KAUFMAN & CANOLES
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credit union legal update

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FTC STATEMENT OF POLICY REGARDING COMMUNICATIONS IN CONNECTION WITH THE COLLECTION OF DECEDENTS' DEBTS

Rarely does a week go by when we do not receive a call from a credit union regarding potential elder abuse. Recently, the number of calls regarding the legal, moral and ethical means to collect a credit union debt from a deceased member's estate has been increasing. With those credit unions that have an "aging" membership, these issues become more and more paramount.

With little fanfare and very little press coverage, the Federal Trade Commission ("FTC") recently published a "Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts." The final policy statement became effective August 29, 2011 and impacts all companies that are subject to the Fair Debt Collection Practices Act ("FDCPA"). Generally speaking, if a credit union is conducting their collection efforts "in house," they are probably not subject to the FDCPA, but many credit unions utilize CUSOs, collection agencies or collection attorneys, and all of those entities are generally subject to the FDCPA.

The FTC acknowledged that when a person dies, creditors and debt collectors hired by credit unions usually have the right to collect the person's debts from the assets of his or her estate. The FDCPA prohibits debt collectors from contacting individuals other than the debtor to collect a debt unless the individual is the debtor's spouse, parent (in the cases where the debtor is a minor), guardian, executor or administrator. The FTC had received a number of complaints regarding some debt collectors contacting the decedent's relatives. Often, the relatives do not have the authority to pay the debts from the decedents' estate and perhaps no legal obligation to pay the debts from their own assets.

Struggling to find a middle ground between the rights of the creditors, the actions of debt collectors to collect debts and the grief and vulnerability of spouses and others mourning the death of loved ones, the FTC issued a 33-page statement along with a commentary to provide guidance and direction.

Generally speaking, the FTC announced that to balance the interests and protect consumers from unfair, deceptive and abusive practices, the FTC would forbear enforcement of certain sections of the FDCPA against a debt collector for communicating about a decedent's debts with persons specifically identified as appropriate to contact under the FDCPA or any other person who has the authority to pay the decedent's debts from the assets of the decedent's estate. The statement further clarified how a debt collector can comply with the law in locating the person who has the requisite authority with whom to discuss the decedent's debts. Finally, the statement explains how a debt collector can avoid engaging in deceptive practices in communicating with a third party about a decedent's debts. Noting that "most debts incurred in life do not simply vanish upon death," the FTC acknowledged that formal probate has proven to be time-consuming and expensive for consumers, and to require the payment of debts to be processed through formal probate process might be burdensome to both consumers, heirs and creditors.

Specific aspects of the final policy statement are as follows:

1. Permissible Individuals for Collection Communications. As noted above, the FTC concluded that they would not bring an enforcement action under the FDCPA against the debt collector for communicating for the purpose of collecting a decedent's debt with any of the following individuals: the decedent's spouse, parent, guardian, executor or administrator, or another person who has authority to pay the decedent's debts from the assets of the decedent's estate. Individuals who have the "requisite authority" may include personal representatives under

continued to page 2

continued from page 1

the informal probate and summary administration procedures of many states, persons appointed as universal successors, persons who sign declarations or affidavits to effect the transfer of estate assets and persons who dispose of the decedent's assets in general.

2. Locating Proper Individuals for Deceased Account Collection. In instances in which collectors do not know the identity of those with the authority to pay the decedent's debts, collectors may communicate with others to identify these individuals. For example, they may utilize location information such as a consumer's place of abode and his telephone number at such place or his place of employment. Any collectors seeking such location information must "(1) identify himself, state that he is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his employer; and (2) not state that such consumer owes any debt." Struggling to find the middle ground, based on comments received, the FTC noted in their statement that they will forbear from taking enforcement action for violating the FDCPA against a debt collector who includes in location communications a general reference to paying the "outstanding bills" of the decedent out of the estate's assets. Such a reference, according to the FTC, balances the legitimate needs of the collector with the privacy interests of the decedent. Such language should provide sufficient information for the recipient of the communications to identify the person with authority to pay the decedent's debts out of the estate's assets, while minimizing the harm to the decedent's reputation. However, be warned, using the term "outstanding bills" could imply that the decedent was delinquent and such an implication is improper.

3. Compliance in Communicating With Permitted Individuals. As always, collectors must not engage in unfair, deceptive, abusive or other unlawful conduct in violation of the FDCPA.

However, the final FTC statement does not include a "cooling-off period." Credit unions and their collectors are encouraged to utilize good judgment.

The FTC statement is a good read. It is clear, concise and well-presented. It is a must read for all credit unions that are in the collection business, as well as their collection agencies and their collection attorneys. A copy of this FTC Statement of Policy can be downloaded in .pdf format at www.kaufcan.com.

BANKRUPTCY FILINGS DOWN – BUT WATCH OUT! – SELECT LAW SUITS MAY BE ON THE HORIZON

The following is a reprint from an earlier Kaufman & Canoles Credit Union Legal Update and continues to be a very "hot" litigation item.

Several Debtor's Rights attorneys have recently sued scores of credit unions and credit providers for improper reports to credit bureau companies. Under the Federal Fair Credit Reporting Act ("FCRA"), a credit provider generally cannot be held liable for damages unless it has received notice that there is a reporting problem. Across the country bankruptcy attorneys are attempting to short-circuit this notice requirement. By examining credit reports for individuals who have previously been discharged from Bankruptcy, these attorneys are able to find potential plaintiffs from their Rolodex of previous clients. If they find any discrepancies in credit reporting, rather than notify the credit union, a lawsuit is filed against the credit union. They assert that the credit reporting discrepancy is an unlawful (and intentional) attempt to collect a debt. Because it is alleged that the credit union has intentionally violated the Bankruptcy Court's discharge order, substantial sanctions in the form of money damages are possible. In many of these cases the first notice a credit union receives regarding the alleged improper credit reporting is service of the lawsuit.

Kaufman & Canoles successfully defended a major federal credit union in federal bankruptcy litigation. A former member sought damages for discrepancies in his credit report. (In re Jones, 2007 WL 1160420 (Bkrtcy. E.D. Va. 2007)). The Court denied the Debtor's motion to reopen the bankruptcy case and impose sanctions, even though - as the Court noted in its Opinion - such motions are "almost routinely granted."

Although the Kaufman & Canoles case is a significant victory and can be cited as precedent, potential liability for discrepancies in credit reporting in the post-bankruptcy context continues to be a serious concern for credit unions. A credit union may have no notice of a credit reporting discrepancy until suit is filed. Once suit is filed, there is normally very little time before the matter comes before a federal bankruptcy judge for consideration.

DOCUMENT RETENTION GUIDELINES

Document/Record - Name/Type	Retention Period	Regulation/Reference
All Departments		
Manuals, Letters & Official Instructions from NCUA & Government Agencies	Permanent (Until Revised)	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(1)(c)
NCUA Reports	Permanent	• One copy of each financial report, NCUA Form 5300 or 5310; Credit Union Profile Report; NCUA Form 4501 or equivalent. 12 C.F.R. § 749, App. A (E)(2)(b) • One copy of each supervisory committee comprehensive annual audit report and attachments. 12 C.F.R. § 749, App. A (E)(2)(c)
Member Correspondence	Varies Depending on the Type of Correspondence; Average Retention Period, 2 Years	• Credit offers to members which are not initiated by the member must be maintained for 3 years. 15 USC §1681(m) • CU must maintain credit decisions of members for 25 months following notice of decision. 12 CFR § 202.12 • Nonpayment correspondence from the NCUA and other governmental agencies – Periodically destroyed per 12 C.F.R. § 749, App. A (F)(h) • Applications for membership – Permanent. 12 C.F.R. § 749, App. A (E)(2)(e)
Official Correspondence	Permanent	Accounting Manual for Federal Credit Unions.
All Licenses to operate required by State or locale	Permanent	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(1)(b)
CU policies, current & section since updated	Permanent (Until Revised)	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(1)(c)
Listing of records destroyed	Permanent (Until Updated)	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(2)(j)
Journal and Cash Record; General Ledger	Permanent	12 C.F.R. § 749, App. A (E)(2)(f), (g)
Copies of Periodic Statements of Members, or Individual Share and Loan Ledger	Permanent	12 C.F.R. § 749, App. A (E)(2)(h)
Bank Reconcilements	Permanent	12 C.F.R. § 749, App. A (E)(2)(j)
Executive Offices		
Board of Directors Meeting Minutes & attachments	Permanent	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(2)(a)
Minutes of Supervisory Committee	Permanent	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(2)(a)
Minutes of ALCO, Nominations, and all other Committees including credit	Permanent	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(2)(a)
Bylaws & Amendments	Permanent	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(1)(a).
Charter & FOM Amendments NCUA	Permanent	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(1)(a).
Merger Documents	Permanent	NCUA Credit Union Merger Procedures and Merger Forms Manual.
Civil Court Case Records		• May depend on relevant statute of limitations.
Annual Membership Meeting Minutes & Reports	Permanent	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(2)(a)
Legal Agreements		• May depend on relevant statute of limitations.
Senior Managers Operations Update Meeting Minutes & attachments (Monthly Meeting)	Permanent	NCUA Rules and Regs., 12 C.F.R. § 749, App. A (E)(2)(a)

Note: Permanent documents may be scanned and if appropriate the originals properly discarded.

MORE REAL ESTATE LENDING OPTIONS

Historically, real estate loans were good for credit unions and good for their members. With the economy showing some signs of potential recovery, credit unions are once again evaluating their real estate options, including the terms of these loans.

A recent legal opinion by Hattie M. Ulan, Associate General Counsel for the National Credit Union Administration, provided significant guidance for federal credit unions. The letter concluded with the finding that a federal credit union can make multiple-lien, long-term residential mortgage loans to the same member if the loan is for the member's current principal residence or intended for a future principal residence. Some specific guidance as offered in the opinion letter is as follows:

- A long-term mortgage loan to a federal credit union member to purchase a second residence for a family member to live in while attending college would be proper if, and only if, the house is intended to be the future principal residence of the member.

- The Federal Credit Union Act and NCUA's general lending regulations permit federal credit unions to make long-term residential real estate loans with maturities up to 40 years on one to four family dwellings if it is or will be the principal residence of the member-borrower.

- A federal credit union may offer more than one long-term mortgage loan to the same borrower if the loans are for the member's current principal residence and for a residence that is intended to be the member's principal residence at some point in the future.

- A federal credit union must determine if the "principal residence" requirement is met at the time the loan is made.

- A member can also get an additional long-term mortgage loan on a retirement home.

- A federal credit union can make a long-term residential loan for a future principal residence if the dwelling "will be" or is intended to be the principal residence of the member at some point in the future.

- A member can only have one principal residence at any given time.

A copy of this opinion of the General Counsel can be downloaded in .pdf format at www.kaufcan.com.

FIXED ASSET WAIVERS

NCUA has revised their RegFlex program and made significant changes to the rules dealing with fixed asset limits. Many credit unions have been impacted. Previously, NCUA's RegFlex rule exempted RegFlex eligible credit unions from limits on the amount a federal credit union with more than $1,000,000 in assets could invest in fixed assets. Credit unions are now required to seek a waiver for asset acquisitions exceeding 5% of shares and retained earnings. This issue has been so controversial that in the NCUA Report of August 2011 an entire article was reserved to address this issue. The article notes and provides two key paragraphs. They are as follows:

1. What if a credit union acquired assets exceeding the cap before the change to RegFlex? "A credit union that had already exceeded the 5 percent limit by Nov. 29, 2010, is grandfathered at that limit. However, as the credit union's level of fixed assets subsequently declines, so will the level at which it is grandfathered. New acquisitions of fixed assets will require a waiver. The credit union does not need to seek a waiver for the existing assets, but must seek a waiver for any new acquisitions."

2. How can a credit union with a fixed-asset level above 5 percent avoid having to request multiple waivers to replace and repair plant and equipment? "A credit union can seek a waiver that includes a reasonable annual operating range for necessary plant and equipment. Subsequent fixed-asset acquisitions require a waiver request only if the new fixed-asset level exceeds any predetermined operating level approved by the Regional Director."

continued to page 5

continued from page 4

The documentation required for a fixed-asset waiver is comprehensive, and generally speaking, the Regional Director has approximately 60 days to respond to the credit union. Accordingly, care and planning should be utilized in this area. You should also consider your accounting procedures and determine whether or not it is beneficial to increase the levels of those items where you can expense rather than depreciate, and perhaps this will be of benefit to you.

Lastly, although the NCUA article did not promote the concept, it is strongly recommended that before a credit union files a fixed-asset waiver request with the Regional Director that they contact their examiner, explain the situation and obtain some general consensus or approval from the examiner. It is more than likely that once the waiver request is filed, the Regional Directors will promptly notify the examiner, and if the credit union has already done its homework, perhaps the credit union will have an affirmative response in less than 60 days. A copy of the NCUA Report can be downloaded in .pdf format at www.kaufcan.com.

PROOFS OF CLAIM PRIVACY ISSUES AND POTENTIAL BREACHES/ RISK ALERT

The following is another reprint from a previous Kaufman & Canoles Credit Union Legal Update which also continues to be a very “hot” litigation item.

Buckle your seatbelt. There is more litigation on the way. An increasing number of lawsuits are being filed against all financial institutions, including credit unions, for alleged breaches of a federal bankruptcy rule which provides for the required redaction of certain personal information from any document filed with the Bankruptcy Court.

A bankruptcy rule was adopted to address the disclosure of private identifying information. Creditors, including credit unions, are now prohibited from reporting on any proof of claim form (or an attachment to the proof of claim form) full account numbers, full social security numbers, dates of birth or drivers license information. Basically, all personal identifying information is prohibited from disclosure.

There are seminars being conducted by plaintiffs’ attorneys as to how to utilize this infraction and other alleged violations of consumer laws to bring lawsuits. Damages are often sought in excess of $100,000. Yes, those members that have already cost a credit union money may be considering suing if their private information has been disclosed in a Bankruptcy Court filing. Last fall, CUNA Mutual issued a risk alert regarding this issue. You may have missed the alert. A copy of the alert can be found at www.kaufcan.com.

Authorized/redacted Bankruptcy Court filings regarding private identifying information may include:

1. The last four digits of a social security number;
2. The year of the individual’s birth;
3. A minor’s initials; or
4. The last four digits of the financial account number

Special care should be taken to insulate a credit union from any liability that may arise from an unintentional disclosure of confidential information.

If you discover that protected information was filed with the Bankruptcy Court on a proof of claim or an attachment to a proof of claim, many recommend that immediate efforts be undertaken to redact the information before litigation is brought. This may help eliminate potential damages that could be claimed by a plaintiff in a lawsuit against a credit union. Legal counsel should be consulted regarding the procedures that might be necessary to address potential liability to the credit union

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IN THIS ISSUE

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