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Quarterly Report

Mississippi Regulatory Compliance Group

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Deposit Accounts, NSF/OD Fees and UDAP

As everyone knows, the federal financial institution regulators have the authority to enforce Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices, for the institutions they supervise. When examiners cite UDAP violations in exams, they generally require the institution to perform a lookback to identify all customers harmed by the unfair or deceptive practice and to make full restitution. Lookbacks can extend as far back as 5 years prior to the exam. In this article, we will review several deposit account and OD/NSF fee practices that have raised UDAP concerns recently.

First, it may be helpful to review the basics. The legal standard for unfairness is different from the standard for deception, but depending on the facts, an act or practice may be unfair or deceptive, or both. And practices which violate other regulatory requirements, such as Reg. E for example, may also be found to be unfair or deceptive, or both, depending on the situation. Section 5 of the FTC Act applies to consumers and businesses, so UDAP is not just a consumer issue although it is usually examined for in compliance examinations.

For an act or practice to be found to be unfair, there are three basic elements:

- The act or practice must cause or be likely to cause substantial injury.
  Substantial injury usually involves monetary harm but can also include reputational harm. An act or practice that causes even a small amount of harm to a large number of people may be deemed to cause substantial injury.
- Customers must not be reasonably able to avoid the injury.
  An act or practice is not considered unfair if consumers may reasonably avoid injury, but customers cannot reasonably avoid injury from an act or practice if it interferes with their ability to effectively make decisions or to take action to avoid injury. This can occur, for example, when customers don't have all material information needed to make an informed decision.
- The injury must not be outweighed by countervailing benefits to customers or to competition. To be unfair, the act or practice must be harmful in its net effects; the harm must not be outweighed by offsetting customer or competitive benefits.

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A separate three-part test is used to determine whether an act or practice is deceptive.

- There must be a representation, omission, or practice that misleads or is likely to mislead the customer.
  An act or practice may be found to be deceptive if there is a representation, omission, or practice that misleads or is likely to mislead a customer. For example, it could be an incorrect statement in a customer agreement or disclosure or the omission of relevant information.
- The act or practice must be considered from the perspective of the reasonable customer.
  The customer's interpretation of or reaction to the representation, omission, or practice must be reasonable under the circumstances, and what is reasonable under the circumstances may depend in part on the target audience, such as the elderly or the financially unsophisticated, and how a member of that audience might interpret the agreement or marketing material.
- The representation, omission, or practice must be material.
  A representation, omission, or practice is material if it is likely to affect a customer's decision to obtain a product or service. Pretty much any information about fees, costs, benefits or restrictions on the use or availability of a product or service is material.

It is not always easy to apply these standards to specific products or practices. Frequently, identifying UDAP issues involves an exercise of judgment, so it is helpful to be mindful of products or practices that the regulators have previously identified as raising UDAP concerns. Here are a few that the regulators have raised more recently.

NSF Fees and Representment of Items. FDIC examiners have cited UDAP violations in connection with multiple NSF fees being charged when an NSF item, check or ACH, is returned unpaid and then represented and returned again or represented and paid in the overdraft. Examiners have said that unless the deposit agreement or disclosures explain fully that the same item can be presented and returned multiple times and that a fee may be charged each time the same item is presented, then a reasonable customer would believe that this is a single item or transaction and would not understand that multiple fees for the same item may result. Truth in Savings disclosures and fee schedules often describe NSF and OD fees as a charge "per item" and the failure to provide a fuller explanation is a material omission and deceptive. Lookbacks and restitution have been required. There has also been class action litigation filed against a number of banks and credit unions across the country, a number of which have resulted in multi-million-dollar settlements.

In addition, there have been some reports from other areas of the country that some banks have been cited for UDAP violations for the failure to provide sufficient notice of the negative balance when the first NSF fee is assessed so that the customer could deposit additional funds and avoid a second NSF fee. The allegation is that this is an unfair practice.

ODP Programs and Changing from Static to Dynamic Limits. Many institutions offer automated overdraft protection programs where small overdrafts for qualifying accounts are routinely paid up to a set amount. The limit is typically a fixed amount, say $500, but the amount may vary based on customer or account type, and this limit is usually communicated to the customer in advance. Some institutions are changing to dynamic limits where the OD limit may change periodically, and as frequently as daily, based on an algorithm or set of rules that takes a number of variables into account to calculate the limit, such as age of the account, average balance, overdraft history, deposit frequency, and other relationships the customer may have with the institution. These variables may be adjusted by the institution from time to time based on risk tolerance, market conditions or changes in policy.

Examiners have cited some institutions for deceptive practices in connection with the conversion from a static to dynamic limit. The failure to disclose key details such as the replacement of a fixed with a variable OD limit that may change as frequently as daily, the use of a new OD limit that may be higher or lower than the fixed amount the customer was accustomed to, the possibility that the limit could fall to zero resulting in NSF items being returned unpaid and incurring NSF fees were all material omissions. The findings were that customers did not have sufficient information to make an informed decision about the new program or how to avoid fees.

ODP Programs, Reg. E Opt-ins, and OD Fees on Force Pay Debit Card Transactions. Some institutions do not offer ODP programs and have a policy of declining to authorize ATM or point of sale (POS) debit card transactions when the account has insufficient funds (sometimes referred to as a "no pay" bank). Institutions that do offer some form of ODP usually have requirements for eligibility, such as a waiting period for new accounts, regular deposits, etc., and they may allow customers to opt-in or out of participation in the ODP program. There may also be times when ODP is not available such as when the ODP limit has been reached or when a fresh start repayment loan is outstanding.

In either scenario, there may be times when the institution is required to pay an ATM or POS transaction even though the customer's account has insufficient funds. These 'force pay' situations might occur, for example, where the customer's account had sufficient funds when the debit card transaction was authorized but the balance was insufficient when the transaction actually posted. Or, there could be an authorization for a pre-set amount, such as for a hotel stay or a purchase at a gas pump, but the actual amount of the transaction is higher. There may also be times when the transaction is below the floor limit for authorizations. Several different practices relating to these force pay debit card transactions have been identified as raising UDAP concerns.

If a "no pay" bank solicits and obtains a customer's Reg. E opt-in using the Reg. E model form, and then assesses an OD fee for a force pay ATM or POS transaction, there may be a UDAP violation. When the institution only pays ATM or POS transactions in the overdraft in force pay situations, the use of the model form of Reg. E opt-in is considered deceptive because a reasonable consumer would be misled into thinking the institution would generally pay their overdrafts on ATM or POS transactions. Also, the model form does not explain that force pay transactions will be paid regardless of whether the consumer opts in. So, in these situations, the consumer is receiving no benefit and is only opting in to a fee.

For an institution with an ODP program, ATM and POS transactions may result in a UDAP violation if an OD fee is imposed when consumers do not have access to the program. This could occur, for example, when a consumer opens a new account and provides a Reg. E opt-in, but there is a waiting period before ODP becomes available. Or, a consumer may have initially opted in for coverage of ATM and POS transactions, but ODP is not available later for some reason, such as when the consumer opts out of the ODP program or ODP has been temporarily suspended or terminated. According to examiners, when OD fees are assessed in these instances, consumers are paying for an overdraft program but receiving no benefit. Imposing an OD fee on force pay transactions in these instances may result in violations of Reg. E and UDAP.

Debit Card Suspension and Reactivation. UDAP and Reg. E violations have been found in connection with an institution's practices concerning debit card suspension and reactivation. Some 'no pay' institutions suspend use of a debit card following force pay transactions, and some institutions with ODP programs may suspend use of a debit card when the OD limit is reached. Some institutions of these institutions require the customer to request reactivation of the card and have used the reactivation as an opportunity to ask the customer to reconsider their Reg. E opt-in decision. UDAP and Reg. E violations have been found where the institution failed to clearly disclose the terms and conditions of the overdraft service, such as the fact that an overdraft fee would be charged for paying force pay transactions that result in an overdraft if the consumer opted-in while those same transactions would not result if a OD fee if the customer had not opted in. In another scenario, the institution imposed different terms, conditions, and features on customers' accounts who had not opted-in compared to those offered on consumers' accounts who did opt-in (i.e., suspending debit cards of customers who did not opt-in, while not suspending the debit card access to accounts of customers who opted-in). In other instances, Reg. DD and UDAP violations have been found where institutions did not provide clear information about their debit card suspension and reactivation practices.

OD Protection Through Linked Accounts. Many institutions offer alternative forms of overdraft protection through a linked savings account or linked line of credit. When the checking account has a negative balance, funds are automatically transferred from the linked account to the checking account. Sometimes the transfers are made in pre-set dollar increments and some institutions charge a fee for each transfer which is typically much lower than an NSF or OD fee. UDAP violations have occurred when customer agreements and disclosures do not adequately explain how the transfer works or its limitations and where system settings differ from what has been disclosed to the customer. For example, some customer agreements state or imply that transfers will occur only when the linked account has sufficient funds available to cover the overdraft balance in the checking account. Examiners have found UDAP violations in situations where transfers can still occur even though the amount available to be transferred is not enough to fully cover the overdraft balance. The customer will still incur an NSF or OD fee on the checking account and, possibly, a fee for the transfer. Examiners have cited violations of Reg. DD and UDAP when the documents failed to disclose that transfers may not always occur in fixed increments or that transfers may still occur even when the funds available in the linked account is not sufficient to cover the full overdraft balance in the checking account, and that NSF and OD fees may still be incurred.

We plan to discuss these issues at the quarterly meeting along with some thoughts on ways to mitigate UDAP risk.

<Cliff Harrison>

CHANGES TO DEPOSIT INSURANCE RULES FOR TRUST ACCOUNTS AND MORTGAGE SERVICING ACCOUNTS

The FDIC recently issued a final rule effective April 1, 2024 which amends existing regulations regarding insurance for trust accounts and mortgage servicing accounts (the “Final Rule”). The Final Rule simplifies the current requirements for revocable and irrevocable trusts and changes the rules for determining coverage for mortgage servicing account deposits.

Currently, there are different deposit insurance rules applicable to revocable trust accounts and irrevocable trusts. The Final Rule does away with the differences and provides a single rule that will apply to both. Trust deposits will be insured up to $250,000 for each of the trust beneficiaries up to five. For trust accounts, the maximum deposit coverage will be $1,250,000 per owner, per insured depository institution.

Currently, coverage for mortgage trust accounts is based on each mortgagor’s payments of principal and interested into the account, up to $250,000 per mortgagor. Additionally, there are currently potential differences in the level of deposit coverage when servicers advance their own funds to lenders on behalf of borrowers as opposed to deposits made directly by a mortgagor. The Final Rule provides that deposits made on behalf of mortgagors will be insured up to $250,000 per mortgagor in the same manner as payments made directly from mortgagors.

<Memrie Fortenberry>

MEDICAL MARIJUANA COMES TO MISSISSIPPI

On February 2, 2022, Governor Reeves signed SB 2095, the Mississippi Medical Cannabis Act, adding Mississippi to the list of 37 states and the District of Columbia which have authorized the medical use of cannabis products, including our nearby states of AL, FL, LA and AR. Eighteen states and the District of Columbia have legalized non-medical, recreational, use of cannabis.

The 445-page bill was passed by overwhelming margins in the MS House and Senate. It sets up a comprehensive regulatory scheme to allow cannabis to be used to treat “debilitating medical conditions.” The new law follows the Mississippi Supreme Court’s decision in May of 2021 that struck down the state’s previous medical marijuana law and, in the process, invalidated Mississippi’s initiative and referendum process.

The Mississippi Medical Cannabis Act, effective immediately, governs all facets of the cultivation, disposal, processing, research, testing, transportation, and use of cannabis in Mississippi. The legislation designates the Mississippi Department of Health (MDOH) as the lead agency, to have “ultimate authority for oversight of the administration” of the program and is charged to coordinate its activities with the Mississippi Department of Revenue (MDOR).

The Act defines debilitating medical conditions eligible for treatment with cannabis and authorizes its use based on a diagnosis and certification by a qualified practitioner (physician, nurse practitioner, physician assistant or optometrist) and issuance of a registry identification card by MDOH. Cultivators, processors, dispensaries, transportation companies, disposal companies, testing facilities and research facilities all have to be licensed by MDOH. MDOH can begin accepting applications for patient ID cards 120 days after passage and begin issuing licenses 150 days after passage.

What does passage of the Act mean for financial institutions? Well, it seems that is still being sorted out.

Federal Law. At the federal level, cannabis remains classified as a Schedule I substance under the Federal Controlled Substances Act (CSA). Schedule I substances are considered to have a high potential for abuse or dependency and no accepted medical use. Except as specifically authorized by the CSA, it is a federal offense for anyone knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. State laws allowing for medical or recreational use of cannabis do not override federal law.

While cannabis remains illegal at the federal level, enforcement policy has varied. In 2013, the U.S. Dept. of Justice explained its enforcement policy in a memo to all U.S. Attorneys known as the "Cole Memo" to provide guidance regarding marijuana related crimes. The Cole Memo identified eight enforcement areas that federal prosecutors should prioritize with respect to marijuana related offenses including, among other things, preventing the distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; and preventing state authorized activity from being used as a cover for drug trafficking or other illegal activity. The federal enforcement focus, then, would be on the stated priorities including crimes such as money laundering, drug trafficking, and the like. For those states that enacted laws legalizing marijuana in some form, DOJ said it expects those states to establish strict regulatory schemes that protect the eight federal interests identified in the guidance. For the states that did so, it would generally defer to the states to enforce those laws unless one or more of the stated enforcement priorities became implicated.

In 2018, however, U.S. Attorney General Jeff Sessions issued a memorandum announcing, "a return to the rule of law" and rescinding the Cole Memo. AG Sessions directed U.S. Attorneys to "weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community." DOJ has been silent since.

While DOJ could enforce the CSA with respect cannabis, its ability to prosecute CSA offenses related to medical marijuana may be temporarily restricted. Each fiscal year since 2015, Congress has included in its annual appropriations bills language referred to as the Rohrabacher-Blumenauer Amendment prohibiting the DOJ from using appropriated funds to prevent any state from implementing its own laws to authorize the use, distribution, possession, or cultivation of medical marijuana. This provision is limited to state medical marijuana programs, however, and does not address recreational marijuana. Congress has continued to attach this amendment, also known as the "Rohrabacher-Farr Amendment," to its annual appropriations bills. The most recent amendment expires September 30, 2022, unless further extended.

The Rohrabacher-Farr Amendment may not be a complete bar to prosecution for violations of the CSA. The U.S. Court of Appeals for the First Circuit recently held that the Rohrabacher-Farr Amendment could not be used as a defense to prosecution of persons who were using licensed medical marijuana operations as a facade for a black-market marijuana operation growing and selling marijuana to unauthorized users. (See U.S. v. Bilodeau, 24 F.4th 705 (1st Cir. 2022), And, a Ninth Circuit decision notes that while Congress currently restricts the government from spending appropriated funds to prosecute certain crimes, that could change, and if it did, the government could still prosecute offenses that occurred while it lacked funding to do so, for up to 5 years after the offenses occurred. See U.S. v McIntosh, 833 F.3d 1163 (9th Cir. 2016). While it seems unlikely that these decisions will have a significant effect on persons and businesses who operate in full compliance with state medical marijuana laws, they do confirm that there remains some uncertainty surrounding enforcement of federal law regarding marijuana.

Various bills have been introduced in Congress at different times to solve this issue where financial institutions are concerned. The U.S. House of Representatives recently passed, for the sixth time and with bipartisan support, the Secure and Fair Enforcement (SAFE) Banking Act providing a safe harbor for financial institutions that serve cannabis-related businesses in states that have legalized it for medical or recreational use. The House did so by attaching it as an amendment to another bill, the America COMPETES Act, which was previously passed by the Senate. That bill is now in conference, and it remains to be seen whether the Conference Committee will retain the amendment. A stand-alone version of the SAFE Banking Act passed by the House last year remains in the Senate Banking Committee.

BSA Expectations Regarding Marijuana-Related Businesses. All banks and credit unions and certain other financial institutions are subject to the Bank Secrecy Act (BSA) which imposes criminal penalties on anyone or any financial institution that knowingly assists in the laundering of money, which includes processing the proceeds of an illegal transaction. Under the BSA, institutions must also file suspicious activity reports with FinCEN reporting suspected illegal activity which would include any transaction associated with a marijuana business since federal law still makes it illegal to possess or distribute marijuana. SARs must be filed even though the business is operating legitimately under state law.

In 2014, FinCEN issued guidance titled “BSA Expectations Regarding Marijuana-Related Businesses” (the “Guidance”). The Guidance was issued alongside the now rescinded Cole Memo; however, there has been no indication that the FFIEC does not intend for banks to continue to follow the Guidance. In fact, FinCEN publishes a “Marijuana Banking Update” on a periodic basis- the most of recent of which was published in March 2022 for SARs filed as of September 30, 2021. In the update, FinCEN referred to its 2014 Guidance and specifically provided that the Guidance regarding SARs is still in place. Additionally, there is a joint statement from December 3, 2019, issued by the Federal Reserve, the FDIC, OCC and FinCEN providing guidance for banks following the legalization of hemp. In that joint statement, the Agencies reiterated that the 2014 Guidance still applies to the provision of banking services to marijuana-related businesses. In early 2021, the National Credit Union Administration published a cease and desist order against a federal credit union in Michigan for failure to properly file marijuana related SARs, CTRs, and inadequate monitoring. The credit union agreed to cease its marijuana-related business banking.

The Guidance provides that it is the business decision of an institution, after assessing the risk, whether to do business with a marijuana-related business. It also provides factors to consider when conducting its due diligence on a marijuana-related businesses such as: verification with the appropriate state authorities that the marijuana-related business is properly licensed and registered; reviewing the license application and related documentation submitted in order to obtain a state license; requesting and reviewing available information from state licensing and enforcement authorities about the business and any related party; development of an understanding of the normal and expected activity for the marijuana-related business, including the types of products to be sold and the types of customers to be served, including whether used for recreational or medical purposes; monitoring of information from publicly available sources for adverse information related to the business and any related parties; conducting ongoing monitoring for suspicious activity; and updating customer due diligence information on a periodic basis commensurate with the risk. The Guidance also advised institutions to consider the eight enforcement areas listed in the Cole Memo (and discussed above) prior to entering into a relationship with a marijuana-related business.

SARs must be filed on financial activity conducted by a marijuana-related business regardless of whether the state in which the activity is conducted has legalized marijuana-related activity, because federal law still prohibits the distribution and sale of marijuana and, thus, such related activity would be considered to be funds derived from an illegal source. There are three types of SARs that may be filed for these purposes: (1) "Marijuana- Limited" SARs; (2) "Marijuana -Priority" SARs; and (3) "Marijuana-Termination" SARs. "Marijuana-Limited" SARs are to be filed when a transaction involves a marijuana-related business that the institution reasonably believes, based on its due diligence, does not violate state law. An institution should file continuing SARs on Marijuana- Limited activity, and, if suspicious activity is detected during ongoing monitoring, the institution will file a "Marijuana -Priority" SAR. A "Marijuana -Priority" SAR is filed when, according to its due diligence, the institution reasonably believes that the activity does violate state law. The Guidance also sets forth some red flags to aid institutions in determining when to file a "Marijuana -Priority" as opposed to a "Marijuana-Limited" SAR. A "Marijuana-Termination" SAR is to be filed when the institution determines that it is necessary to terminate a relationship with a marijuana-related business.

Financial institutions are also required to file CTRs on marijuana-related businesses in the same manner that is required for a transaction conducted by any other type of business. Marijuana-related businesses may not be exempt from CTR reporting requirements.

In addition to the information found in the Guidance, additional considerations should be made when deciding whether to do business with a marijuana-related business. First, consider that there is no specific definition of what constitutes a marijuana-related business. A financial institution will need to consider how far down the supply chain it should or is willing to go. There are also many investors hoping to invest in some aspect of the medical marijuana market. How is the investor's business organized? Could this be an extension of a marijuana-related business? An institution will be required to obtain CIP and beneficial owner information as currently required for other business types. Prior to offering services to a marijuana-related business, the bank will need to have board approved policies and procedures in place including due diligence, risk ratings and ongoing monitoring.

Our intent is for this article to serve as an overview and provide some initial considerations for weighing the risks and responsibilities connected with these banking relationships. We plans to discuss this issue at the quarterly meeting, and, as always, will continue to keep you informed on changes in the law and regulations when they occur.

<Memrie Fortenberry and Cliff Harrison>

PERMISSIBLE ACTIVITIES FOR BANKS AT NON-BRANCH FACILITIES

Many banks reach customers through non-branch facilities such as loan production offices ("LPOs"), deposit production offices ("DPOs"), and remote service units ("RSUs"), which includes ATMs and interactive teller machines, or ITMs.

For both national banks and many state banks, regulatory authority for non-branch facilities is found in the National Bank Act and its implementing regulations. These rules and regulations obviously apply to national banks, but they may also apply to state banks under various state "wild card" or "parity" statutes which permit state banks to engage in activities that are permissible for national banks.

Typically, a bank must transact business only in the place specified in its charter and in any branches established in accordance with applicable law and regulations. Under national bank regulations, a "branch" is defined as a place of business established by the bank where "deposits are received, or checks paid, or money lent." Under the same regulations, "money" is deemed to be "lent" only at the place, if any, where the borrower in person receives loan proceeds directly from bank funds either: (1) from the lending bank or (2) at a facility that is established by the lending bank.

The regulations allow a borrower to receive loan proceeds directly from bank funds in person at a place that is not the bank's main office and is not licensed as a branch without violating the law, provided that a third party is used to deliver the funds and the place is not established by the lending bank. In this scenario, a third party might be a messenger service or someone who customarily delivers loan proceeds directly from bank funds under accepted industry practice, such as an attorney or escrow agent at a real estate closing.

It is important for banks to understand what is permissible and what is prohibited at non-branch facilities because failure to follow the rules could result in safety and soundness violations and, possibly, civil monetary penalties.

Under OCC interpretations, a bank may conduct the following activities at LPOs: soliciting loan customers, marketing loan products, assisting persons in completing application forms and related documents to obtain a loan, originating and approving loans, making credit decisions regarding a loan application, and offering other lending-related services such as loan information and applications at a loan production office, provided that "money" is not deemed to be "lent" at that site within the meaning of the regulation and the site does not accept deposits or pay withdrawals.

A bank may conduct the following activities at DPOs: soliciting deposits, providing information about deposit products, and assisting persons in completing application forms and related documents to open a deposit account. A DPO is not be considered a branch as so long as it does not receive deposits, pay withdrawals, or make loans.

National bank regulations define a "remote service unit" as an automated facility, operated by a customer of a bank, that conducts banking functions, such as receiving deposits, paying withdrawals, or lending money. While the terms “automated teller machine” or “ATM” are not defined, it is well established that ATMs are not considered branches under OCC guidance. Several years ago, banks began establishing ITMs, which are ATMs with a video terminal and are also known as remote video tellers. ITMs provide similar services to customers as ATMs such as the ability to check balances, process withdrawals, accept deposits, but with the added ability to interact with a teller located in another location. Interacting with a live person allows the customer to perform a number of transactions not provided by a traditional ATM, including cashing checks and opening new accounts. Despite the enhanced services provided at ITMs, the OCC has issued guidance stating that ITMs are RSUs, and therefore not branches.

OCC regulations allow banks to operate a combination LPO-DPO and an RSU from the same location without being deemed a “branch” because individually, an LPO, a DPO or an RSU is not considered a branch. However, an RSU at such a combined location must be primarily operated by the customer with at most delimited assistance from bank personnel.

While states with wild card statutes generally permit state chartered banks to engage in activities permissible for national banks, they may also impose laws to ensure that banks under their supervision maintain practices consistent with safety and soundness concerns. For example, Louisiana law lists permissible and prohibited activities that are similar to but not exactly the same as national bank regulations. Prior to operating a non-branch facility, we recommend you review your state’s banking regulations to determine what activities are permissible at that location.

For example, some states require LPOs and DPOs to have different signage to indicate that the location is not a branch. Also, an LPO or DPO is not required to post the FDIC or Reg. CC notices, because those requirements only apply to branches. But, an LPO or DPO must have the Equal Housing Lender poster, which is required wherever deposits are received or loans are made.

Generally, regulatory approval is required before operating an LPO or DPO and the application process is a relatively simple and straightforward process. National banks must file an application with the OCC, while state banks must file an application with their state banking authority. Typically, the application is in the form of a letter to the regulator. State banks opening LPOs located out of state must file the application with their home state banking authority and may also need to register to do business with the secretary of state in the state where the office is to be located.

<Doug Weissinger>

BANKING IS RISKY BUSINESS WITHOUT RISK ASSESSMENTS!

In the compliance world there are all types of risk assessments but three of the most significant are: compliance management system (overall compliance risk assessment), fair lending, and BSA (which is examined for under safety and soundness, but pertinent to banking compliance). In this and future newsletters and meetings, we plan to discuss all three of these. Since the compliance management system (CMS) includes an overview of fair lending, let’s start with that one.

First, what is CMS? A compliance management system is how a bank:

- Learns about its compliance responsibilities;
- Communicates these responsibilities to employees;
- Ensures that legal requirements and internal policies are incorporated into business processes;
- Reviews operations to ensure that responsibilities are carried out and legal requirements are met; and
- Takes corrective action and updates tools, systems, and materials as necessary.

An effective CMS is comprised of board and management oversight and a compliance program that includes policies and procedures, training, monitoring and audit, and a process for monitoring and responding to consumer complaints. Implemented properly and working together, these components provide a strong compliance program. Working "willy-nilly" will lead to potential harm to consumers and possible enforcement action by the regulators!

We plan to discuss this in more detail at the quarterly meeting, but here are a few "teasers" to get you ready.

Compliance touches almost every area of a financial institution, and management and the board of directors set the tone for any compliance program. To provide for the administration of the compliance program, the board and management should designate a compliance officer. The key to a successful compliance officer is support from management and authority granted by management to cross departmental lines, have access to all areas of the bank's operations, and effect corrective action. The compliance officer should be provided with the training necessary to know compliance laws and regulations; have a good understanding of the bank's products, services, and practices; and be provided the necessary resources in staffing and tools and continuing education.

A financial institution should also have a formal, written compliance program which includes detailed and effective policies and procedures; a robust training program; regular monitoring and audits; and a consumer complaint response program. Compliance programs will vary based on the and complexity of the institution's activity including asset size, number of branches, organization, product and service complexity, staff expertise and training, type and extent of third-party relationships, and interstate or intrastate banking. A bank's compliance program should be detailed enough for other staff as well as examiners to be able to follow the program.

Ready to fill in the details now? Be ready for a discussion at the quarterly meeting.

<Patsy Parkin>

NEW COMPUTER SECURITY BREACH NOTIFICATION REQUIREMENTS

In November 2021, the FDIC, Federal Reserve and the OCC issued a joint final rule related to data security breach incidents at banks (the "Final Rule") to provide the Agencies with early awareness of data security threats and incidents. Banks are required to provide their primary federal regulatory agency with notice of any computer-security incident as soon as possible but not later than 36 hours after determination that a breach has occurred. The notification may be made to the bank's designated point-of-contact at its primary federal regulatory agency orally or in writing (including telephone and email) and should include any information the bank is able to provide regarding the incident. An incident requiring notification is one that is a computer security incident that has or is likely to materially disrupt or degrade: (1) the bank'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; (2) 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 (3) 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. "

Third party service providers are also subject to notification requirements. Third-parties must notify a bank-designated point of contact for each financial institution that is affected by the breach. If the bank has not designated a contact person, then the notification should be made to the bank's CEO and Chief Information Officer or two employees with comparable responsibilities.

The Final Rule takes effect on April 1, 2022, with a full compliance date of May 1, 2022.

<Memrie Fortenberry>

FAIR LENDING "REDLINING" CONUNDRUM

I had the opportunity to speak at the MBA Great River Mortgage Banker's Conference last week on fair lending and redlining issues. Several bankers made the comment that, despite their efforts, they receive few mortgage loan requests from residents of majority-minority census tracts. Some thought this was due in part to market conditions. A few thought that at least in some cases, residents were trying to move out of some of some areas due to high crime and dilapidated housing. Of course, the examiners are still looking at the numbers – the lending patterns in majority-minority tracts as compared to non-majority-minority tracts, as we have seen in recent DOJ consent orders. The allegations include little or no lending in majority-minority tracts, and often times those "dots" on the maps that are exhibits to a DOJ complaint and consent order look pretty incriminating. So, what is a lender to do?!?

As we all know, you cannot force anyone to get a loan at your bank, or in a particular area! ☺ Let's think about this. One question would be are you receiving applications from minority applicants (Hispanic, non-white, female only) more generally? Are you giving <u>all</u> applicants the same considerations? If the answer to both questions is "yes," then my three favorite words come into play – document! document! document!

Document the detail in the majority-minority census tracts:

- Number of housing units?
- Are the housing units owner-occupied, rental, multi-family?
- Is the area residential, commercial, industrial, agricultural?
- Average age of housing? (Will indicate established or new neighborhoods.)
- Population?

What is the opportunity for lending in those tracts? What is your competition doing? Who is making loans in those tracts?

Document the minority applications for purchase or refinance of home loans:

- Were the applications approved or denied?
- Were the applications as complete and information reviewed as detailed and thorough as non-minority applications?

- Were any of the applications withdrawn, conditioned or action other than approved or denied?
- What tracts are the minority loans located in?

If the bank is not receiving minority applications, then why?

- Does the bank have minority mortgage loan originators?
- Does the bank have any branches in a majority-minority tract, or adjacent to a majority-minority tract?
- Where and how is the bank marketing? (locations, periodicals, radio or TV stations)
- What is the bank's community involvement?
- What types of loan products are offered?
- Are you reaching out to minority realtors and businesses?

A lender will need to show it is doing everything it can to generate business from all areas. My second favorite phrase comes into play – "TELL YOUR STORY!"

Part of that story should also include meaningful, specific training that you are conducting with lenders, lending staff, marketing, management, and anyone else that can assist in "telling your story."

Think about this. The heads of the CFPB and all of the regulatory agencies have increased their focus and scrutiny on redlining. Make sure you are prepared.

<Patsy Parkin>

MRCG MEETING TO BE HELD IN PERSON ON MAY 19, 2022

The MRCG will hold its Quarterly Meeting IN PERSON on May 19, 2022, at the Mississippi Sports Hall of Fame & Museum Conference Center, 1152 Lakeland Drive, Jackson, Mississippi. Registration will begin at 9:00 a.m. with the meeting to begin at 9:30 a.m.

During our May meeting, we will discuss banking cannabis-related businesses, conducting a compliance management system risk assessment, permissible and non-permissible activities for a DPO and LPO, and NSF/OD fees and UDAP issues. We also plan to allow time for discussion among the group about recent exam and compliance issues.

As always, the dress code for this occasion is casual, and lunch will be provided. We ask that you fax or e-mail your registration to Liz Crabtree no later than Thursday, May 12, 2022, so that arrangements for lunch can be finalized. We look forward to seeing you there.

<Cliff Harrison>

MSRCG MEETING TO BE HELD IN PERSON ON MAY 24, 2022

The MSRCG will hold its Quarterly Meeting IN PERSON on May 24, 2022, at Memphis Botanic Garden in the Goldsmith Room located at 750 Cherry Road, Memphis, Tennessee. Registration will begin at 9:00 a.m. with the meeting to begin at 9:30 a.m.

During our May meeting, we will discuss banking cannabis-related businesses, conducting a compliance management system risk assessment, permissible and non-permissible activities for a DPO and LPO, and NSF/OD fees and UDAP issues. We also plan to allow time for discussion among the group about recent exam and compliance issues.

As always, the dress code for this occasion is casual, and lunch will be provided. We ask that you fax or e-mail your registration to Liz Crabtree no later than Thursday, May 12, 2022, so that arrangements for lunch can be finalized. We look forward to seeing you there.

<Cliff Harrison>

MRCG-MSRCG COMPLIANCE CALENDAR

01/01/2022 – HMDA open-end coverage threshold permanently adjusts to 200 loans	05/24/2022 - MSRCG May Quarterly Meeting
01/06/2022 – Comments due on proposed Reg. B changes for small business loan data collection/reporting.	07/21/2022 - MRCG-MSRCG Joint Steering Committee meeting
01/21/2022 – Comments due on CFPB Request for Information on Effectiveness of HMDA Reg. C changes	08/18/2022 - MRCG August Quarterly Meeting
02/07/2022 – Comments on FinCEN proposed beneficial ownership reporting rule	08/23/2022 - MSRCG August Quarterly Meeting
03/31/2022 – Comments due on CFPB Request for Information on "junk fees"	09/15/2022 - MRCG-MSRCG Joint Steering Committee meeting
04/01/2022 – Inter-Agency Rule requiring notice of computer-security incidents within 36 hours effective	10/01/2022 – Mandatory compliance date for revised standard QM loans; GSE QM loan category removed
05/01/2022 – OCC rule regarding authority to issue exemptions from SAR requirements effective.	11/15/2022 – MSRCG November Quarterly Meeting
05/19/2022 - MRCG May Quarterly Meeting	11/17/2022 - MRCG November Quarterly Meeting