

Virginia Credit Union League

Compliance Roundtable

June 29th, 2022

Joseph (“Jay”) E. Spruill, III

Woods Rogers, PLC

Richmond, VA

jspruill@woodsrogers.com

(804) 343-5031

I. Elder Financial Exploitation

- A. Growing Problem.** Financial exploitation affects at least 10% of the elderly adult population each year, according to a recent report from the Treasury’s Financial Crimes Enforcement Network (FinCEN).
1. The pandemic exacerbated the problem and statistics show the problem continues to grow.
 2. FinCEN has urged financial institutions to be vigilant. What should credit unions do?
- B. 2022 Virginia General Assembly Session.** Legislation was enacted to further address elder financial exploitation and the duties of financial institutions to help. (**H.B. 95, H.B. 496/S.B. 687, and H.B. 497/S.B. 124**).
1. Requires a financial institution to cooperate in any investigation by a local department of social services (DSS).
 2. Requires a financial institution to make any financial records or information relevant to the investigation available to DSS upon request, to the extent allowed under GLBA.
 3. Financial institution may also voluntarily report to DSS or a court-appointed guardian ad litem in connection with an investigation. Immunity from civil and criminal liability in so reporting.
 4. Changes the definition “incapacitated adult” to “vulnerable adult”.
 5. Agent under a power of attorney who knowingly and intentionally engages in financial exploitation of an incapacitated adult guilty of a Class 1 misdemeanor. Upon conviction, the agent’s authority under the POA is revoked.

- C. **Existing Law (Va. Code §63.1-1606.L).** Virginia law permits a financial institution to refuse to execute a transaction if it has a good faith belief that the transaction may involve financial exploitation, or if the financial institution makes, or knows that another person has made, a report to DSS stating a good faith belief that a transaction may involve financial exploitation.
 - 1. May continue to refuse to execute the transaction for no longer than 30 business days, unless otherwise ordered by a court.
 - 2. Must report to DSS the refusal to execute the transaction within 5 business days.

II. **Equal Credit Opportunity (Regulation B) - Consumer Financial Protection Bureau (CFPB) Advisory Opinion (May 9, 2022)**

- A. **Application of ECOA and Regulation B to Existing Credit Customers.** Affirmed that the Equal Credit Opportunity Act (ECOA) and Regulation B protect not only those actively seeking credit but also those who have sought and received credit.
- B. **Compliance Risk.** The advisory opinion notes that many creditors fail to recognize that ECOA and Regulation B apply after credit has been granted, including in connection with a revocation or an unfavorable change in the terms of a credit arrangement.
- C. **Definitions.** Under Regulation B and the Advisory Opinion:
 - 1. “Applicant” includes “any person who requests or who has received an extension of credit from the creditor.
 - 2. “Existing account holder” refers to an applicant who has applied for and received an extension of credit. “Existing account” or “existing credit arrangement” refers to an extension of credit previously made by a creditor other than an extension of credit that is closed or inactive.
 - 3. “Adverse action” includes “[a] termination of an account or an unfavorable change in an account that does not affect all or substantially of a class of the creditor’s accounts.
- D. **Adverse Action Notice.** Creditors must give notice of an adverse action (i.e., termination or unfavorable change) taken on an existing account within 30 days.
- E. **Private Right of Action.** ECOA’s private right of action makes it imperative that creditors comply.

III. **Bank of America’s Garnishment Practices - CFPB Consent Order (\$10 million penalty)**

- A. **Background.** The bank’s practice was to process a garnishment order under the laws of the state where the garnishment was issued rather than the state where the depositor resided. As a result, depositors were not afforded exemptions and other creditor protections under the appropriate state law (i.e., the state of a depositor’s residence). In addition, the bank required depositors to waive the bank’s liability for any garnishment-related protections in its deposit agreement and misrepresented to depositors that they could not go to court to prevent wrongful garnishments. The CFPB found that the bank had engaged in unfair and deceptive acts and practices.

B. Lessons.

1. Ensure that a court has jurisdiction before recognizing a garnishment or other creditor process.
2. Assuming the court has jurisdiction, ensure that the proper state law is applied.
3. Avoid waivers and other provisions in account agreements that are not permitted under the law.
4. Avoid misrepresentations as to the rights of customers and/or the credit union.

IV. Recent Virginia Supreme Court Decision regarding Check Collection and POD Payee – Stahl v. Stitt (March 3, 2022)

A. Background. An elderly aunt lived with her niece and received hospice care while she lived there. The aunt had an account at BB&T and MCNB. With the niece's assistance, the aunt initiated an electronic request for a check to transfer \$245, 271 from the aunt's MCNB account to her BB&T account. A check made payable to BB&T was created and presented to MCNB. The niece was a POD payee on the BB&T account. MCNB determined not to honor the check but failed to return the check by its midnight deadline. The aunt died shortly thereafter. The niece, as the POD payee who became the owner of the BB&T account upon the aunt's death, filed suit against MCNB for retaining the check beyond the midnight deadline. The Virginia Supreme Court ruled the niece lacked standing to bring the suit since she had no interest in the BB&T account when the check was presented.

B. Lessons.

1. POD payees have no rights before the account owner's death.
2. Do not honor POD payee instructions before the account owner's death.
3. Understand the potential liability in handling POD accounts and joint accounts with survivorship and take appropriate care in handling signature card beneficiary and survivorship designations.

V. 2022 Virginia General Assembly Session – Other Legislation of Interest to Credit Unions

A. HB 209 and SB 329 – Activity Authorized for State-Chartered Credit Union Based on Federal Authority – The bill provides that a state-chartered credit union has the power to engage in any activity, service, or practice that is authorized for a federally-chartered credit union and that has not otherwise been authorized for a state-chartered credit union. Notice must be given to the State Corporation Commission at least 45 days in advance and the same terms, conditions, and limitations applicable to a federally-chartered credit unions will apply to the state-chartered credit union.

B. HB 268/SB 326 – Priority of Shares - Removes a provision that shares of a member shall be subordinate to all other obligations of the credit union. The legislation will facilitate the ability of credit unions to issue subordinated debt.

- C. **H.B. 263 – Banks; Virtual Currency Custody Servicers** - Permits a bank to provide its customers with virtual currency custody services in a fiduciary or non-fiduciary capacity so long as the bank has adequate protocols in place to effectively manage the associated risks.
- D. **H.B. 1153/S.B. 303 – Mortgage Brokers; Dual Compensation** - Removes the prohibition on dual compensation for a person who acts as a mortgage broker and a real estate broker or salesperson in connection with any real estate transaction. A mortgage broker who acts as a real estate broker or salesperson must provide a borrower a written disclosure at the time the mortgage broker services are first offered to the borrower.