Banking Update

April 1, 2013 • Jonathan J. Wegner, Editor

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Banks in Many Nebraska, Iowa Counties Qualify for Exceptions under New Mortgage Rules

A preliminary list of rural and underserved counties released this month by the CFPB shows that many community banks that predominantly operate in rural counties in Nebraska and Iowa will qualify for special exceptions under a number of the Bureau's new rules affecting mortgage lending practices.

The first such rule, implementing certain escrow requirements Escrow Requirements under the Truth in Lending Act, takes effect June 1, 2013. The rule generally requires escrow accounts to be maintained for a minimum of 5 years for higher-priced mortgage loans (HPMLs) but exempts HPMLs made by certain small lenders that operate primarily in rural or underserved counties.

Other exceptions to recent changes to mortgage rules that are keyed to the list of rural and underserved communities include:

- The Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act rule, under which mortgage loans with balloon payments will not meet the qualified mortgage (QM) standard in most cases. However, certain small lenders that operate predominantly in rural or underserved counties will be eligible to originate balloon-payment QMs;
- The Bureau's High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act rule (the HOEPA rule), under which creditors that operated primarily in rural and underserved counties will be exempt from restrictions on

Also in this issue

2 Dealing with Estates: Using Small-Estate Affidavits in Banking

3 Supreme Court: FDCPA Allows Award of Costs to Prevailing Creditor Defendants

4 Cautionary Tale: Community Bank Fined $700,000 for ECOA Violations

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balloon payments for certain high-cost mortgages; and

- The interagency [Appraisals for Higher-Priced Mortgage Loans rule], under which certain HPMLs will be exempt from new second appraisal requirements if they are originated in rural counties.

These three rules will take effect in January 2014.

Since most Nebraska and Iowa counties qualify as "rural" or "underserved," it is easier to note those counties that do not qualify for the exceptions. Counties that are not eligible for these exceptions in Nebraska include Dodge, Douglas, Gage, Lancaster, Sarpy, Seward, Saunders and Washington counties. Counties that are not eligible for these exceptions in Iowa include Clinton, Dallas, Dubuque, Harrison, Jackson, Jasper, Mills, Polk, Pottawattamie and Warren counties. ■

Jonathan J. Wegner

Dealing with Estates: Using Small-Estate Affidavits in Banking

Financial institutions are often presented with the dilemma of what to do with bank accounts after the death of the primary account holder. Of course, accounts held jointly or with a "payable-on-death" (POD) designation are generally easy to handle. At the death of the primary account holder, the co-owner or designated beneficiary can simply claim the money directly from the bank with a certified copy of the death certificate. This can be done without probate court proceedings.

When the bank account does not have a joint owner or POD designation, the account holder's estate is often presented to the County Court for probate proceedings. Once a probate case is opened, the Court will appoint a personal representative to administer the estate by issuing letters of appointment. Banks can and should generally rely on a certified copy of the letters of appointment when transferring the account to the decedent's personal representative.

Probate Avoidance

The probate process can be a time-consuming and expensive process. As a result, people often go to great lengths to avoid probate court. In certain circumstances, nearly every state has a law that allows certain "small estates" to avoid probate by using an Affidavit for Transfer of Personal Property Without Probate, also known as a "Small Estate Affidavit." These affidavits allow a decedent's personal property to be transferred to his or her successors without a formal probate proceeding. In Nebraska, the Small Estate Affidavit must comply with Section 30-24,125 of the Nebraska Probate Code.

Small Estate Affidavit Requirements

Personal property, including bank accounts, may be transferred to a person (or persons) claiming to be the successor of the decedent using a Small Estate Affidavit if:

- At least 30 days have elapsed since the decedent's death;
- The total amount of the decedent's personal property subject to probate proceedings does not exceed $50,000; and
- There are no probate proceedings conducted or pending for the decedent's estate in Nebraska or any other state.

In addition to these basic requirements which must be asserted in the affidavit, Nebraska law requires the Small Estate Affidavit to also include statements (i) providing the claiming successor's relationship to the decedent

and/or the basis of the successor's claim to the bank account; and (ii) that the successor is entitled to payment or delivery of the bank account. The affidavit must be signed under oath before a notary, under penalties of perjury, stating that all of the statements in the affidavit are true. In addition, a certified copy of the death certificate must be attached to the affidavit.

Required Compliance with Small Estate Affidavit

If a financial institution refuses to deliver the funds pursuant to the affidavit, Nebraska law allows the person claiming a right to the bank account to bring an action against the institution to compel the transfer. While this would force the claimant to prove the facts in the affidavit, such a refusal could result in the reimbursement for that person's attorney fees if there was not a valid reason to deny payment.

Financial institutions should consider implementing certain basic safeguards before transferring an account to someone claiming to be a successor.

Reliance on Small Estate Affidavit

Nebraska law protects financial institutions that rely on a Small Estate Affidavit; specifically providing that persons paying or delivering personal property pursuant to a Small Estate Affidavit are "discharged and released to the same extent" as if the bank had transferred the bank account to the decedent's personal representative. In that case, the recipient of the transfer becomes "answerable and accountable" to the estate or any other person claiming a superior right. Therefore, financial institutions should generally not become subject to double payments if there is a transfer to an improper recipient.

Basic Safeguards

It is important to note that financial institutions are not required to look beyond the four-corners of the affidavit or to otherwise "inquire into the truth of any statement in the affidavit." However, to be safe, financial institutions should consider implementing certain basic safeguards before transferring an account to someone claiming to be a successor:

- The 30-day waiting period can be verified using the death certificate;
- The affidavit would, of course, be invalid if the decedent owned one or more accounts at the institution with an aggregate date of death value in excess of $50,000 – provided that only "probate assets" are included in this limitation, so accounts held jointly or with a POD designation are not included for this purpose;
- The affidavit should be prepared in compliance with Nebraska law, be signed under oath, notarized and subject to penalties of perjury;
- The person claiming to be a successor should provide sufficient identification;
- All persons designated in the affidavit as entitled successors should generally sign the affidavit.

Conclusion

While this process is less familiar for some financial institutions, it is a legally acceptable way to transfer a decedent's bank account. Financial institutions should not blindly accept each and every Small Estate Affidavit presented to them; however, Nebraska law does require financial institutions to transfer bank account proceeds pursuant to a properly completed affidavit. ■

Douglas D. Murray

Supreme Court: FDCPA Allows Award of Costs to Prevailing Creditor Defendants

Last month, the U.S. Supreme Court held that the Fair Debt Collection Practices Act (FDCPA) does not preclude a court from awarding costs to a lender that prevails against allegations that it violated the FDCPA. A lower court decision held that a defendant who is found to not have violated the FDCPA could be awarded costs under Federal Rules of Civil Procedure, and the Supreme Court affirmed the decision, finding that the FDCPA did not preclude such an award.

The case, which may prevent the filing of frivolous lawsuits against creditors, is *Marx v. Gen. Revenue Corp.*, No. 11-1175, 2013 WL 673254 (Feb. 26, 2013). ■

Jonathan J. Wegner

Cautionary Tale: Community Bank Fined $700,000 for ECOA Violations

Last month, the Department of Justice entered into a consent order with a $338 million community bank in Texas for alleged violations of the Equal Credit Opportunity Act, highlighting the continued regulatory focus on fair lending and the importance of uniform policies and training in this area.

The DOJ's complaint alleged that the bank had charged higher rates on unsecured consumer loans to Hispanic borrowers than similarly situated non-Hispanic borrowers. The complaint stated that the bank provided only general guidance to its loan officers regarding the pricing of unsecured consumer loans and stated that the Bank's Credit Policy and Procedures Guide provided only a general, non-exclusive list of factors for loan officers to consider when setting interest rates, such as money market conditions, local economic conditions, competitive lending practices, total customer relationship and the loan terms. The complaint went on to note that "The Credit Policy and Procedures Guide … was a 'broad guide' for loan officers, and that 'ultimate responsibility' for credit decisions rested with individual officers."

The consent order requires the bank to establish a $700,000 fund to compensate borrowers who may have been harmed by the alleged ECOA violations. It also requires that the bank establish uniform policies that include standards for collecting applications, financial documents, and credit reports for all borrowers, to create uniform pricing matrices for loans covered by the order, to institute compliance monitoring programs and to conduct employee training. Although the violations stemmed from practices involving only unsecured loans, the order also applies to all residential single-family real estate construction loans, automobile loans, home improvement loans and mortgage loans. ■

Jonathan J. Wegner

Upcoming Speaking Engagements

Jesse D. Sitz and Jonathan J. Wegner will present at National Business Institute's Business Law Boot Camp. The seminar will take place on May 21, 2013 at the Scott Conference Center in Omaha. ■

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