New Hampshire Coronavirus Tracker: NCUA Update; CFPB, FinCEN Update; PPP Update; Power of Attorney Update – 7.11.20

NCUA Update
Eastern Region Webinar
The Association is hosting a virtual meeting with NCUA featuring Eastern Regional Director, John Kutchey, who will share an update on NCUA and their continued actions in response to the pandemic. Participants are invited to submit questions and observations they would like NCUA to address. Questions can be emailed to **communications@ccua.org** prior to and during the session.

A Dialogue with NCUA
Thursday, July 16, 2020
2:00 pm - 3:00 pm

There is no cost to participate in this regulatory forum, but registration is required. **Click HERE** to register. Instructions will be sent to registered participants.

Field-of-Membership
https://www.ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/field-membership-rural-districts
20-CU-20/July 2020

Letter to Credit Unions 20-CU-21 provides guidance following the U.S. Supreme Court's June 29 rejection of an appeal by the American Bankers Association of a lower court's decision on the field-of-membership rules. In addition to the postponed rural district membership applications, NCUA will begin accepting new rural applications also immediately. Federal credit unions with a rural district community charter are eligible to apply. NCUA is also in the process of reinstating rural districts for 18 credit unions that had these removed due to the lawsuit. The NCUA's Office of Credit Union Resources and Expansion has contacted these credit unions to confirm the reinstatement so that no further action will be required by these credit unions.

A proposed area would generally qualify as a rural district if it has well-defined, contiguous geographic boundaries, and the total population of the proposed district does not exceed one million. Federal credit unions seeking additional information should refer to **Appendix B to Part 701—Chartering and Field of Membership Manual; Chapter 2, Field of Membership Requirements for Federal Credit Unions, V—Community Charter Requirements.**

Reasonable Proximity Opinion Letter
https://www.ncua.gov/regulation-supervision/legal-opinions/2020/reasonable-proximity-analysis

The NCUA was asked whether the term "reasonable proximity," as used in the Federal Credit Union Act ("Act") and as interpreted by NCUA regulations, includes a geographic limitation that is a specific distance. The Act permits the NCUA to add a group to the field-of-membership of a multiple common bond federal credit union when it is neither "practicable" nor "consistent with reasonable standards for the safe and sound operation of the credit union" for a group to charter its own single common bond credit union. The credit

union seeking to add the group must be "within *reasonable proximity* to the location of the group whenever practicable and consistent with" those standards of safety and soundness.

NCUA has recently determined that there is no statutory constraint on the term "reasonable proximity" that would impose a limit such as a maximum distance between the location of the group and the location of the FCU. Consistent with the Act and legislative history, the NCUA has always viewed "reasonable proximity" as including a geographic component, but NCUA will continue to assess this geographic component on a case-by-case basis free of a mileage limit.

Automated Loan Underwriting System-Segregation of Duties for Loan Officers Opinion Letter
https://www.ncua.gov/regulation-supervision/legal-opinions/2020/automated-loan-underwriting-system-segregation-duties-loan-officers

NCUA was asked if §1761c(b) of the Federal Credit Union Act ("Act") prohibits a member service representative of a federal credit union from inputting data into its automated loan underwriting system ("ALUS") and then disbursing the funds if the ALUS approves the loan. The Act does not prohibit such a scenario, provided appropriate controls and safeguards are in place.

Subordinated Debt Comment Letter
The Association submitted a comment letter to the NCUA on its Notice of Proposed Rulemaking ("NPR") relative to subordinated debt. This NPR addresses subordinated debt authority, restrictions, and requirements for new, complex, and low-income credit unions ("LICUs"). The comment letter may be found **HERE**.

Conference Call on SBA Lending Programs July 14
Register Now for the July 14 Conference Call on SBA Lending Programs

NCUA is hosting a conference call to provide updates to the Small Business Administration's lending programs, including the Paycheck Protection Program on Tuesday, July 14 at 3:00 pm Eastern. The SBA recently made several updates to the PPP loan program, including a streamlined loan forgiveness application and updated FAQs. The application period for the PPP loan program was also extended until August 8, 2020. Registration for this conference call is now open, but the number of participants is limited. Registrants will receive an email containing a personalized access link. Participants may join the call starting at 2:30 pm Eastern.

CFPB Update
Representative Payee Guidance
https://www.consumerfinance.gov/about-us/blog/guide-covid-19-economic-stimulus-checks/utm_source=newsletter&utm_medium=email&utm_campaign=OA_EIP#representative-payees

The Consumer Financial Protection Bureau ("CFPB") has released Guidance, in a Question and Answer format, for representative payees of a Social Security or Supplemental Security Income (SSI) beneficiary. A representative payee is only responsible for managing Social Security or SSI benefits. The Economic Impact Payment is not an SSA benefit and it belongs to the beneficiary. Representative payees should discuss the payment with the beneficiary, when possible. If the beneficiary requests access to the funds, then they are obligated to provide it.

Final Rule on Small Dollar Lending
https://files.consumerfinance.gov/f/documents/cfpb_payday_final-rule-2020-revocation.pdf

The CFPB **released** final **amendments** to its small-dollar lending rule published in November 2017, specifically repealing the mandatory underwriting provisions of the rule. The CFPB did not rescind or alter the payments provisions of the 2017 Rule, and instead **ratified** those provisions and will move forward to implement those provisions.
Mandatory underwriting provisions. The mandatory underwriting provisions of the 2017 Rule required lenders to assess borrowers' ability to repay, verify borrowers' incomes, and furnish certain information regarding payday loans to registered information systems, among other things. The CFPB based its decision to repeal the mandatory underwriting provisions on "the insufficient legal and evidentiary bases for the 2017 rule's mandatory underwriting provisions." It also noted that its action "will help to ensure the continued availability of small dollar lending products for consumers who demand them, including those who may have a particular need for such products as a result of the current pandemic."
Payment provisions. The final amendments do not rescind or amend the payments provisions of the 2017 Rule. Instead, the CFPB issued a **ratification** of the payment provisions of the 2017 Rule in response to the U.S. Supreme Court's recent decision in *Seila Law*. The CFPB denied a petition to commence a rulemaking to exclude debit and prepaid cards from the payments provisions of the small dollar lending rule, and issued limited **guidance** in the form of FAQs clarifying the payments provisions' scope and assisting lenders in complying with those provisions. The CFPB indicated that it "is continuing to monitor and assess the effects of the Payment Provisions, including their scope, and the agency may determine whether further action is needed in light of what it learns."
In connection with the finalization of these amendments, the CFPB published (i) a **redline** of the effect of these amendments to the 2017 Rule, (ii) an **executive summary** of the amendments, (iii) an updated small entity payday lending rule **compliance guide**, and (iv) payday lending **FAQs**.
Debt Collection Rules
The CFPB **announced** that it plans to publish final debt collection rules in October 2020. The final rules will be the first rules clarifying the nearly 40-year-old Fair Debt Collection Practices Act (FDCPA) and are expected to address a variety of topics including:

- Communications with borrowers;
- Guidance on what constitutes harassment or abuse, false or misleading representations, and unfair practices; and
- Disclosures (including time-barred debt disclosures).

In the proposed rule that was published in May 2019, the CFPB proposed a one-year implementation before the debt collection rules would become effective. If they incorporate the same implementation period in the final rule so that it becomes effective one year after publication in the Federal Register, it likely could become effective as early as October or November 2021.

Ratification of Prior Regulations
https://files.consumerfinance.gov/f/documents/cfpb_ratification_bureau-actions_2020-07.pdf

The CFPB has ratified the majority of its existing regulations, as well as certain other guidance, to address any potential defect in the validity of CFPB's prior actions under Article II of the Constitution. CFPB ratification follows a Supreme Court ruling in the case of *Seila Law LLC v. Consumer Financial Protection Bureau*, in which the Court held that the "for cause" removal protection in 12 U.S.C. 5491(c) enjoyed by CFPB's single Director violated

the Constitution's separation of powers. The Court, however, expressly declined to address the impact of its ruling on prior agency actions.

With the ratification, CFPB is attempting to "resolve any possible uncertainty" regarding the validity of its prior actions. Specifically, the CFPB "has decided to ratify a number of official actions from January 4, 2012 to June 30, 2020," including:

- each CFPB-published document categorized under "Rules and Regulations" by the Federal Register, except the July 2017 "Arbitration Agreements" rule and the November 2017 "Payday, Vehicle, and Certain High-Cost Installment Loans" rule;
- each CFPB-issued consumer information publication under Regulation X and Z;
- each "Fair Credit Reporting Act Disclosures" notice;
- the official approval titled "Final Redesigned Uniform Residential Loan Application Status Under Regulation B";
- the preemption determination titled "Electronic Fund Transfers, Determination of Effect on State Laws (Maine and Tennessee)"; and
- CFPB's concurrences with series of rules by the Federal banking agencies titled "Real Estate Appraisals."

As for other agency actions, CFPB "is considering whether ratifications of certain other legally significant actions, such as certain pending enforcement actions, are appropriate." CFPB stated that it will make such ratifications separately, and that it does not believe ratification is necessary for previous CFPB actions that "have no legal consequences for the public, or enforcement actions that have been finally resolved." The ratification is effective July 10, 2020.

The *Selia Law LLC* opinion really means that with each new President, it is expected that the director will be removed and replaced with a director that shares the same political views and ambitions as the new administration. This is similar to how a newly elected President appoints cabinet members. In turn, the CFPB likely will shift its regulatory and enforcement focus with each change in administration. With the 2020 election fast-approaching, a potential shift in the CFPB is on the horizon.

Regulation Z Escrow Exemption for High Priced Loans
https://files.consumerfinance.gov/f/documents/cfpb_proposed-rule_hpml-escrow-exemption_2020-07.pdf

The CFPB has issued a proposed notice of rulemaking ("NPRM") to amend Regulation Z, as required by the *Economic Growth, Regulatory Relief, and Consumer Protection Act*, and exempt certain insured depository institutions and credit unions from the requirement to establish escrow accounts for certain higher-priced mortgage loans ("HPMLs"). Under the proposed amendment, any loan made by an insured depository institution or credit union that is secured by a first lien on the principal dwelling of a consumer would be exempt from Regulation Z's HPML escrow requirement if (i) the institution has assets of no more than $10 billion; (ii) "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 (iii) the institution meets certain existing HPML escrow exemption criteria. Comments on the NPRM will be accepted for 60 days following publication in the *Federal Register*.

Consumer Protection Week

The CFPB plans a week of virtual events on July 14 through July 17 that will focus on how it is protecting consumers in the financial marketplace. Also addressed will be the issues consumers are confronting, as well as informing consumers of how they can communicate any issues that they may have with a financial services provider.

The **full schedule of events** are available on the CFPB's website as well as the opportunity to **register for individual events.**

Financial Crimes Enforcement Network Update

Hemp Guidance

The U.S. Treasury Department, through its Financial Crimes Enforcement Network ("FinCEN"), has issued new guidance to banks and credit unions that, in short, hemp companies should be treated like just about everyone else, except for non-hemp cannabis companies known as marijuana-related businesses. This broad, definitive statement from FinCEN is intended to open up banking and credit. The guidance is very focused on customer due diligence. This includes not only confirming proper licensing, but also that the customer is complying with state laws and not otherwise dealing with non-hemp cannabis.

FinCEN and other federal regulators clarified that financial institutions are not required to file a SAR regarding a hemp customer "solely because" the customer grows or cultivates hemp. The guidance reiterates that the 2018 Farm Bill removed "hemp" from the definition of marijuana in the Controlled Substances Act and recommends that financial institutions conduct risk-based customer due diligence on any hemp-related business, as they should for all customers. The guidance relates specifically to businesses or individuals that grow hemp, and processors or manufacturers who purchase hemp directly from such growers, and does not replace or supersede FinCEN's earlier guidance regarding marijuana-related businesses operating in violation of the CSA.

The new guidance builds on the December guidance by (1) clarifying a financial institution's customer due diligence ("CDD") and customer identification program ("CIP") obligations with respect to its hemp customers, and (2) providing examples of "suspicious activity" that may prompt a financial institution to file a SAR regarding one of its hemp customers.

Customer Due Diligence and Customer Identification Programs

The guidance makes clear that financial institutions should tailor the customer risk profiles of and CDD for their hemp clients to reflect the unique aspects of the hemp industry. For example, when performing CDD on a hemp customer, a financial institution should verify the customer is complying with the licensing requirements of the jurisdiction in which it is operating. The guidance states that an institution can "confirm [a] hemp grower's compliance … by either obtaining (1) a written attestation by the hemp grower that they are validly licensed, or (2) a copy of such license." Whether additional information is required "will depend on the financial institution's assessment of the level of risk posed by" the customer. The guidance provides the following examples of additional information a financial institution could seek: (1) crop inspection or testing reports; (2) license renewals; (3) updated attestations from the hemp customer; or (4) the customer's correspondence with the applicable state, tribal, or federal licensing authority.

Suspicious Activity Reporting

The guidance states that "financial institutions are not required to file an SAR on customers solely because they are engaged in the growth or cultivation of hemp in accordance with applicable laws and regulations." Financial institutions still must utilize their customer risk profiles and ongoing CDD to determine whether their hemp customers are engaged in "suspicious activity" that warrants a SAR. The guidance lists examples of such suspicious activity:

1. "A customer appears to be engaged in hemp production in a state or jurisdiction in which hemp production remains illegal."
2. "A customer appears to be using a state-licensed hemp business as a front or pretext to launder money derived from other criminal activity or derived from marijuana-related activity that may not be permitted under applicable law."

3. "A customer engaged in hemp production seeks to conceal or disguise involvement in marijuana-related business activity."
4. "The customer is unable or unwilling to certify or provide sufficient information to demonstrate that it is duly licensed and operating consistent with applicable law, or the financial institution becomes aware that the customer continues to operate (i) after a license revocation, or (ii) inconsistently with applicable law."

The guidance also speaks to a financial institution's SAR obligations with respect to a customer involved with both federally legal hemp and federally illegal marijuana. If the customer's hemp and marijuana proceeds are commingled in the same account, then the institution must file a marijuana-specific SAR based on "**FinCEN's 2014 Marijuana Guidance.**" If the hemp and marijuana proceeds are kept in separate accounts or are separately identifiable, "then the 2014 Marijuana Guidance, including specific SAR filing, applies only to the marijuana-related part of the business."
Many financial institutions have remained hesitant to provide services to the hemp industry, due in large part to the perceived burden of incorporating hemp-specific procedures into their AML Compliance Programs. The guidance may alleviate that burden to an extent by providing additional clarity regarding an institution's BSA/AML obligations when banking hemp.
FinCEN Fraud Alert
https://www.fincen.gov/sites/default/files/advisory/2020-07-07/Advisory_%20Imposter_and_Money_Mule_COVID_19_508_FINAL.pdf

Credit union members and others have become more vulnerable to scams during the COVID-19 pandemic. The FinCEN advisory provides detailed instructions for financial institutions to report COVID-19-related imposter scams and money mule schemes in suspicious activity reports.

Imposter Scams. Imposter scams involve criminals that seek payments or personal information via email, robocalls, or text messages while impersonating a government agency or charity. FinCEN cited scams in which criminals pose as representatives of the Internal Revenue Service, the Centers for Disease Control and Prevention, the World Health Organization, other non-profit groups, or academic institutions. FinCEN warned that imposters may attempt to obtain personal details by claiming that the information is needed to process a COVID-19-related stimulus payment, or as part of contact tracing efforts.

Money Mule Schemes. Money mules are "person[s] who transfer illegally acquired money on behalf of or at the direction of another." FinCEN identified schemes that involve criminals recruiting money mules by posing as "good Samaritans," romantic interests, or employers with work-from-home opportunities.
FinCEN advised financial institutions to identify and report these fraudulent activities.

PPP Update

President Trump has signed into law the bill passed by the U.S. Congress that extends the application deadline for the Paycheck Protection Program ("PPP") from June 30, 2020 to August 8, 2020.

As a reminder, the PPP has undergone significant changes with respect to loan forgiveness. Unfortunately, the SBA has not defined the term "owner-employee", nor has the SBA provided any guidance to help participants determine if the term "owner-employee" is intended to extend to any employee who owns *any* portion, even a nominal amount, of the equity interests of the PPP borrower. The instructions to the updated loan forgiveness application direct the PPP borrower to exclude any "owner-employees" from the list of employees identified on the Schedule A Worksheet, but no rubric is provided to guide a

borrower in making the distinction between an "owner-employee" and "employee". This lack of clarity as to which employee should be deemed an "owner-employee" is problematic for PPP borrowers seeking to maximize forgiveness because the per *non-owner* employee cap for the 24-week forgiveness period is $46,154 whereas the per owner-employee cap is over 50% lower.

Lawmakers are already in discussions for Phase 4 about how to revise the PPP to make it more accessible to smaller companies and those most in need, such as businesses in the travel and restaurant industries. It is expected that Congress will take up these new measures after their break through July 20th but before they adjourn in August.

Power of Attorney Update
An overview of state requirements may be found at **Presentation PowerPoint Slides**.