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To Mandate the Vaccine or Not?

As the highly contagious Delta variant has taken over 2021 with increasing rates of COVID-19 infections across the United States, many employers are considering implementing a mandatory vaccine policy to require employees to get vaccinated or potentially face disciplinary action. Recently, the EEOC stated that an employer may require COVID-19 vaccines for employees because their presence may pose a direct threat to the health or safety of others. In addition to the ramifications such a policy may have on company culture, employers must consider the burdens in administering such a policy (e.g., confidentiality, ensuring equal treatment of all employees, requests for accommodations, etc.).

We have also seen some employers take a different approach than requiring mandatory vaccines. This includes (i) implementing a voluntary vaccine policy wherein employees are strongly encouraged to get vaccinated, (ii) providing incentives to get the vaccines (e.g., cash payments, gift cards, extra PTO, or other rewards), and/or (iii) requiring recurring (e.g., weekly) proof of a negative COVID-19 test. In its updated guidance, the EEOC expressly states that it is permissible for employers to offer employees incentives to get vaccinated against COVID-19. The caveat here is that if an employer is administering the vaccine themselves, the incentive offered must not be so substantial as to be coercive.

Plaid Agrees to $58 Million Dollar Settlement

Plaid Inc., a FinTech company, recently agreed to a $58 million class action settlement and injunctive relief over claims that it misled and violated the privacy rights of consumers by using their bank account access credentials to download information about their transactions and monetize such information through a variety of means without adequate disclosures and consent. In other words, under the guise of providing account verification services, Plaid was harvesting and monetizing transactional data of millions of Americans that went well beyond what it needed to provide its core service to consumers.

The settlement encompasses five separate class actions suits filed by users of Plaid's platform to connect their bank accounts to payment apps such as Venmo. The suits included allegations of invasion of privacy, unjust enrichment, and violation of anti-phishing laws. In addition to the monetary compensation, Plaid agreed to make changes to their interface to improve data security and consumer privacy and is required to improve product transparency which will allow its users to view and manage connections that have been made between apps and their financial accounts using the Plaid platform. Furthermore, Plaid must minimize the data it stores and delete certain types of data, unless the consumer has expressly consented to Plaid's collection and storage of such data.

CFPB Enforcement Action Against GreenSky

On July 12, 2021, the CFPB issued a consent order against FinTech company GreenSky, LLC for unfair business practices. Specifically, the CFPB found that GreenSky's customer service practices enabled its home improvement service merchants to set up fraudulent loans without the customer's knowledge or consent. The CFPB took issue with GreenSky allowing its merchants to promote and offer financing options for home improvement loans based on criteria provided by GreenSky's network of partner banks, in which the loan proceeds bypassed the customer without their knowledge and went directly to the merchants upon loan approval.

The CFPB noted that GreenSky received over 6,000 complaints from consumers over a five-year span stating that they did not authorize submission of a loan application. The CFPB also found that GreenSky failed to implement appropriate controls during the loan application, approval, and funding process, and adequate merchant training and oversight. The CFPB required GreenSky to refund or cancel up to $9 million in loans, pay $2.5 million in civil fines and penalties, and implement new procedures to prevent future harm to consumers.

Although the partner banks used by GreenSky were not included in the consent order, risk remains. This consent order serves as an important reminder that financial institutions must carefully select and monitor indirect channels and FinTech providers.

Ninth Circuit Holds TCPA Prohibits Robocalls to Cell Phones without Prior Written Consent

On August 10, 2021, the Ninth Circuit Court of Appeals held that the TCPA's prohibition on robocalls to cell phones is not limited to calls that include advertisements or constitute telemarketing. The Ninth Circuit reversed a lower court's dismissal of the Plaintiff's complaint wherein he alleged TCPA violations based on a pre-recorded job-recruitment message left on his cell phone. The lower court's dismissal was based, in part, by the implementing regulations to the TCPA promulgated by the FCC which refers to "advertising or telemarketing.

The Ninth Circuit specifically held that the TCPA prohibits in plain terms "any call," regardless of content, that is made to a cell phone using an automatic telephone dialing system or an artificial or pre-recorded voice, unless the call is made either for emergency purposes or with the prior express consent of the person being called. Financial institutions should be mindful that any call made to a consumer's cell phone using robocalls

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or an auto dialer must have the prior express consent of the consumer to avoid any potential TCPA liability.

California and SEC Investment Advisor Definitions

Under NCUA's Letter 10-FCU-03, many credit unions engage in sales of nondeposit investments, whether through dual employees or through networking or "finder" arrangements. Credit unions should take care that under 30+ year old SEC and California DFPI interpretations, a credit union can be an "investment advisor" merely by advising about the selection of an investment advisor and receiving compensation. This poses a significant compliance risk for networking or referral relationships in California. However, it appears there are initiatives to align the treatment of credit unions with banks, which are exempt from investment advisor registration entirely. Credit unions should engage in lobbying efforts to obtain the necessary legislative fix.

FFIEC Issues New Cybersecurity Guidance

On August 11, 2021, the FFIEC issued new guidance titled "Authentication and Access to Financial Institution Services and Systems," aimed at providing financial institutions with guidance regarding effective risk management principles and practices for access and authentication related to digital banking services. This guidance replaces 2005 and 2011 versions of advice the FFIEC had previously given on the same topic. In its latest release, the FFIEC encourages financial institutions to engage in risk assessments before implementing new financial services, and periodic risk assessments utilizing information from across functions to help identify emerging authentication and access related threats. The FFIEC also discusses the importance of multi-factor authentication as part of a layered security process, as single-factor authentication is the only control mechanism that has been proven to be inadequate against the types of threats facing information systems and digital banking services today. While not imposing any new regulatory requirements on financial institutions, the guidance includes an Appendix that lists examples of practices related to access management, authentication, and supporting controls that should serve useful to financial institutions looking to strengthen their information security programs.

Extension of CDC and FHFA Eviction Moratoriums

On August 26, 2021, the Supreme Court struck down the CDC's extension of the eviction moratorium through October 3, 2021, stating that the CDC exceeded its authority, and any continued national ban requires congressional action. The issue involved the CDC's authority granted under the Public Health Service Act. The Supreme Court noted the Act limits the authority to measures such as fumigation, disinfection, sanitation, and pest extermination. In response, the White House has encouraged state and local governments and landlords to urgently act to prevent evictions.

The FHFA also extended the government-sponsored enterprises' moratorium on single-family real estate owned (REO) evictions until September 30, 2021. The REO eviction moratorium applies to properties that have been acquired by Fannie Mae or Freddie Mac through foreclosure or deed-in-lieu of foreclosure transactions.

CFPB FAQs on Compliance with the EFTA

On June 4, 2021, the CFPB issued eight FAQs regarding EFTA and Regulation E compliance. Of note, the CFPB confirmed that the definition of an unauthorized transaction under Regulation E includes transfers initiated by a person who obtained the access device from the consumer through fraud (e.g., a spoofer) or robbery. Therefore, if a consumer willingly furnishes their access information to a person who, unbeknownst to the consumer, turns out to be a fraudster, the consumer would still be protected by the Regulation E limits on liability.

Accordingly, financial institutions should not deny EFT claims in cases where unsuspecting consumers provide their access information (online banking information, PIN numbers, or card numbers) to fraudsters, without applying Regulation E's limits. This is even more important with the increased use of P2P services, such as Zelle. Financial institutions should review the FAQs to ensure compliance and review their Regulation E policies and procedures to ensure they are updated to account for Regulation E's requirements as well as the changing landscape of new EFT services.

What is Community Discharge?

With bankruptcies likely on the rise, financial institutions should revisit the concept of "community discharge." Where one spouse has filed a bankruptcy case and received a discharge, but the other spouse has not filed a bankruptcy case, it's clear that the Bankruptcy Code protects the filing spouse. But what about the non-filing spouse? This is where "community discharge" comes in. The term "community discharge" is something of a misnomer since it doesn't directly impact the non-filing spouse's *in personam* liability, but is instead an aspect of the filing spouse's discharge, which applies to enjoin collection of pre-petition obligations against community property. Accordingly, it is only an effective shield for a non-filing spouse to the extent the property in question is community property. Since the "community discharge" does not affect the *in personam* liability of the non-filing spouse, certain collection efforts against the spouse (e.g., a collection letter) are permitted. Only acts seeking to enforce the non-filing spouse's *in personam* liability against community property are enjoined. Of course, continued collection efforts should be conducted with caution and only where there is a clear understanding of the parameters of the discharge injunction.

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