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LEGAL ISSUES BULLETIN

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New Edition of Robert's Rules of Order

A new edition of Robert's Rules of Order (12th Edition) is available and is now the "official" version. For institutions whose bylaws provide that "the most recent" edition of Robert's Rules applies to meetings, this is a must-have. Note that important changes include commentary about special parliamentary rules for electronic meetings. Such rules would have to be modified significantly for each institution's electronic meeting plans and barely keep up with how 2020 changed institutions' preferences for holding members' and shareholders' meetings (let alone board meetings). But any developments in parliamentary procedure to keep up with technology and preference can help maintain orderly governance. If you have questions about virtual meeting issues, do not hesitate to contact SW&M.

California COVID-19 Supplemental Paid Sick Leave

SB 95 went into effect as of March 29, 2021, requiring employers to provide employees with up to 80 hours of supplemental paid sick leave (SPSL) for various COVID-related absences. The amount of leave available to an employee depends on whether they are full-time or part-time. This law applies to employers with more than 25 employees are covered. Notably, the law requires retroactive payment if an employee would have been eligible for SPSL going back to January 1, 2021, under certain circumstances.

The law provides COVID-19 SPSL for covered employees who cannot work or telework for COVID-19 qualifying reasons. This includes leave rights like those provided in 2020 (i.e., leave for an employee to care for themselves or a family member for COVID-19 related reasons). In addition, the law allows leave for an employee attending a vaccine appointment (or experiencing vaccine-related symptoms).

This law establishes a new "bank" of COVID-19 related SPSL in addition to any other leave previously provided. Employers are required to provide such leave (for a qualifying reason) immediately upon the oral or written request by the employee.

The legal landscape continues to shift and evolve quickly, and there is a lack of clear-cut authority or bright-line rules. Given the various federal, state, and local laws regarding COVID-19 paid sick leave, financial institutions are advised to carefully review their obligations to ensure their practices adhere to current law. Please do not hesitate to contact our office with any questions.

Interpretive Rule on Discrimination on Bases of Sexual Orientation and Gender Identity

On March 16, 2021, the CFPB issued an interpretive rule addressing any regulatory uncertainty in the Equal Credit Opportunity Act ("ECOA") or Regulation B regarding discrimination based on sexual orientation or gender identity. The CFPB clarified that sex discrimination as used in ECOA and Regulation B will be consistent with the Supreme Court's recent interpretations to include the additional sub-types of sex discrimination.

In reaching its decision, the Bureau addressed that:

1. Sexual orientation discrimination and gender identity discrimination necessarily involve consideration of sex.
2. An applicant's sex must be a "but for" cause of the injury but need not be the only cause.
3. ECOA and Regulation B apply to sex discrimination against individuals as well as groups. A creditor is not protected from violating ECOA by rejecting both women who are not sufficiently feminine and men who are not sufficiently masculine—thus discriminating against both groups equally. Each instance of discrimination against an individual is an independent violation.
4. Discrimination may be motivated by perceived nonconformity with sex-based or gender-based stereotypes as well as an applicant's associations.

Financial institutions should ensure that their staff is fully trained to recognize and avoid conduct that could constitute sex discrimination. Further, internal policies and procedures should incorporate the CFPB's definition in the lending context.

Federal Court Strikes New York Prohibition on Paper Statements Fees

On March 16, 2021, the United States District Court of the Northern District of New held that New York General Business Law section 399-zzz, which prohibited fees for paper billing statements, was unconstitutional because it restricted businesses' First Amendment right of commercial speech. Ultimately, because the law allowed for statement/billing fees, and a "credit" to customers who requested electronic statements, the court found areas to criticize the law as not actually fulfilling the legislature's objective, as vague, and ultimately as only restricting the way financial institutions could communicate. While this decision may be closely

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watched in future litigation, and provides potential creative arguments for defense of financial institutions, the specific manner in which the New York legislature drafted this rule was likely the cause of this specific and narrow decision.

Saga of Website Accessibility Cases Continues with Landmark Case in 11th Circuit

The question whether websites fall within the purview of the Americans With Disabilities Act (ADA) has been looming over financial institutions and other businesses. Traditionally, ADA cases have involved "brick and mortar" businesses; however, over the last several years, there has been a flood of cases involving website accessibility. A primary issue in such cases has been whether websites constitute a "place of public accommodation" for purposes of ADA compliance. Many courts have extended the ADA to websites and found that businesses must make their websites accessible. However, on April 7, the 11th Circuit joined those founding that a website is not a place of public accommodation.

The Court stated that the ADA applies to tangible places and "[n]o intangible places or spaces, such as websites, are listed in the ADA," concluding that "pursuant to the plain language of [the ADA], public accommodations are limited to actual, physical places." Nonetheless, the Court left the door open for potential liability where a website that is inaccessible to individuals with disabilities creates an "intangible barrier" to accessing goods and services available at a physical location.

While this case is a win for businesses within the 11th Circuit (Alabama, Florida, and Georgia), it is likely to be challenged. Because of the nature of the internet and websites, individuals may bring cases in other jurisdictions where courts have ruled that the ADA applies to websites, including California. Accordingly, to minimize legal risk, it is advisable that all financial institutions that offer products and services online to maintain accessible websites.

CARES Act Bankruptcy Provisions Extended By One Year

The COVID-19 Bankruptcy Relief Extension Act was signed on March 27, 2021 (the "Extension Act"). The Extension Act extends certain personal and small bankruptcy relief provisions from the CARES Act (which would have expired March 27, 2021) to March 27, 2022. In particular, the Extension Act applies the one-year extension to the following:

1. The increase in the debt ceiling from $2,725,625 to $7,500,000.00 for small business bankruptcies under Subchapter V of Chapter 11.
2. The extension, from a maximum of five (5) years to seven (7) years of a debtor's time to repay creditors under a Chapter 13 payment plan where the debtor is experiencing a material financial hardship due to COVID-19.

Collections departments should be aware of these revisions.

SBA Clarifies Bankruptcy Eligibility for PPP Loans

The Paycheck Protection Program (PPP) loan application requires that each applicant and any owner of twenty percent (20%) or more of the applicant certify that it is NOT "presently involved in any bankruptcy" to be eligible. On April 6, 2021, the Small Business Administration issued FAQ 67, which states that three conditions terminate "involvement" in a bankruptcy case. First, if an individual was involved in a Chapter 7 bankruptcy, then that individual is no longer "involved" in the bankruptcy once a discharge order is entered. Second, if the applicant (or owner) has been a debtor in a case under Chapter 11, 12, or 13, then the applicant is no longer "presently involved in any bankruptcy" once a plan confirmation order has been entered. Third, under any bankruptcy chapter, once an order dismissing the case is entered, then the bankruptcy involvement ends. In each circumstance, the applicable order must be entered before the filing of the PPP application. Financial institutions accepting PPP applications should be aware of these distinctions as they review application materials and answer applicant questions.

FDIC Provides Guidance Regarding Leads Versus Referrals for RESPA Rule 8 Purposes

The March 2021 issue of the FDIC's *Consumer Compliance Supervisory Highlights* discussed recent trends in Real Estate Settlement Procedures Act (RESPA) § 8 compliance and enforcement. The FDIC observed that a frequent issue in RESPA cases involves determining whether the service provider was paying for a lead (which is generally acceptable) or a referral (which is prohibited).

In order to distinguish between a lead and a referral, examiners looked at whether the person providing the lead/referral was merely giving information about a potential borrower to the settlement service provider or the person was "affirmatively influencing" a consumer to select a certain provider. True leads permissible under RESPA are often lists of customer contacts that are not conditioned on the number of closed transactions resulting from the leads, or any other considerations, such as endorsement of the settlement service.

Buying "leads" should be pursued cautiously, and while the "value" of a lead is intrinsically linked to the number of transactions resulting, pricing explicitly based on closed transactions is problematic (under RESPA, potentially criminal).

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