered in electronic form in accordance with the consumer consent and other applicable provisions of the E-Sign Act). The notice must be on a separate piece of paper but may appear with other information such as the itemization of the amount financed. The creditor may deliver the notice after the transaction is consummated, but the rescission period will not begin to run until the notice is given. *See* 12 CFR 1026.23(b)(1) and comments 23(b)(1)-2 and -4.
[4]The seven-business-day waiting period begins when the creditor delivers the Loan Estimate or places it in the mail, not when the consumer receives or is considered to have received the Loan Estimate. Comment 19(e)(1)(iii)-2.
[5]In such circumstances, the creditor may, alternatively, rely on evidence that the consumer received the disclosures earlier. Comments 19(e)(1)(iv)-1 and -2 provide that if the Loan Estimate is not provided to the consumer in person (such as by mail or email), the creditor may, alternatively, rely on evidence that the consumer received the Loan Estimate earlier than three business days after it is delivered or placed in the mail. *See also* comments 19(e)(4)(ii)-1 and 19(f)(1)(iii)-1 and -2.
[6]Relatedly, §1026.19(e)(2)(i)(A) provides that neither a creditor nor any other person may impose a fee on a consumer in connection with the consumer's application for a mortgage transaction before the consumer has, among other things, received the Loan Estimate. While §1026.19(e)(2)(i)(A) does not refer to business days when referencing the consumer receiving the Loan Estimate, §1026.2(a)(6) lists the specific business day definition as applying to §1026.19(e)(2)(i)(A). The same interpretation that applies to the mailbox rules for purposes of determining the receipt of disclosures also applies to §1026.19(e)(2)(i)(A).
[7]This provision also prohibits a creditor from delivering a revised Loan Estimate on or after the date on which the creditor provides the Closing Disclosure. 12 CFR 1026.19(e)(4)(ii).

WBA Reg Z Ability to Repay: Revised General QM Loan Definition Toolkit Now Available



WBA has recently released its Regulation Z Ability to Repay: Revised General QM Loan Definition Toolkit for use by banks in understanding the 2020-2021 revisions to the Regulation Z general qualified mortgage (QM) definition. Overall, the toolkit has been designed to provide readers with a perspective of the rule change in relation to their operation and prepare for implementation of revised loan policy and underwriting procedures, both in terms of practical and compliance considerations.

The toolkit includes an introduction, background, revised general QM definition overview, implementation considerations, an implementation checklist, select template loan or underwriting policy provisions, a template board resolution, and additional resources.

The toolkit is intended for use to supplement a bank's residential mortgage loan policy and underwriting procedures regarding residential mortgages. The toolkit is only a template; therefore, banks need customize it to their specific situation prior to its implementation and use. The new toolkit may be viewed at: www.wisbank.com/resources/compliance/ ■

Wisconsin Bankers Association

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Compliance Journal

Special Focus

Long Awaited Dodd-Frank Act Small Business Lending Reg B Data Collection Rule Finally Proposed

The long awaited proposed rule regarding the collection and reporting of small business lending data as required by Section 1071 of the Dodd-Frank Act has finally been released by the Bureau of Consumer Financial Protection (CFPB). Unfortunately, the proposed rule is as broad and onerous as the industry expected it to be as it will be costly to train, implement, and monitor. The proposal would revise Regulation B, which implements the Equal Credit Opportunity Act (ECOA), to require the collection and reporting to CFPB certain data on applications for credit by small businesses. The proposal is substantial; however, below is a brief summary of the proposed rule.

Who Must Collect Data

The first step of analysis for any proposal is to identify whether it will apply to the bank. In this case, the proposal is broad and will very likely apply to all banks in Wisconsin. As proposed, if a bank originates at least 25 credit transactions that are considered "covered credit transactions" to "small businesses" in each of the two preceding years, the proposed rule will apply to the bank. Generally, a "small business" under the proposal is a business that had $5 million or less in gross annual revenue for its preceding fiscal year.

What CFPB has proposed be considered a "covered credit transaction" is a bit trickier an analysis but is generally the same as what is considered an application under the existing Regulation B definition of "application." The proposed term does; however, exclude reevaluation requests, extension requests, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts; also excluded is an inquiry or prequalification request.

What Data is to be Collected

Next, the data to be collected. Dodd-Frank Act Section 1071 identified certain data that must be collected by CFPB; the law also gave CFPB discretion to collect additional data. CFPB has incorporated all Dodd-Frank Act required data and several discretional data into its proposal. In particular, banks must collect a unique identifier of each application, application date, application method, application recipient, action taken by bank on the application, date action taken, denial reasons, amount applied for, amount originated or approved, and pricing information including interest rate, total origination charges, broker fees, initial annual charges, additional cost for merchant cash advances or other sales-based financing, and prepayment penalties.

Banks must also collect credit type, credit purpose, information related to the applicant's business such as census tract, NAICS code and gross annual revenue for applicant's preceding fiscal year, number of applicant's non-owner workers, applicant's time in business, and number of applicant's principal owners.

There is also demographic information about the applicant's principal owners to collect. These data points include minority- and women-owned business status, and the ethnicity, race, and sex of the applicant's principal owners. The proposal also requires banks to maintain procedures to collect applicant-provided data at a time and in a manner that is reasonably designed to obtain a response, addresses how banks are to report certain data if data are not obtainable from an applicant, when banks are permitted to rely on statements made by an applicant, when banks must verify applicant's responses to certain data collected, and when banks may reuse certain data collected in certain circumstances such as when data was collected within the same calendar year as a current covered application and when the bank has no reason to believe the data are inaccurate.

When and How Data Must be Reported

Banks would be required to collect data on a calendar-year basis and report the data to CFPB by June 1 of the following year. CFPB has proposed to provide technical instructions for the submission of data in a *Filing Instructions Guide* and related materials.

The submitted data is also to be made available to the public on an annual basis. Banks would be required to make the reported data available on their website, or otherwise upon request, or must provide a statement that the bank's small business lending application register is available on CFPB's website. Model language for such statement has been proposed by CFPB.

Limit of Certain Bank Personnel's Access to Certain Data

The proposed rule implements a requirement under Section 1071 that banks limit certain employees' and officers' access to certain data. CFPB refers to this as the "firewall." Pursuant to the proposed rule, an employee or officer of a bank or bank's affiliate who are involved in making any determination concerning the applicant's covered application would be prohibited from accessing an applicant's responses to inquiries that the bank made regarding whether the applicant is a minority- or woman-owned business. Such employees are also restricted from information about an applicant's ethnicity, race, and sex of the applicant's principal owners.

There are exceptions to the requirement if it is not feasible to limit such access, as that factor is further set forth in the proposal. If an exception is permissible under the proposal, notice must be given to the application regarding such access. Again, CFPB has created model language for such notice.

Recordkeeping and Enforcement

The proposal establishes certain recordkeeping requirements, including a three year retention period for small business lending application registers. The proposal also includes a requirement to maintain an applicant's responses to Section 1071 inquiries regarding whether an applicant is a minority- or women-owned business, and responses regarding the ethnicity, race, and sex of the applicant's principal owners, separate from the rest of the application and accompanying information.

The proposal does include enforcement for violations of the new rules, addresses bona fide errors, and provides for a safe harbor.

Learn More and Get Involved

The proposal and additional information, including a chart of the proposed data collection points, may be viewed at: https://www.consumerfinance.gov/rules-policy/rules-under-development/small-business-lending-data-collection-under-equal-credit-opportunity-act-regulation-b/

WBA will comment on the proposal and will create a template letter for bankers to use in providing their own comments to CFPB regarding the impact the proposal will have on the bank. Comments are due 90 days from publication of the proposed rule in the *Federal Register*. At time of publication of the article, the proposal had not yet been published. CFPB has proposed mandatory compliance of a final rule be eighteen months after its effective date. WBA Legal is creating a working group to collect data and concerns from Wisconsin's bankers on the proposal. If you wish to be part of the working group, please contact WBA Legal at wbalegal@wisbank.com. ■

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Transition of Wisconsin's Hemp Pilot Program to USDA

For the past few years, hemp has been grown legally in Wisconsin under a temporary pilot program, designed for research purposes. During this time, many banks in Wisconsin have developed policies and procedures to bank customers entering the industry. As the pilot program comes to an end this month, it will transition to a permanent program administered by the United States Department of Agriculture (USDA) starting **January 1, 2022**. This article provides a brief background leading up to the transition, some of the broader considerations under USDA's program, and how banks can start to prepare their policies and procedures accordingly.

Background

Wisconsin's pilot program has been administered by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP), as provided for research purposes pursuant to the Agricultural Act of 2014 and Wisconsin law. The Agriculture Improvement Act of 2018 (2018 Farm Bill) has since transitioned hemp from a research crop to a commodity. Following enactment of the 2018 Farm Bill, USDA issued a final rule in January 2021 establishing a federal program regulating the production of hemp. While DATCP issued emergency rules to maintain Wisconsin's existing pilot program throughout the 2021 growing season, it has recently announced its plan to transition the program from a state-run program to a federal-run program for future seasons, starting in 2022.

Considerations

Every institution with customers involved in the hemp-related industry should consider its existing policies and procedures in relation to the transition. While there remain no hemp-related rules specific to banking, as the regulatory landscape for the industry continues to shift, it is important for banks to be aware of how various changes may affect some customers.

One important reason for establishing this familiarity is in order to maintain confidence as to whether the bank's customer is engaged in hemp-related activity legally. For example, while DATCP issued licenses to "growers" and "processors," USDA's program licenses "producers" of hemp. "Producer" is defined under 7 CFR 718.2 to mean an owner, operator, landlord, tenant, or sharecropper, who shares in the risk of producing a crop and who is entitled to share in the crop available for marketing from the farm, or would have shared had the crop been produced. A producer includes a grower of hybrid seed. Meaning, as of January 1, 2022, in Wisconsin, anyone who produces hemp must be licensed under a Tribal hemp program or the USDA hemp program.

Ultimately, the bank's customer must make the determination as to whether they are in the business of hemp production, however the bank may want to familiarize itself with the term, program requirements, and nature of its customer's business so as to ensure it is able to make a good faith determination as to whether its customer's hemp-related activities are legal.

As discussed above, DATCP will transfer primary regulatory authority for hemp production in Wisconsin to USDA on January 1, 2022. Nothing will change for Wisconsin hemp licensees during the 2021 growing season. Licensed individuals will continue to work with DATCP on all harvest notifications, sample collection, testing, and final reports until December 31, 2021. Thus, existing bank policies and procedures with respect to existing program requirements should suffice until the end of the year.

Beginning on January 1, 2022, however, producers will be required to obtain a USDA license. Specific information on the application process, including contact information, can be found on USDA and DATCP's websites. For the 2022 and future growing seasons, producers must collect samples and testing through hemp sampling agents certified with the Department of Drug Enforcement Administration (DEA). USDA provides a list of certified samplers, for which producers must find their own agents and testing facilities. While DATCP collected samples, and conducted its own testing in Wisconsin, USDA does not sample nor test hemp.

Some other key differences to be aware of are as follows:

- USDA licenses must be renewed every 3 years.
- No special approval is required for specific varieties (*e.g.*, specific seeds).
- No research agreement is required.
- Reporting must be done at the local Farm Service Agency (FSA) office. This report includes a farm record.
- USDA does not license processors.
- USDA does not regulate manufacturing, transportation, or creation of products.
- Producers must designate growing areas by "lots" (separate lots for separate varieties or strains).

As discussed above, USDA will not issue licenses for hemp processors. As of January 1, 2022, DATCP will also no longer issue licenses for processors. However, DATCP will retain the authority to regulate the quality and safety of hemp pursuant to existing trade, consumer protection, and plant industry regulations. Thus, while USDA will become the primary regulatory authority for hemp production in Wisconsin, DATCP will retain authority to enforce Wisconsin-specific hemp labeling, food safety, and consumer protection laws. These laws and corresponding requirements will not change with the transition.

While there are no specific requirements for banks to check samples, test results, or otherwise monitor the hemp-related activity of their customers, it is important to remember the importance of overall "know-your-customer" considerations as a matter of prudent business practice. Potential customers may be growers, sellers, retailers, or have other, more unique prospects. It is important that banks consider the extent to which their potential customers are engaged in the hemp industry, and whether they are "producers" under USDA rules, in order to determine whether bank is comfortable opening and maintaining an account relationship and, if so, what it will require to do so.

At a minimum, banks should start with whether the business is licensed. A bank may determine on a case-by-case basis whether a customer is required to be licensed. It may also make a make a business decision to only do business with licensed customers, regardless of whether they are required to obtain a license or not. As outlined above, "producer" is a broad term under the federal rule and could cover various business activities outside of growing and processing. Even if a hemp-related business has compelling rationale for not being licensed, bank may seek certifications that its related-businesses are licensed.

Other certifications might include representations from customers regarding their licensing status, submission of samples for testing, and overall compliance with USDA's program. For more specific information regarding those requirements, USDA provides resources for acceptable testing, disposal and remediation of non-compliant plants, sampling methods, timing of sampling, and other requirements that bank customers might be required to comply with.

In the past, banks may have collected what was known as a "fit for commerce certificate," which was issued by DATCP at time of testing. Such a certificate will no longer be available. Instead, the representations will depend on the DEA-certified laboratory the producer selects, but will generally be a report of whether the test passes or fails. Banks may also have collected information such as: planting date, GPS coordinates, crop type, intended use, size of each growing location, and irrigation practice. Such information will now be included in the farm record which must be reported to the producer's local FSA.

In addition to understanding USDA's program requirements, banks should seek to understand the nature and types of businesses its customers are engaged in. For example, the process may begin with a series of questions to identify whether a customer is engaged in hemp-related activity, and to what extent. This is important because a bank may not ask, or require, the same information from a grower as it does a seller. Once bank has an understanding of the business its customer is engaged in, bank will be better able to ask follow-up questions such as:

Is the customer required to be licensed?

- If so, are they licensed through USDA or an otherwise USDA approved program?
- Can they provide documentation that their licensing is up to date?
- Will they provide ongoing documentation as to the status of their licensure?
- Do they collect and submit samples for regular testing?
- If they are a retailer, who do they buy/sell to?
- Are they engaged with any other businesses? Within Wisconsin? Outside of Wisconsin?
- Are those businesses licensed under a USDA approved program?
- Other questions?

Lastly, WBA encourages banks to learn not only more about the requirements that might apply to growers, but also about hemp itself. Having these conversations with customers is important to better understand the plant, and the industry. As familiarity in those areas increases, so too will comfort in maintaining an account relationship.

Conclusion

Growers will continue to work with DATCP for the current growing season for harvest notifications, sample collection, and testing until December 31, 2021. Starting **January 1, 2022**, hemp growers, as defined by USDA's rules, will transition to the federal-run program. Hemp processors will no longer need a DATCP license to process hemp. Hemp processors will remain under DATCP's current authority for consumer and food products. Banks should adjust and prepare their policies and procedures, accordingly.

Special Focus

Additional Resources

DATCP Hemp Research Program: https://datcp.wi.gov/Pages/Programs_Services/Hemp.aspx

Hemp Program Transition to USDA: https://datcp.wi.gov/Pages/Programs_Services/HempTransition.aspx

WI Hemp Growers Transition Checklist: https://datcp.wi.gov/Documents2/WIHempGrowersUSDATransitionChecklist.pdf

USDA Hemp Production: https://www.ams.usda.gov/rules-regulations/hemp

USDA Final Rule: https://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2021-00967.pdf ■

Regulatory Spotlight

Agencies Extend Comment Period on Proposed Guidance on Third-Party Relationships.

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC) (collectively, the agencies) extended the comment period on proposed guidance regarding managing risks associated with third-party relationships. The proposed guidance, published on **07/19/2021**, provided for a comment period ending **09/17/2021**. The agencies have extended the comment period to **10/18/2021**. The notice may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-09-10/pdf/2021-19545.pdf. *Federal Register*, Vol. 86, No. 173, 09/10/2021, 50789.

CFPB Issues Final Rule to Revise Privacy Regulations to Obtain Records.

The Bureau of Consumer Financial Protection (CFPB) issued a final rule to revise its regulations that establish the procedures used by the public to obtain records from CFPB under the Privacy Act. The revisions change the definition of "Chief Privacy Officer" in order to align the Chief Privacy Officer's authorities and responsibilities identified in the regulation to those of CFPB's designated Senior Agency Official for Privacy. The revisions also facilitate electronic or remote identity proofing and authentication by creating an additional method for a requester to verify their identity when submitting a Privacy Act request to CFPB. The final rule is effective **09/01/2021**. The final rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-09-01/pdf/2021-18589.pdf. *Federal Register*, Vol. 86, No. 167, 09/01/2021, 48900-48901.

CFPB Issues Interpretive Rule on Impact of the Juneteenth Holiday on Certain Closed-End Mortgage Requirements.

CFPB issued an interpretive rule to provide guidance on certain Regulation Z timing requirements related to rescission of closed-end mortgages and the TILA-RESPA Integrated Disclosures (TRID). The timing requirements are based on a definition of "business day" that excludes days that are designated as legal public holidays under federal law. The interpretive rule explains timing requirements in light of recent legislation that designated "Juneteenth National Independence Day, June 19" (Juneteenth) as a federal legal public holiday. The interpretive rule clarifies that, if the relevant closed-end rescission or TRID time period began on or before **06/17/2021**, then **06/19/2021**, was considered a business day, but nothing prohibits creditors from providing longer time periods. It would also be compliant for creditors to have considered **06/19/2021**, a federal holiday for purposes of these provisions. The interpretive rule is effective **08/12/2021**. The interpretive rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-08-12/pdf/2021-17050.pdf. *Federal Register,* Vol. 86, No. 153, 08/12/2021, 44267-44270.

CFPB Issues Technical Specifications for Credit Card Agreement and Data Submissions Required Under TILA and the CARD Act.

CFPB issued new technical specifications for certain credit card issuers to comply with submission requirements involving credit card agreements and data under the Truth in Lending Act (TILA) and the Credit Card Accountability Responsibility and Disclosure Act (CARD Act). Credit card issuers will make the required submissions under TILA and the CARD Act through CFPB's "Collect"

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Due Diligence Resource for Community Banks to Consider When Partnering with Fintech Companies

In late August, the Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC) issued a new resource titled, *Conducting Due Diligence on Financial Technology Companies, A Guide for Community Banks* (Guide), which was intended to help community banks in conducting due diligence when considering relationships with fintech companies.

Use of the Guide is voluntary, and it does not anticipate all types of third-party relationships and risks. Therefore, a community bank can tailor how it uses relevant information in the Guide, based on its specific circumstances, the risks posed by each third-party relationship, and the related product, service, or activity (herein, activities) offered by the fintech company.

While the Guide is written from a community bank perspective, the fundamental concepts may be useful for banks of varying size and for other types of third-party relationships. Due diligence is an important component of an effective third-party risk management process, as highlighted in the federal banking agencies' respective guidance; which, for FRB-regulated banks is SR Letter 13-19, for FDIC-regulated banks is FIL-44-2008, and for OCC banks is Bulletin-2013-29.

During due diligence, a community bank collects and analyzes information to determine whether third-party relationships would support its strategic and financial goals and whether the relationship can be implemented in a safe and sound manner, consistent with applicable legal and regulatory requirements. The scope and depth of due diligence performed by a community bank will depend on the risk to the bank from the nature and criticality of the prospective activity. Banks may also choose to supplement or augment their due diligence efforts with other resources as appropriate, such as use of industry utilities or consortiums that focus on third-party oversight.

The Guide focuses on six key due diligence topics, including relevant considerations and a list of potential sources of information. The following is a summary of the key due diligence topics within the Guide.

Business Experience and Qualifications

The agencies have identified that by evaluating a fintech company's business experience, strategic goals, and overall qualifications, a community bank can better consider a fintech company's experience in conducting the activity and its ability to meet the bank's needs. Review of operational history will provide insight into a fintech company's ability to meet a community bank's needs, including, for example, the ability to adequately provide the activities being considered in a manner that enables a community bank to comply with regulatory requirements and meet customer needs.

Review of client references and complaints about a fintech company may provide useful information when considering, among other things, whether a fintech company has adequate experience and expertise to meet a community bank's needs and resolve issues, including experience with other community banking clients. Review of legal or regulatory actions against a fintech company can be indicators of the company's track record in providing activities.

When a community bank is considering a third-party relationship, discussing a fintech company's strategic plans can provide insight on key decisions it is considering, such as plans to launch new products or pursue new arrangements (such as acquisitions, joint ventures, or joint marketing initiatives). A community bank may subsequently consider whether the fintech company's strategies or any planned initiatives would affect the prospective activity. Further, inquiring about a fintech company's strategies and management style may help a community bank assess whether a fintech company's culture, values, and business style fit those of the community bank.

The agencies further instruct that understanding the background and expertise of a fintech company's directors and executive leadership may provide a community bank useful information on the fintech company's board and management knowledge and experience related to the activity sought by the community bank. A community bank may also consider whether the company has sufficient management and staff with appropriate expertise to handle the prospective activity.

For example, imagine that a fintech company, its directors, or its management have varying levels of expertise conducting activities similar to what a community bank is seeking. A fintech company's historical experience also may not include engaging in relationships with community banks. As part of due diligence, a community bank may therefore consider how a fintech company's particular experiences could affect the success of the proposed activity and overall relationship. Understanding a fintech company's qualifications and strategic direction will help a community bank assess the fintech company's ability to meet the community bank's expectations and support a community bank's objectives. When evaluating the potential relationship, a community bank may consider a fintech company's willingness and ability to align the proposed activity with the community bank's needs, its plans to adapt activities for the community bank's regulatory environment, and whether there is a need to address any integration challenges with community bank systems and operations.

Financial Condition

Another step the agencies identified is for a bank to evaluate a fintech company's financial condition to help the bank assess the company's ability to remain in business and fulfill any obligations created by the relationship. Review of financial reports provide useful information when evaluating a fintech company's capacity to provide the activity under consideration, remain a going concern, and fulfill any of its obligations, including its obligations to the community bank. Understanding funding sources provide useful information in assessing a fintech company's financial condition. A fintech company may be able to fund operations and growth through cash flow and profitability or it may rely on other sources, such as loans, capital injections, venture capital, or planned public offerings.

Additionally, information about a fintech company's competitive environment may provide additional insight on the company's viability. Review of information on a fintech company's client base can shed insight into any reliance a fintech company may have on a few significant clients. A few critical clients may provide key sources of operating cash flow and support growth but may also demand much of a fintech company's resources. Loss of a critical client may negatively affect revenue and hinder a fintech company's ability to fulfill its obligations with a community bank. A community bank may also consider a fintech company's susceptibility to external risks, such as geopolitical events that may affect the company's financial condition.

For example, some fintech companies, such as those in an early or expansion stage, have yet to achieve profitability or may not possess financial stability comparable to more established companies. Some newer fintech companies may also be unable to provide several years of financial reporting, which may impact a community bank's ability to apply its traditional financial analysis processes. When audited financial statements are not available, a community bank may want to seek other financial information to gain confidence that a fintech company can continue to operate, provide the activity satisfactorily, and fulfill its obligations. For example, a community bank may consider a fintech company's access to funds, its funding sources, earnings, net cash flow, expected growth, projected borrowing capacity, and other factors that may affect a fintech company's overall financial performance.

Legal and Regulatory Compliance

The Guide further outlines how in evaluating a fintech company's legal standing, its knowledge about legal and regulatory requirements applicable to the proposed activity, and its experience working within

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the legal and regulatory framework, better enables a community bank to verify a fintech company's ability to comply with applicable laws and regulations.

A bank may want to consider reviewing organizational documents and business licenses, charters, and registrations as such documentation provides information on where a fintech company is domiciled and authorized to operate (for example, domestically or internationally) and legally permissible activities under governing laws and regulations. Reviewing the nature of the proposed relationship, including roles and responsibilities of each party involved, may also help a community bank identify legal considerations. Assessing any outstanding legal or regulatory issues may provide insight into a fintech company's management, its operating environment, and its ability to provide certain activities.

A bank could also consider reviewing a fintech company's risk and compliance processes to help assess the fintech company's ability to support the community bank's legal and regulatory requirements, including privacy, consumer protection, fair lending, anti-money-laundering, and other matters. A fintech company's experience working with other community banks may provide insight into the fintech company's familiarity with the community bank's regulatory environment. Reviewing information surrounding any consumer-facing applications, delivery channels, disclosures, and marketing materials for community bank customers can assist a community bank to anticipate and address potential consumer compliance issues. Considering industry ratings (for example, Better Business Bureau) and the nature of any complaints against a fintech company may provide insight into potential customer service and compliance issues or other consumer protection matters.

For example, some fintech companies may have limited experience working within the legal and regulatory framework in which a community bank operates. To protect its interests, community banks may consider including contract terms requiring (a) compliance with relevant legal and regulatory requirements, including federal consumer protection laws and regulations, as applicable; (b) authorization for a community bank and the bank's primary supervisory agency to access a fintech company's records; or (c) authorization for a community bank to monitor and periodically review or audit a fintech company for compliance with the agreed-upon terms. Other approaches could include (1) instituting approval mechanisms (for example, community bank signs off on any changes to marketing materials related to the activity), or (2) periodically reviewing customer complaints, if available, related to the activity.

Risk Management and Controls

The agencies have also identified that by banks evaluating the effectiveness of a fintech company's risk management policies, processes, and controls, such review helps a community bank to assess the company's ability to conduct the activity in a safe and sound manner, consistent with the community bank's risk appetite and in compliance with relevant legal and regulatory requirements.

Banks should consider reviewing a fintech company's policies and procedures governing the applicable activity as it will provide insight into how the fintech company outlines risk management responsibilities and reporting processes, and how the fintech company's employees are responsible for complying with policies and procedures. A community bank may also use the information to assess whether a fintech company's processes are in line with its own risk appetite, policies, and procedures. Information about the nature, scope, and frequency of control reviews, especially those related to the prospective activity, provides a community bank with insight into the quality of the fintech company's risk management and control environment. A community bank may also want to consider the relative independence and qualifications of those involved in testing. A fintech company may employ an audit function (either in-house or outsourced). In these cases, evaluating the scope and results of relevant audit work may help a community bank determine how a fintech company ensures that its risk management and internal control processes are effective.

Banks should also consider the findings, conclusions, and any related action plans from recent control reviews and audits as the information may provide insight into the effectiveness of a fintech company's program and the appropriateness and timeliness of any related action plans. Evaluating a fintech company's reporting helps a community bank to consider how the fintech company monitors key risk, performance, and control indicators; how those indicators relate to the community bank's desired service-level agreements; and how the fintech company's reporting processes identify and escalate risk issues and control testing results. A community bank may also consider how it would incorporate such reporting into the bank's own issue management processes. Review of information on a fintech company's staffing and expertise, including for risk and compliance, provide a means to assess the overall adequacy of the fintech company's risk and control processes for the proposed activity.

Information on a fintech company's training program also assists in considering how the fintech company ensures that its staff remains knowledgeable about regulatory requirements, risks, technology, and other factors that may affect the quality of the activities provided to a community bank.

For example, a fintech company's audit, risk, and compliance functions will vary with the maturity of the company and the nature and complexity of activities offered. As a result, a fintech company may not have supporting information that responds in full to a community bank's typical due diligence questionnaires. In other cases, a fintech company may be hesitant to provide certain information that is considered proprietary or a trade secret (for example, their development methodology or model components). In these situations, a community bank may take other steps to identify and manage risks in the third-party relationship and gain confidence that the fintech company can provide the activity satisfactorily.

For example, a community bank may consider on-site visits to help evaluate a fintech company's operations and control environment, or a community bank's auditors (or another independent party) may evaluate a fintech company's operations as part of due diligence. Other approaches could include (a) accepting due diligence limitations, with any necessary approvals and/or exception reporting, compared to the community bank's normal processes, commensurate with the criticality of the arrangement and in line with the bank's risk appetite and applicable third-party risk management procedures; (b) incorporating contract provisions that establish the right to audit, conduct on-site visits, monitor performance, and require remediation when issues are identified; (c) establishing a community bank's right to terminate a third-party relationship, based on a fintech company's failure to meet specified technical and operational requirements or performance standards. Contract provisions may also provide for a smooth transition to another party (for example, ownership of records and data by the community bank and reasonable termination fees); or (d) outlining risk and performance expectations and related metrics within the contract to address a community bank's requirements.

Information Security

In understanding a fintech company's operations infrastructure and the security measures for managing operational risk, a community bank may better evaluate whether the measures are appropriate for the prospective activity. A community bank may evaluate whether the proposed activity can be performed using existing systems, or if additional IT investment would be needed at the community bank or at the fintech company to successfully perform the activity. For example, a community bank may evaluate whether the fintech company's systems can support the bank's business, customers, and transaction volumes (current and projected). A fintech company's procedures for deploying new hardware or software, and its policy toward patching and using unsupported (end-of-life) hardware or software, will provide a community bank with information on the prospective third party's potential security and business impacts to the community bank.

For example, fintech companies' information security processes may vary, particularly for fintech companies in an early or expansion stage. Community banks may evaluate whether a fintech company's information security processes are appropriate and commensurate with the risk of the proposed activity. Depending on the activity provided, community banks may also seek to understand a fintech company's oversight of its subcontractors, including data and information security risks and controls.

For a fintech company that provides transaction processing or that accesses customer data, for example, community banks may request information about how the fintech company restricts access to its systems and data, identifies and corrects vulnerabilities, and updates and replaces hardware or software. The bank may also consider risks and related controls pertaining to its customers' data, in the event of the fintech company's security failure. Also, contractual terms that authorize a community bank to access fintech company records can better enable the bank to validate compliance with the laws and regulations related to information security and customer privacy.

Operational Resilience

A community bank may evaluate a fintech company's ability to continue operations through a disruption. Depending on the activity, a community bank may look to the fintech company's processes to identify, respond to, and protect itself and customers from threats and potential failures, as well as recover and learn from disruptive events. It is important that third-party continuity and resilience planning be commensurate with the nature and criticality of activities performed for the bank.

Evaluating a fintech company's business continuity plan, incident response plan, disaster recovery plan and related testing can help a community bank determine the fintech company's ability to continue operations in the event of a disruption. Also, evaluating a fintech company's recovery objectives, such as any established recovery time objectives and recovery point objectives, helps to ascertain whether the company's tolerances for downtime and data loss align with a community bank's expectations. A community bank that contemplates how a fintech company considers changing operational resilience processes to account for changing conditions, threats, or incidents, as well as how the company handles threat detection (both in-house and outsourced) may provide a community bank with additional information on incident preparation. Discussions with a fintech company, as well as online research, could provide insights into how the company responded to any actual cyber events or operational outages and any impact they had on other clients or customers.

Understanding where a fintech company's data centers are or will reside, domestically or internationally, helps a community bank to consider which laws or regulations would apply to the community bank's business and customer data. Another matter for a community bank to consider is whether a fintech company has appropriate insurance policies (for example, hazard insurance or cyber insurance) and whether the fintech company has the financial ability to make the community bank whole in the event of loss.

Service level agreements between a community bank and a fintech company set forth the rights and responsibilities of each party with regard to expected activities and functions. A community bank may consider the reasonableness of the proposed service level agreement and incorporate performance standards to ensure key obligations are met, including activity uptime. A community bank may also consider whether to define default triggers and recourse in the event that a fintech company fails to meet performance standards.

A fintech company's monitoring of its subcontractors (if used) may offer insight into the company's own operational resilience. For example, a community bank may inquire as to whether the fintech company depends on a small number of subcontractors for operations, what activities they provide, and how the fintech company will address a subcontractors' inability to perform. A community bank may assess a fintech company's processes for conducting background checks on subcontractors, particularly if subcontractors have access to critical systems related to the proposed activity.

For example, as with previous due diligence scenarios, fintech companies may exhibit a range of resiliency and continuity processes, depending on the activities offered. Community banks may evaluate whether a fintech company's planning and related processes are commensurate with the nature and criticality of activities performed for the bank.

For example, community banks may evaluate a fintech company's ability to meet the community bank's recovery expectations and identify any subcontractors the fintech company relies upon for recovery operations. A fintech company may have recovery time objectives for the proposed activity that exceed the desired recovery time objectives of a community bank. If a fintech company can meet the community bank's desired recovery time objectives, the bank may consider including related contractual terms, such as a contract stipulation that the community bank can participate in business continuity testing exercises and that provides appropriate recourse if the recovery time objective is missed in the event of an actual service disruption.

A community bank may also consider appropriate contingency plans, such as the availability of substitutable service providers, in case the fintech company experiences a business interruption, fails, or declares bankruptcy and is unable to perform the agreed-upon activities. In addition to potential contractual clauses and requirements, a community bank's management may also consider how it would wind down or transfer the activity in the event the fintech company fails to recover in a timely manner.

Conclusion

The agencies have outlined a number of relevant considerations, non-exhaustive lists of potential sources of information, and illustrative examples to assist community banks with identifying strengths and potential risks when considering relationships with fintech companies. The voluntary Guide helps provide a starting point for banks with their due diligence efforts. The Guide may be viewed at: https://www.fdic.gov/news/press-releases/2021/pr21075a.pdf ■

Additional Provisions

Act 87 provides many additions to the provisions above. While this article does not describe all of them, WBA recommends that financial institutions review Act 87 in order to understand the full scope of the changes to Wisconsin's Uniform Unclaimed Property Act. Some highlights are included below to assist in identifying important changes in addition to those described in more detail above:

- The definitions of several new terms including for certain items that are not considered to be property, such as gift cards and game-related digital content, and for terms that are considered property and are subject to the act, such as virtual currency.
- Definitions of the address of apparent owner in Wisconsin.
- The use of tax records and assistance from other state agencies to identify and deliver property to an apparent owner.
- The income, interest, or gain accrued by property while in the custody of DOR.
- The penalties for failing to file a report or deliver property to DOR.
- DOR's ability to enter into agreements with other states and countries to deliver unclaimed property.
- Voluntary disclosures by a property holder for failing to file a report despite being required to do so.
- Agreements between an apparent owner and a locator service to locate property, subject to certain requirements in the agreement.
- Confidentiality and security of information provisions.

Conclusion

Act 87 is effective as of **November 7, 2021**. Accordingly, Wisconsin banks should consider their current procedures related to abandoned property, including reporting, in relation to the updated definitions and requirements.

Additional Resources

2021 Wisconsin Act 87: https://docs.legis.wisconsin.gov/2021/related/acts/87.pdf

Wisconsin Department of Revenue's Unclaimed Property FAQ: https://www.revenue.wi.gov/Pages/FAQS/ucp-unclaimed-property.aspx ■

Reminder: Lower Open-End Line of Credit HMDA Volume Threshold Begins January 1, 2022

The Bureau of Consumer Financial Protection (CFPB) recently released revised frequently asked questions (FAQs) regarding the Home Mortgage Disclosure Act (HMDA). In particular, the FAQs remind banks that the lower open-end line of credit volume threshold begins January 2022. The following are revised FAQs related to HMDA transactional coverage and partial exemptions.

Institutional and Transactional Coverage

Q1: What are the loan volume thresholds for determining institutional and transactional coverage?

A1: As of **January 1, 2022**, the loan-volume thresholds are 100 closed-end mortgage loans in each of the two preceding calendar years and 200 open-end lines of credit in each of the two preceding calendar years. CFPB issued a final rule in April 2020 that set the closed-end mortgage loan threshold at 100 in each of the two preceding calendar years, effective July 1, 2020, and set the open-end line of credit threshold at 200 in each of the two preceding calendar years, effective January 1, 2022, upon the expiration of the temporary threshold of 500 open-end lines of credit.

Q2: My institution originated 400 closed-end mortgage loans and 199 open-end lines of credit in calendar year 2020 and 600 closed-end mortgage loans and 499 open-end lines of credit in calendar year 2021. My institution has met all other Regulation C institutional coverage criteria. Is my institution required to collect and report HMDA data for calendar year 2022 on closed-end mortgage loans and open-end lines of credit?

A2: Your institution will be required to collect and report data about its closed-end mortgage loans for calendar year 2022 because it originated at least 100 closed-end mortgage loans in each of the two preceding calendar years (2020 and 2021). Your institution will not be required to collect and report data about its open-end lines of credit for calendar year 2022 because it did not originate at least 200 open-end lines of credit in each of the two preceding calendar years (2020 and 2021).

Q3: My institution originated 100 closed-end mortgage loans and 200 open-end lines of credit in calendar year 2020 and 190 closed-end mortgage loans and 250 open-end lines of credit in calendar year 2021. My institution has met all the other Regulation C institutional coverage criteria. Is my institution required to collect and report HMDA data for calendar year 2022 on closed-end mortgage loans and open-end lines of credit?

A3: Yes, your institution will be required to collect and report data about its closed-end mortgage loans and open-end lines of credit for calendar year 2022 because it originated at least 100 closed-end mortgage loans in each of the two preceding calendar years (2020 and 2021) and it originated at least 200 open-end lines of credit in each of the two preceding calendar years (2020 and 2021).

Q4: My financial institution met the loan-volume threshold for closed-end mortgage loans and all other Regulation C institutional coverage criteria, but it did not meet the loan-volume threshold for open-end lines of credit. Can my financial institution collect and report data about its open-end lines of credit even though it did not meet the loan-volume threshold for open-end lines of credit?

A4: Yes. A financial institution that meets the loan-volume threshold for closed-end mortgage loans and all other Regulation C institutional coverage criteria may voluntarily opt to report applications, originations, and purchases of its open-end lines of credit even though it did not meet the open-end line of credit threshold. It is thus not required to report data on its open-end lines of credit transactions. However, a financial institution that voluntarily opts to report such data must report all the applications, originations, and purchases of its open-end lines of credit that would be covered transactions if it had met the open-end line of credit threshold.

Q5: My financial institution originated less than 500 closed-end mortgage loans and less than 500 open-end lines of credit. I heard that my financial institution was exempt from collecting and reporting data.

A5: Effective July 1, 2020, if your financial institution originated at least 100 closed-end mortgage loans in each of the two preceding calendar years and met all other Regulation C institutional coverage criteria, your financial institution will be required to collect and report data about its closed-end mortgage loans. Similarly, effective **January 1, 2022**, if your financial institution originated at least 200 open-end lines of credit in each of the two preceding calendar years and met all other Regulation C institutional coverage criteria, your financial institution will be required to collect and report data about its open-end lines of credit. However, if your financial institution is an insured depository institution or insured credit union that originated less than 500 closed-end mortgage loans in each of the two preceding calendar years and/or 500 open-end lines of credit in each of the two preceding calendar years, your financial institution may be eligible for partial exemptions. For more information about partial exemptions, see Partial Exemption FAQs below.

Partial Exemptions, Regulation C Section 1003.3(d)

Q1: Are all types of lending institutions eligible for the partial exemption?

A1: No. To be eligible for a partial exemption, a financial institution must be an insured depository institution as defined in Section 3 of the Federal Deposit Insurance Act.

Q2: If my financial institution originated 500 or more closed-end mortgage loans in the previous calendar year, can it take advantage of the partial exemption found in 12 CFR §1003.3(d) and collect, record, and report the limited HMDA data set for closed-end mortgage loans?

A2: No. Section 1003.3(d)(2) of Regulation C states that a financial institution that originated fewer than 500 closed-end mortgages that are not excluded by 12 CFR § 1003.3(c)(1) through (10) or (13) *in each* of the two preceding calendar years can claim the partial exemption for closed-end mortgage loans. Thus, the financial institution cannot take advantage of the partial exemption if it originated 500 or more such closed-end mortgage loans in the previous calendar year. Note that, in addition to originating fewer than 500 closed-end mortgage loan in each of the two preceding calendar years, the financial institution must meet additional requirements that are not discussed in this FAQ to be eligible for the partial exemption. See 12 CFR §1003.3(d) for the additional requirements.

For general information on the partial exemptions, see section 4.3 of the HMDA Small Entity Compliance Guide, and Regulation C, 12 CFR §1003.3(d).

Q3: If my financial institution originated 500 or more open-end lines of credit in the previous calendar year, can it take advantage of the partial exemption found in 12 CFR §1003.3(d) and collect, record, and report the limited HMDA data set for open-end lines of credit?

A3: No. Section 1003.3(d)(3) of Regulation C states that a financial institution that originated fewer than 500 open-end lines of credit that are not excluded by 12 CFR §1003.3(c)(1) through (10) *in each* of the two preceding calendar years can claim the partial exemption for open-end lines of credit. Thus, the financial institution cannot take advantage of the partial exemption if the financial institution originated 500 or more such open-end lines of credit in the previous calendar year. Note that, in addition to originating fewer than 500 open-end lines of credit in each of the two preceding calendar years, the financial institution must meet additional requirements that are not discussed in this FAQ to be eligible for the partial exemption. See 12 CFR §1003.3(d) for the additional requirements.

For general information on the partial exemptions, see section 4.3 of the HMDA Small Entity Compliance Guide, and Regulation C, 12 CFR §1003.3(d).

Q4: Can a financial institution that originates fewer than 500 open-end lines of credit in each of the two preceding calendar years claim the partial exemption for open-end lines of credit even if it originated 500 or more closed-end mortgage loans in one of those years?

A4: The partial exemption for closed-end mortgage loans and the partial exemption for open-end lines of credit operate independently of one another. Thus, in a given calendar year, an eligible financial institution may be able to rely on one partial exemption but not the other. See 12 CFR §1003.3(d)(2) and (3). The table below contains partial exemption examples that assume that the originations indicated in the table are not excluded by 12 CFR §1003.3(c)(1) through (10) or (13), and that the financial institution meets the other eligibility requirements of 12 CFR §1003.3(d).

Financial Institution	**Originations in calendar year 1**	**Originations in calendar year 2**	**Partial exemption(s) eligibility in calendar year 3**
A	Closed-end mortgage loans: 600 Open-end lines of credit: 350	Closed-end mortgage loans: 400 Open-end lines of credit: 600	Financial Institution A *cannot* claim either partial exemption in year 3
B	Closed-end mortgage loans: 600 Open-end lines of credit: 350	Closed-end mortgage loans: 400 Open-end lines of credit: 275	Financial Institution B *can* claim the partial exemption for open-end lines of credit in year 3, but it *cannot* claim the partial exemption for closed-end mortgage loans.
C	Closed-end mortgage loans: 400 Open-end lines of credit: 250	Closed-end mortgage loans: 499 Open-end lines of credit: 500	Financial Institution C *can* claim the partial exemption for closed-end mortgage loans in year 3, but it *cannot* claim the partial exemption for open-end lines of credit.
D	Closed-end mortgage loans: 200 Open-end lines of credit: 250	Closed-end mortgage loans: 150 Open-end lines of credit: 300	Financial Institution D *can* claim the partial exemptions for both closed-end mortgage loans and open-end lines of credit in year 3.

Note that prior to January 1, 2022, a financial institution originating fewer than 500 open-end lines of credit in either of the two preceding calendar years is not required to collect, record, or report HMDA data for open-end lines of credit. See 12 CFR §§1003.2(g), 1003.3(c)(12). Beginning on **January 1, 2022**, a financial institution originating 200 or more open-end lines of credit must collect, record, and report HMDA data for open-end lines of credit.

Special Focus

Q5: Can a financial institution that originated fewer than 500 closed-end lines mortgage loans or open-end lines of credit in each of the two preceding calendar years claim a partial exemption for the following collection year even if it knows it will originate more than 500 closed-end mortgage loans or open-end lines of credit in the following calendar year?

A5: Section 1003.3(d)(2) and (3) of Regulation C requires that the financial institution look at the amount of loans it originated in each of the two preceding calendar years. Neither 12 CFR §1003.3(d)(2) nor (3) requires the financial institution to consider or anticipate the number of loans it will originate for the following calendar year. See HMDA Partial Exemption FAQ #4 for partial exemption examples. Note that, in addition to originating fewer than 500 open-end lines of credit in each of the two preceding calendar years, the financial institution must meet additional requirements that are not discussed in this FAQ to be eligible for the partial exemption.

Resources

The full HMDA FAQs also address universal loan identifier; legal entity identifier; ethnicity, race, and sex reporting; discount points; multiple data points; and construction and construction/permanent transactions. The full FAQ may be viewed at: https://files.consumerfinance.gov/f/documents/cfpb_hmda_frequently-asked-questions-v6_2021-11.pdf

For loan-volume thresholds in effect prior to January 1, 2022, see the HMDA institutional and transactional coverage charts which may be viewed at: https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/hmda-reporting-requirements/

The HMDA Small Entity Compliance Guide may be viewed at: https://files.consumerfinance.gov/f/documents/cfpb_hmda_small-entity-compliance-guide_2021-04.pdf ■

Regulatory Spotlight

Agencies Seek Comment on Call Report Forms.

- The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC) (collectively, the agencies) seek comment on revision to the FFIEC 031, FFIEC 042, and FFIEC 051 Consolidated Reports of Condition and Income (Call Report) forms. Revisions to the forms were meant to accommodate a new item for calculating the exposure amount for derivative contracts for purposes of calculating total risk-weighted assets, called SA-CCR and to clarify instructional guidance and correct grammatical and typographical errors. Comments are due **12/06/2021**. The notice may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-11-04/pdf/2021-24060.pdf. *Federal Register*, Vol. 86, No. 211, 11/04/2021, 60965-60968.

- The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (FRB), and Federal Deposit Insurance Corporation (FDIC) (collectively, the agencies) seek comment on the FFIEC 030, Foreign Branch Report of Condition and the Abbreviated Foreign Branch Report of Condition, FFIEC 030S, which are currently approved collections of information. Comments are due **12/10/2021**. The notice may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-11-10/pdf/2021-24519.pdf. *Federal Register*, Vol. 86, No. 215, 11/10/2021, 62599-62601.

CFPB Issues Annual Regulation Z Threshold Adjustments for Credit Cards, HOEPA, and QMs.

The Bureau of Consumer Financial Protection (CFPB) issued a final rule to amend the regulation text and official interpretations for Regulation Z, which implements the Truth in Lending Act (TILA). CFPB is required to calculate annually the dollar amounts for several provisions in Regulation Z. The final rule revises, as applicable, the dollar amounts for provisions implementing TILA and amendments to TILA, including under the Credit Card Accountability Responsibility and Disclosure Act (CARD Act), the Home Ownership and Equity Protection Act (HOEPA), and the Dodd-Frank Wall Street Act, including thresholds related to qualified mortgages (QMs). CFPB has adjusted the amounts, where appropriate, based on the annual percentage change reflected in the Consumer Price Index (CPI) in effect on **06/01/2021**. The final rule is effective **01/01/2022**. The final rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-11-02/pdf/2021-23478.pdf. *Federal Register*, Vol. 86, No. 209, 11/02/2021, 60357-60364.

Wisconsin Bankers ASSOCIATION

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Compliance Journal

Special Focus

Wisconsin's Revised Uniform Unclaimed Property Act

On Friday, November 5, Governor Evers signed 2021 Wisconsin Act 87 (Act 87) into law. Act 87 adopts the Revised Uniform Unclaimed Property Act (RUUPA) as approved by the Uniform Law Commission. By updating the state's unclaimed property laws, Act 87 clarifies the duties of property holders and improves the Department of Revenue's (DOR) ability to return unclaimed property to its rightful owners. WBA supported passage of Act 87, including incorporation of amendments to make clarifications.

Act 87 modifies current Wisconsin Chapter 177 in order to address technological innovation and recognize new types of property not currently included in the law. The Act designates DOR, formerly the Secretary of Revenue, as the administrator of the Act. As under current law, Act 87 applies to property that is presumed to be abandoned, and if certain conditions apply, provides Wisconsin with jurisdiction over the property. The holder of unclaimed property, such as Wisconsin financial institutions, must provide written notice to the apparent owner, file a report with DOR, and deliver any property that remains unclaimed to DOR. If DOR is unable to deliver the unclaimed property to its apparent owner and the unclaimed property is not sold to satisfy the apparent owner's debt to a state agency, county, or municipality, the unclaimed property is sold to the highest bidder. Funds that are not used to pay for administrative expenses or to satisfy claims related to unclaimed property are deposited in the school fund.

Dormancy Periods Under RUUPA

Act 87 describes a dormancy period as the period of time which must pass before certain types of property are presumed abandoned. Thus, revised Chapter 177 provides the dormancy period for certain types of property. The properties listed below are presumed abandoned if unclaimed by the apparent owner during the specified dormancy period. The six types of property categories listed are all subject to the conditions discussed later in the article whereby there is an indication of apparent owner interest in the property.

General Dormancy Periods

The following property is presumed abandoned if it is unclaimed by the apparent owner during the period specified below:

1) A traveler's check, 15 years after issuance.
2) A money order or similar instrument, 5 years after issuance.
3) A state or municipal bond, bearer bond, or original-issue-discount bond, 3 years after the earliest of the date the bond matures or is called or the obligation to pay the principal of the bond arises.
4) A debt of a business association owed to an individual, 3 years after the obligation to pay arises.
5) A payroll card or demand, savings, or time deposit, including a deposit that is automatically renewable, 5 years after the later of maturity or the date of the last indication of interest in the property by the apparent owner, except a deposit that is automatically renewable is deemed matured on its initial date of maturity unless the apparent owner consented in a record on file with the holder to renewal at or about the time of the renewal.
6) Money or a credit owed to a customer as a result of a retail business transaction, other than in-store credit for returned merchandise, 5 years after the obligation arises.
7) An amount owed by an insurance company on a life or endowment insurance policy or an annuity contract that has matured or terminated, 3 years after the obligation to pay arises under the terms of the policy or contract or, if a policy or contract for which an amount is owed on proof of death has not matured by proof of the death of the insured or annuitant, as follows:
   a) With respect to an amount owed on a life or endowment insurance policy, 3 years after the earliest of the date on which the insurance company has knowledge of the death of the insured or the date on which the insured attained, or would have attained if living, the limiting age under the mortality table that forms the basis of the reserve for the policy.
   b) With respect to an amount owed on an annuity contract, 3 years after the date on which the insurance company has knowledge of the death of the annuitant.

8) Property that may distributed by a business association in the course of dissolution, one year after the property may be distributed.
9) Except as provided in Wis. Stat. sections 800.095(8), 852.01(3), 863.37(2), and 863.39, property held by a court, including property received as proceeds of a class action, one year after the property may be distributed.
10) Except as provided in Wis. Stat. sections 40.08(8), 852.01(3), 863.37 (2), and 863.39, property held by a government or governmental subdivision, agency, or instrumentality, including municipal bond interest and unredeemed principal under the administration of a paying agent or indenture trustee, 5 years after the property may be distributed.
11) Wages, commissions, bonuses, or reimbursements to which an employee is entitled, or other compensation for personal services, other than amounts held in a payroll card, one year after the amount becomes payable.
12) A deposit or refund owed to a subscriber by a utility, one year after the deposit or refund becomes payable.
13) Property not specified in section 117.0201 or the sections described in revised sections 177.0202 through 177.0209, the earlier of 5 years after the owner first has a right to demand the property or the date on which the obligation to pay or distribute the property arises.

Tax-deferred Retirement Accounts

1) Property held in a pension account or retirement account that qualifies for federal income tax deferral under the U.S. income tax laws is presumed abandoned if it is unclaimed by the apparent owner 3 years after the later of:
   a) The following dates:
      i) The date on which a 2nd consecutive communication sent by the holder by 1st class mail to the apparent owner is returned to the holder by the U.S. postal service as undeliverable.
      ii) If the 2nd communication is sent later than 30 days after the date on which the first communication is returned to the holder by the U.S. postal service as undeliverable, the date on which the first communication was returned as undeliverable.
   b) The earlier of the following dates:
      i) The date on which the apparent owner reaches the minimum required distribution age, as specified under the Internal Revenue Code or by federal regulation, if that can be determined by the holder.
      ii) If distribution to avoid a tax penalty is required under the Internal Revenue Code, 2 years after the following:
         (1) The date on which the holder receives confirmation of the death of the apparent owner in the ordinary course of the holder's business.
         (2) The date on which the holder confirms the death of the apparent owner under sub 2) below.
2) If a holder in the ordinary course of its business receives notice or an indication of the death of an apparent owner and sub 1)(b) above applies, the holder shall attempt not later than 90 days after receipt of the notice or indication to confirm whether the apparent owner is deceased.
3) If the holder does not send communications to the apparent owner of an account described in sub 1) above by 1st class mail, the holder shall attempt to confirm the apparent owner's interest in the property by sending the apparent owner e-mail not later than 2 years after the apparent owner's last indication of interest in the property, except that the holder shall promptly attempt to contact the apparent owner by 1st class mail if any of the following applies:
   a) The holder does not have information needed to send the apparent owner e-mail or the holder believes that the apparent owner's e-mail address in the holder's records is not valid.
   b) The holder receives notification that the e-mail was not received.
   c) The apparent owner does not respond to the e-mail within 30 days from the date on which the e-mail was sent.
4) If 1st class mail sent under sub 3) above is returned to the holder by the U.S. postal service as undeliverable, the property is presumed abandoned on the date determined under sub 1) above.

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Other Tax-deferred Accounts

For property not subject to the tax-deferred retirement account provisions directly above, and property not held in a plan described in section 529A of the Internal Revenue Code, property held in an account or plan, including a health savings account, that qualifies for federal income tax deferral under the Internal Revenue Code is presumed abandoned if it is unclaimed by the apparent owner 3 years after the earliest of the following:

1) The date specified under the Internal Revenue Code or by federal regulation by which the distribution of property must begin in order to avoid a penalty, if no such distribution has been made.
2) Thirty years after the date on which the account was opened.

Custodial Accounts for a Minor

1) Property held in an account established under any state's uniform gifts to minors act or uniform transfers to minors act is presumed abandoned if it is unclaimed by or on behalf of the minor on whose behalf the account was opened 3 years after the later of the following:
   a) If the date on which the minor's custodian is required to transfer the property to the minor has passed, the date on which a 2nd consecutive communication sent by the holder by 1st class mail to the minor's custodian is returned to the holder by the U.S. postal service as undeliverable.
   b) If the date on which the minor's custodian is required to transfer the property to the minor has passed and if the 2nd communication is sent by the holder to the minor's custodian later than 30 days after the date on which the first communication is returned to the holder by the U.S. postal service as undeliverable, the date on which the first communication was returned as undeliverable.
   c) The date on which the minor's custodian is required to transfer the property to the minor or the minor's estate in accordance with the uniform gifts to minors act or uniform transfers to minors act of the state in which the account was opened.
2) If the holder does not send communications to the custodian by 1st class mail, as described in sub 1) above, the holder shall attempt to confirm the custodian's interest in the property by sending the custodian e-mail not later than 2 years after the custodian's last indication of interest in the property, except that the holder shall promptly attempt to contact the custodian by 1st class mail if any of the following applies:
   a) The holder does not have information needed to send the custodian e-mail or the holder believes that the custodian's e-mail address in the holder's records is not valid.
   b) The holder receives notification that the e-mail was not received.
   c) The custodian does not respond to the e-mail within 30 days from the date on which the e-mail was sent.
3) If 1st class mail sent under sub 2) above is returned to the holder by the U.S. postal service as undeliverable, the property is presumed abandoned on the date determined under sub 1) above.
4) The property in the account described under sub 1) above is not subject to this section after the property is transferred to the minor or the minor's estate.

Contents of a Safe Deposit Box

Tangible property held in a safe deposit box and proceeds from a sale of the property by the holder permitted by Wisconsin law other than chapter 177 are presumed abandoned if the property remains unclaimed by the apparent owner 5 years after the earliest of the following:

1) The expiration of the lease or rental period for the box.
2) The earliest date when the lessor of the box is authorized by contract or Wisconsin law other than chapter 177 to enter the box and remove or dispose of the contents without consent or authorization of the lessee.

Securities

1) A security is presumed to be abandoned 3 years after the following:
   a) The date on which a 2nd consecutive communication sent by the holder by 1st class mail to the apparent owner is returned to the holder by the U.S. postal service as undeliverable.

b) If the 2nd communication is sent by the holder to the apparent owner later than 30 days after the date on which the first communication is returned to the holder by the U.S. postal service as undeliverable, the date on which the first communication was returned as undeliverable.

2) If the holder does not send communications to the apparent owner of the security by 1st class mail, as described in sub 1) above, the holder shall attempt to confirm the apparent owner's interest in the security by sending the apparent owner e-mail not later than 2 years after the apparent owner's last indication of interest in the security, except that the holder shall promptly attempt to contact the apparent owner by 1st class mail if any of the following applies:
   a) The holder does not have information needed to send the apparent owner e-mail or the holder believes that the apparent owner's e-mail address in the holder's records is not valid.
   b) The holder receives notification that the e-mail was not received.
   c) The apparent owner does not respond to the e-mail within 30 days from the date on which the e-mail was sent.
3) If 1st class mail sent under sub 2) above is returned to the holder by the U.S. postal service as undeliverable, the security is presumed abandoned 3 years after the date on which the mail is returned.

Indication of Apparent Owner Interest in Property

Act 87 provides for a general rule describing when an owner has indicated an interest in the property. More specifically:

1) Property is presumed abandoned from the earliest of the following:
   a) The date on which the property is otherwise presumed abandoned, such as within the categories discussed above.
   b) The date on which the dormancy period has elapsed following the last indication of interest by the apparent owner in the property.
2) Under Chapter 177, an indication of an apparent owner's interest in property includes the following:
   a) A record communicated by the apparent owner to the holder or the holder's agent concerning the property or the account in which the property is held.
   b) An oral communication by the apparent owner to the holder or agent of the holder concerning the property or the account in which the property is held, if the holder or the holder's agent contemporaneously makes and preserves a record of the fact of the apparent owner's communication.
   c) Presentment of a check or other instrument of payment of a dividend, interest, or other distribution, or evidence of receipt of a distribution made by electronic or similar means, with respect to an account, underlying security, or interest in a business association.
   d) Activity directed by an apparent owner in the account in which the property is held, including accessing the account or information concerning the account, or a direction by the apparent owner to increase, decrease, or otherwise change the amount or type of property held in the account.
   e) Any of the following activities concerning property or an account held at a financial organization:
      i) A deposit into or withdrawal from an account previously authorized by the apparent owner, other than an automatic reinvestment of dividends or interest.
      ii) A deposit into or withdrawal from any other account the apparent owner has with the financial organization if the mailing address for the apparent owner in the financial organization's books and records is the same for both the inactive account and the active account.
      iii) A payment by the apparent owner on any amount due on a loan with the financial organization if the mailing address for the apparent owner in the financial organization's books and records is the same for both the inactive account and the loan account.
      iv) Communication in writing from the apparent owner to the financial organization about an account or another relationship with the financial organization.
      v) Any correspondence in writing from the financial organization to the apparent owner, such as the mailing of a statement, report of interest paid or credited, or other written advice relating to a deposit, if the correspondence is not returned to the financial organization for non-delivery and if the financial organization maintains a record of all such returned correspondence.
   f) Subject to sub 5) below, payment of a premium on an insurance policy.
   g) Any other action by the apparent owner that reasonably demonstrates to the holder that the apparent owner knows that the property exists.
3) An action by an agent or other representative of an apparent owner, other than the holder acting as the apparent owner's agent, is presumed to be an action on behalf of the apparent owner.

4) A communication with an apparent owner by a person other than the holder or the holder's representative is not an indication of interest in the property by the apparent owner unless a record of the communication evidences the apparent owner's knowledge of a right to the property.
5) If an insured person dies or the insured or beneficiary of an insurance policy otherwise becomes entitled to the proceeds before depletion of the cash surrender value of the policy by operation of an automatic-premium-loan provision or other nonforfeiture provision contained in the policy, the operation does not prevent the policy from maturing or terminating for purposes of Chapter 177.

As a result of this provision, if a financial institution can demonstrate there is an indication of apparent owner interest in the property, the property is not abandoned under the Act 87 general dormancy periods outlined above. For example, Customer Jones has a savings account and checking account. Customer Jones uses the checking account routinely; however, the savings account is an account used just for emergencies resulting in no transactions having been conducted on the account for over 5 years. The financial institution has routinely mailed periodic statements for each account to Customer Jones, none have been returned by the U.S. postal service as undeliverable. Under Act 87, as Customer Jones has indicated an interest in the property (see item v) above) the savings account is not presumed to be abandoned.

Reporting Required by Holder of Property

General Reporting Requirements

1) Report required by holder:
   a) A holder of property presumed abandoned and subject to the custody of DOR shall report in a record to DOR concerning the property.
   b) A holder shall report electronically in a format approved by DOR, unless DOR approves another method.
2) A holder may contract with a 3rd party to make the report required under sub. 1) above.
3) Regardless of whether a holder enters into a contract under sub 2) above, the holder is responsible to DOR for the complete, accurate, and timely reporting of property presumed abandoned and for paying or delivering the property described in the report to DOR.

Report Content Requirements

1) The report required shall be signed by or on behalf of the holder and verified as to its completeness and accuracy and be in a secure format, as approved by DOR, that protects the apparent owner's confidential information in the same manner as is required of DOR and DOR's agent under certain confidentiality and security of information requirements described in Chapter 177. The report shall contain the following information:
   a) A description of the property.
   b) Unless the property is a travelers check, money order, or similar instrument, the name, last-known address, social security number or taxpayer identification number, and date of birth of the property's apparent owner, if such information is known or readily ascertainable.
   c) For an amount held or owing under a life or endowment insurance policy or annuity contract, the name, social security number or taxpayer identification number, if known, date of birth, if known, and last-known address of the insured, annuitant, or other apparent owner of the policy or contract and of each beneficiary.
   d) For property held in or removed from a safe deposit box or other safekeeping repository or for other tangible personal property, an itemized inventory and description of the property, including the location of the property where it may be inspected by DOR and any amounts owed to the holder.
   e) The commencement date for determining abandonment under the periods described in the property descriptions above.
   f) A statement that the holder has complied with the notice requirements.
   g) Any other information prescribed by DOR.
2) A report may include in the aggregate items valued under $5 each only if the apparent owner is unknown.
3) A report may include personal information about the apparent owner or the apparent owner's property to the extent not otherwise prohibited by federal law.
4) If a holder has changed the holder's name while holding property presumed abandoned or is a successor to another person that previously held the property for the apparent owner, the holder shall include in the report the holder's former name or the name of the previous holder, if any, and the known name and address of each previous holder of the property.

Report Timing

1) Subject to sub 2) below, the report shall be filed on or before November 1 of each year and cover the 12 months preceding July 1 of that year.
2) Before the due date for filing the report under, the holder of property presumed abandoned may request DOR to extend the time for filing. DOR may grant an extension of 60 days or other period agreed to by DOR.

Notice to Apparent Owner by Holder

Notice Required

1) Subject to sub 2) below, the holder of property presumed abandoned shall send to the apparent owner notice by 1st class mail, in a format acceptable to DOR, not more than 120 days nor less than 60 days before filing the report required above, if all of the following apply:
   a) The holder has in the holder's records an address for the apparent owner that the records do not indicate to be invalid and that is sufficient to direct the delivery of 1st class mail to the apparent owner.
   b) The value of the property is $50 or more.
2) If an apparent owner has consented to receive e-mail delivery from the holder, the holder shall send the notice described in sub 1) above both by 1st class mail to the apparent owner's last-known mailing address and by e-mail, unless the holder believes that the apparent owner's e-mail address is invalid.

Contents of Required Notice

1) The required notice shall contain a heading that reads substantially as follows: "Notice. The State of Wisconsin requires us to notify you that your property may be transferred to the custody of the state's unclaimed property administrator if you do not contact us before (the date that is 30 days after the date of the notice)."
2) The notice shall do all of the following:
   a) Identify the nature and, except for property that does not have a fixed value, the value of the property that is the subject of the notice.
   b) State that the property will be turned over to DOR.
   c) State that after the property is turned over to DOR an apparent owner that seeks return of the property shall file a claim with DOR.
   d) State that property may be sold by DOR.
   e) Provide instructions that the apparent owner shall follow to prevent the holder from reporting and paying or delivering the property to DOR.
3) A notice under sub 1) above shall contain all of the following:
   a) The names in alphabetical order and the last-known addresses, if any, of persons listed in the report and entitled to notice within the county, as specified in sub 1) above.
   b) A statement that information concerning the property and the name and last-known address of the holder may be obtained by any person possessing an interest in the property by addressing an inquiry to DOR.

Dormancy Charge

Act 87 provides that a holder may deduct a dormancy charge from property required to be paid or delivered to DOR if all of the following apply:

1) A valid written contract between the holder and the apparent owner authorizes imposition of the charge for the apparent owner's failure to claim the property within a specified time.
2) The holder regularly imposes the charge and regularly does not reverse or otherwise cancel or not collect the charge.

In addition, Act 87 requires that the amount of the deduction for a dormancy charge is limited to an amount that is not unconscionable considering all relevant factors, including the marginal transactional costs incurred by the holder in maintaining the apparent owner's property and any services received by the apparent owner.

Additional Provisions

Act 87 provides many additions to the provisions above. While this article does not describe all of them, WBA recommends that financial institutions review Act 87 in order to understand the full scope of the changes to Wisconsin's Uniform Unclaimed Property Act. Some highlights are included below to assist in identifying important changes in addition to those described in more detail above:

- The definitions of several new terms including for certain items that are not considered to be property, such as gift cards and game-related digital content, and for terms that are considered property and are subject to the act, such as virtual currency.
- Definitions of the address of apparent owner in Wisconsin.
- The use of tax records and assistance from other state agencies to identify and deliver property to an apparent owner.
- The income, interest, or gain accrued by property while in the custody of DOR.
- The penalties for failing to file a report or deliver property to DOR.
- DOR's ability to enter into agreements with other states and countries to deliver unclaimed property.
- Voluntary disclosures by a property holder for failing to file a report despite being required to do so.
- Agreements between an apparent owner and a locator service to locate property, subject to certain requirements in the agreement.
- Confidentiality and security of information provisions.

Conclusion

Act 87 is effective as of **November 7, 2021**. Accordingly, Wisconsin banks should consider their current procedures related to abandoned property, including reporting, in relation to the updated definitions and requirements.

Additional Resources

2021 Wisconsin Act 87: https://docs.legis.wisconsin.gov/2021/related/acts/87.pdf

Wisconsin Department of Revenue's Unclaimed Property FAQ: https://www.revenue.wi.gov/Pages/FAQS/ucp-unclaimed-property.aspx ■

Reminder: Lower Open-End Line of Credit HMDA Volume Threshold Begins January 1, 2022

The Bureau of Consumer Financial Protection (CFPB) recently released revised frequently asked questions (FAQs) regarding the Home Mortgage Disclosure Act (HMDA). In particular, the FAQs remind banks that the lower open-end line of credit volume threshold begins January 2022. The following are revised FAQs related to HMDA transactional coverage and partial exemptions.

Institutional and Transactional Coverage

Q1: What are the loan volume thresholds for determining institutional and transactional coverage?

A1: As of **January 1, 2022**, the loan-volume thresholds are 100 closed-end mortgage loans in each of the two preceding calendar years and 200 open-end lines of credit in each of the two preceding calendar years. CFPB issued a final rule in April 2020 that set the closed-end mortgage loan threshold at 100 in each of the two preceding calendar years, effective July 1, 2020, and set the open-end line of credit threshold at 200 in each of the two preceding calendar years, effective January 1, 2022, upon the expiration of the temporary threshold of 500 open-end lines of credit.

Q2: My institution originated 400 closed-end mortgage loans and 199 open-end lines of credit in calendar year 2020 and 600 closed-end mortgage loans and 499 open-end lines of credit in calendar year 2021. My institution has met all other Regulation C institutional coverage criteria. Is my institution required to collect and report HMDA data for calendar year 2022 on closed-end mortgage loans and open-end lines of credit?

Additionally, banks are reminded that qualifying for the Volcker rule's venture capital exclusion does not make a fund a permissible investment for a bank. See 12 CFR 44.10(c)(16).

OCC also reminded banks that, as with any investment, before a bank invests in a venture capital fund, the bank must determine whether the investment is permissible and appropriate for the bank. For such matters, OCC refers banks to 12 CFR 1.5, 44.20, and 160.1. It is also an unsafe or unsound practice to make investments without determining their appropriateness. Refer to *In re FNBT Wibaux, Mont.*, Enf. Action 413, 1991 WL 535322, page 11 (October 31, 1991). It is also an unsafe or unsound practice to buy securities with long maturities, including equity securities, without a pre-purchase analysis, and when the desire for yield causes management to overlook normal prudential controls. Sound investment practices dictate that management must understand the structure and price sensitivity of its security purchases, as well as how they affect the bank's overall interest rate risk profile.

OCC also referred banks to OCC Bulletin 2002-19, Unsafe and Unsound Investment Portfolio Practices: Supplemental Guidance. OCC also cautions that management should know and understand the risks and rewards of each equity security before purchasing. Additionally, management should have a logical reason for the investment and know whether the investment is within legal limitations. Refer to the OCC's *An Examiner's Guide to Investment Products and Practices*, page 18 (December 1992).

The release is of interest beyond OCC-regulated institutions as the Federal Deposit Insurance Corporation (FDIC) has often taken a similar position as OCC regarding the matter. As a result, FDIC-regulated institutions should also be aware of the OCC release and work with bank counsel to further consider whether the reminder impacts the bank.

The bulletin may be viewed at: https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-54.html ■

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WBA Compliance Forum, November 2021
4.0 CLE Hours
November 9, 2021 – Wausau
November 10, 2021 – Madison

WBA In-House Legal Counsel Webinar Series
September 2021:
Mergers and Acquisitions, and Post M/A Issues to Consider
2.0 CLE Hours – live webcast and on demand

WBA In-House Legal Counsel Webinar Series
October 2021:
Troubled Business Borrowers Deal with Real and Personal Property in a Defaulted Loan
2.0 CLE Hours – live webcast and on demand

Wisconsin Bankers ASSOCIATION
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Compliance Journal
Special Focus

New Computer-Security Incident Notification Requirements for Banks and Bank Service Providers

The Board of Governors of the Federal Reserve System (FRB), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC) recently issued a final rule that requires a banking organization to notify its primary federal regulator of computer-security incidents. The rule is effective **April 1, 2022**, and has a mandatory compliance date of **May 1, 2022**. The final rule applies to all Wisconsin banks, bank holding companies, savings and loan holding companies, federal branches and agencies of foreign banks, Edge, and agreement corporations (collectively, a banking organization). The rule also applies to bank service providers as further discussed below.

Notification by Banking Organization

A banking organization must notify its primary federal regulator's supervisory office, or federal regulator's designated point of contact, about a notification incident through email, telephone, or other similar methods that the primary federal regulator may prescribe. The regulator must receive the notification from the banking organization as soon as possible and no later than 36 hours after the banking organization determines that a notification incident has occurred.

The final rule defines a "notification incident" to mean a computer-security incident that has materially disrupted or degraded, or is reasonably likely to materially disrupt or degrade, a banking organization's:

- Ability to carry out banking operations, activities, or processes, or deliver banking products and services to a material portion of its customer base, in the ordinary course of business;
- Business line(s), including associated operations, services, functions, and support, that upon failure would result in a material loss of revenue, profit, or franchise value; or
- Operations, including associated services, functions, and support, as applicable, the failure or discontinuance of which would pose a threat to the financial stability of the United States.

The mention of business line(s) above means a product or service offered by a banking organization to serve its customers or support other business needs.

The final rule has also defined the term "computer-security incident." This is an occurrence that results in actual harm to the confidentiality, integrity, or availability of an information system or the information that the system processes, stores, or transmits.

Notification by Bank Service Provider

The final rule also requires a bank service provider to notify at least one bank-designated point of contact at each affected banking organization customer as soon as possible when the bank service provider determines that it has experienced a computer-security incident that has materially disrupted or degraded, or is reasonably likely to materially disrupt or degrade, covered services provided to such banking organization for four or more hours. A computer-security incident in this context has the same meaning as the term has for a banking organization.

A bank service provider means a bank service company or other party that performs covered services; the definition excludes any designated financial market utility as defined in 12 U.S.C. 5462(4). The term "covered services" mean services performed, that are subject to the Bank Service Company Act (12 U.S.C. 1861-1867), which generally includes check and deposit sorting and posting, computation and posting of interest, preparation and mailing of checks or statements, other clerical or bookkeeping, accounting or similar functions, data processing, Internet banking and mobile banking services.

For notification purposes, a bank-designated point of contact is an email address, phone number, or any other contact(s) previously provided to the bank service provider by the banking organization customer. If the banking organization customer has not previously provided a bank-designated point of contact, such notification shall be made to the Chief Executive Officer and Chief Information Officer of the banking organization customer, or two individuals of comparable responsibilities, through any reasonable means.

The notification requirement does not apply to any scheduled maintenance, testing, or software update previously communicated to a banking organization customer.

Implementation Considerations

Between now and May 1, a banking organization should consider whether any current procedures to identify computer incidents need be updated in light of the new rule. Banking organizations with bank service providers should also review existing notification duties to ensure the providers can also identify a computer-response incident, as the term is defined in the final rule, and can notify the banking organization as required in the final rule.

It is possible the agencies may issue further guidance regarding the notification requirements, including clarification of which supervisory office to notify of such incidents, and which method (*i.e.*, email, phone number, and party to contact) for notifications. If the agencies issue any further guidance, a banking organization will need update its computer-security incident procedures accordingly.

Resources

The jointly issued final rule may be viewed at: https://www.govinfo.gov/content/pkg/FR-2021-11-23/pdf/2021-25510.pdf

The Bank Service Company Act (12 U.S.C. 1861-1867) may be viewed at: https://www.govinfo.gov/content/pkg/USCODE-2011-title12/pdf/USCODE-2011-title12-chap18-sec1861.pdf ■

OCC Reminds Banks of Limitations When Making Equity Investments

Late last month, the Office of the Comptroller of the Currency (OCC) issued Bulletin 2021-54 to remind banks of limitations when making equity investments. By "banks" OCC collectively means national banks, federal savings associations, and federal branches and agencies of foreign banking organizations.

In its bulletin, OCC warns that banks generally may not make passive equity investments in venture capital funds. Equity investments in venture capital funds may be permissible if they are public welfare investments or investments in small business investment companies. Banks are referred to review 12 USC 24 (Eleventh), 15 USC 682(b), 12 CFR 24, and 12 CFR 7.1015. Additionally, subject to specific regulatory requirements, banks may establish operating subsidiaries and make non-controlling equity investments in entities that conduct bank permissible activities; these activities must be convenient and useful to the bank's business and not mere passive investments. Banks should review 12 CFR 5.34, 5.36, 5.38, and 5.58.

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WBA In-House Legal Counsel Webinar Series
October 2021:
Troubled Business Borrowers Deal with Real and Personal Property in a Defaulted Loan
2.0 CLE Hours – live webcast and on demand