Virginia Financial Institutions

AT A GLANCE: VIRGINIA
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IN THIS ISSUE:

- Virginia General Assembly Concludes 2013 Session – Highlights and Considerations for Financial Institutions
- Cyber Fraud: Lawsuit by Local Community Bank Demonstrates Need for Vigilance
- CFPB Takes Enforcement Action Against Mortgage Insurers for Alleged Improper Payments to Mortgage Lenders
- CFPB Amends Regulation E To Eliminate ATM Notice Requirement

VIRGINIA GENERAL ASSEMBLY CONCLUDES 2013 SESSION – HIGHLIGHTS AND CONSIDERATIONS FOR FINANCIAL INSTITUTIONS

Joseph ("Jay") E. Spruill, III
Counsel– Richmond, VA
Financial Industry Group
jspruill@reedsmith.com

Small Estates/Checks (H.B. 1594)

This legislation permits a designated successor on a small non-probate estate (i.e., assets totaling no more than $50,000) to treat a check payable to the decedent as a "small asset," and to collect payment on such check. Financial institutions, however, will need to consider § 8.4–405 of Virginia's Uniform Commercial Code ("UCC") in responding to requests by designated successors who present checks under this new authority. That section indicates that if a bank has knowledge of a customer's death, and has a reasonable opportunity to act on it, the bank's authority to accept, pay, collect, or account for a check in the name of such deceased customer is revoked. The commentary to the section states that the rule applies to "customers" who own items, as well as "customers" who draw them. Thus, the UCC rule appears to apply to situations where the decedent is the payee on the check.

Non-Waiver Provisions (H.B. 1573 and S.B. 917)

This legislation will make it more difficult for a customer of a financial institution to argue that a temporary adjustment to a term in a loan agreement for the customer's benefit, such as through a workout arrangement, effects a permanent waiver of such term when a non-waiver provision is in the agreement. The legislation provides that if a written contract to which a financial institution is a party contains a provision that no amendment or waiver of the terms of such contract shall be effective unless in writing, then any amendment or waiver of a term by conduct, course of practice or dealing, or otherwise, shall not apply to future rights and obligations under the contract unless in writing. Under existing Virginia law, short-term payment adjustments benefitting a customer may result in a permanent waiver of a contract term, even though a non-waiver provision is in such contract. In this regard, rights under a non-waiver clause are themselves subject to waiver, and a "course of dealing" can cause a waiver of the non-waiver provision. The legislation is intended to ensure that financial institutions have the ability to offer one-time or temporary modifications to payment terms for customers' benefit without fear that such accommodations will be used against them. Financial institutions should review their customer agreements to ensure that the appropriate non-waiver language is included, such that they get the benefit of this legislation.

Joint Accounts (H.B. 1610)

This legislation eliminates the requirement that depository institutions offering joint accounts give customers the option to establish a joint account with survivorship or without survivorship. A depository institution may now choose to offer all of its joint accounts with the same survivorship feature (e.g., with survivorship). The legislation provides the opportunity for operational efficiencies for financial institutions offering joint accounts.

Date of Account Opening on Check (H.B. 2157 and S.B. 1249)

This legislation repeals the requirement that checks and similar instruments drawn on financial institutions located in Virginia display the month and year in which the account was opened.

Definition of "Mortgage Loan Originator" (H.B. 1803 and S.B. 994)

This legislation expands the definition of "mortgage loan originator" consistent with federal regulations under the Secure and Fair Enforcement for Mortgage Licensing Act. The new definition of "mortgage loan originator" includes an individual who represents to the public through advertising or other means of communicating or providing information, that he or she can take an application for or offer or negotiate the terms of a residential mortgage loan. The advertising or communication may be through the use of business cards, stationery, brochures, signs, rate lists, or other promotional items.

NOTE: All bills described above take effect July 1, 2013.

CYBER FRAUD: LAWSUIT BY LOCAL COMMUNITY BANK DEMONSTRATES NEED FOR VIGILANCE

A recent lawsuit filed by Charlotte-based Park Sterling Bank against a corporate customer highlights the importance of financial institutions having "commercially reasonable" security procedures in place to avoid losses in connection with cyber-attacks on customer accounts. In the suit, Park Sterling seeks $336,000 from a law firm that was duped into giving its user name and password to fraudsters who were then able to hijack the firm's account and transfer funds from the account through JPMorgan Chase to an account in Moscow. Park Sterling initially reimbursed the law firm for the loss, but is now suing to recover the funds.

The court will analyze the case under the funds transfer provisions of the Uniform Commercial Code ("UCC") to determine whether the bank's security procedures were "commercially reasonable" and whether the bank acted in "good faith" in allowing the transfers to be made.

While some court decisions have gone against banks on these issues, a recent case from Missouri was decided in the bank's favor where the security procedure recommended by the bank included "dual control" (i.e., the approval of two employees, using separate user IDs and passwords, required to initiate payment orders). *See Choice Escrow and Land Title, LLC v. Bancorp Bank* (W.D. Mo., Case No. 10-03531-CV-S-JTM). The corporate customer in the Bancorp Bank case chose not to use dual control for operational and personnel reasons, and signed a waiver acknowledging the risks inherent in foregoing such dual control. Under

the UCC, a security procedure will be deemed commercially reasonable if: (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in the name and accepted by the bank in compliance with the security procedure chosen by the customer. In this case, the court held these conditions had been satisfied.

CFPB TAKES ENFORCEMENT ACTION AGAINST MORTGAGE INSURERS FOR ALLEGED IMPROPER PAYMENTS TO MORTGAGE LENDERS

On April 4, the Consumer Financial Protection Bureau (“CFPB”) announced settlements with four mortgage insurers to end what it called “improper kickbacks” paid by such insurers to mortgage lenders in exchange for business. The settlement orders require the insurers to pay $15 million in penalties to the CFPB. The four companies are Genworth Mortgage Insurance Corporation, United Guaranty Corporation, Radian Guaranty Inc., and Mortgage Guaranty Insurance Corporation. The CFPB alleges that the four mortgage insurance companies violated section 8 of the Real Estate Settlement Procedures Act (“RESPA”) by engaging in widespread kickback arrangements with lenders across the country. Under these arrangements, as alleged by the CFPB, the mortgage insurers would purchase reinsurance from captive mortgage reinsurance affiliates of the lenders – reinsurance that was worthless – simply to reward the lenders for their referrals of mortgage insurance business to the insurers. The CFPB stated that the mortgage insurers’ payments represented illegal kickbacks that distort markets and inflate the cost of homeownership. It is anticipated that the CFPB will pursue the lenders involved in these arrangements next. The CFPB’s action reflects the recent heightened regulatory scrutiny of referral activities in connection with mortgage loans.

CFPB AMENDS REGULATION E TO ELIMINATE ATM NOTICE REQUIREMENT

On March 26, the Consumer Financial Protection Bureau (“CFPB”) released a final rule removing the requirement under Regulation E that a fee notice be posted on or at ATMs. Prior to December 2012, the Electronic Fund Transfer Act required ATM operators to include fee notices on machines themselves, in addition to providing specific fee disclosures on the screen of the ATM or on paper issued from the ATM. In response to much nuisance litigation concerning this on-machine notice, the Congress passed, and the president signed, legislation eliminating this requirement. The CFPB rule states that ATM operators will now only have to provide the on-screen or paper disclosure that includes the amount of the fee to be charged, and is provided before the consumer is committed to the transaction.

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VIRGINIA AREA OFFICES

Richmond
Riverfront Plaza-West Tower
901 East Byrd Street
Suite 1700
Richmond, VA 23219-4068
Phone: +1 804 344 3400
Fax: +1 804 344 3410

Falls Church
3110 Fairview Park Drive
Suite 1400
Falls Church, VA 22042
Phone: +1 703 641 4200
Fax: +1 703 641 4340

Washington D.C.
1301 K Street, N.W.
Suite 1100, East Tower
Washington, DC 20005-3317
Phone: +1 202 414 9200
Fax: +1 202 414 9299

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