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U P D A T E

News of Developments in the Financial Sector and Related Areas

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Truth in Lending Act Disclosures to Consumers

Janikowski v. Lynch Ford, Inc., et al. No. 99-3092, in the United States Court of Appeals for the Seventh Circuit, reprinted in [Current Binder] Fed. Banking L. Rep. (CCH) ¶ No. 100-450, involved an automobile dealer's initial disclosure of a 5.9 percent annual percentage rate ("APR") in which the consumer ultimately accepted an 11.9 percent APR. The consumer claimed that the disclosure was inaccurate and that it should have been labeled an estimate and in violation of the Truth in Lending Act ("TILA"). The consumer argues that the automobile dealer violated the TILA because although the automobile dealer disclosed an APR of 5.9 percent, the consumer was ultimately required to pay an APR of 11.9 percent. However, the court said that in making the argument, the consumer did not focus upon what really happened. The consumer entered into two contracts each of which disclosed the relevant APR. Before the consumer signed the first contract, the automobile dealer disclosed a contractual rate of 5.9 percent. That disclosure reflected terms of the consumer's legal obligations as required by the TILA. The next day, after the consumer learned that financing had been denied at 5.9 percent, the contract was canceled. The consumer then entered into a new contract, which disclosed an 11.9 percent APR. Therefore, the court concluded that even though the consumer did not eventually obtain financing at 5.9 percent, the automobile dealer did not violate the TILA because it accurately disclosed the consumer's legal obligation under both contracts. The consumer also argued that the automobile dealer engaged in a practice of spot delivery and this practice violated the TILA. The consumer argues that "spot delivery" involves (i) the entering into a sales contract at a low interest rate when the seller knows that the purchaser will not qualify for that rate; (ii) followed by the seller giving the purchaser possession of the car and accepting the purchaser's trade-in; (iii) and finally, the late notification to the purchaser that their financing has been denied and they must enter into a new contract, which the purchaser will do because they no longer have their trade-in and because they have become attached to their new car. Based on the facts in the case, the court rejected this argument in that the consumer did not deliver the trade-in until the next day after the consumer had learned that financing at 5.9 percent was not available and after (or at the same time) the consumer entered into the new contract at 11.9 percent.

Insurance Activities of Banks

Title No. I of the Gramm-Leach-Bliley Act (the "Act") signed into law on November 12, 1999, provides that the McCarran-Ferguson Act gives states the exclusive right to regulate the business of insurance within their borders. However, the Act prohibits any state from

discriminating against any applicant for an insurance license or any insurance licensee because the applicant licensee is a depository institution or a depository institution affiliate or wishes to affiliate with a depository institution. The states are permitted under the Act to impose certain limits and requirements designed to protect the public with respect to insurance sales, solicitation and marketing activities by banks and their affiliates. Recently the Office of the Comptroller of the Currency ("OCC") received its second request to preempt state laws that interfere with bank insurance sales. The Massachusetts Bankers Association asked the OCC to use its authority under the Act to override parts of a Massachusetts law that prohibits bank employees from referring perspective customers to insurance agents working in the bank. Prior to the request from the Massachusetts Bankers Association, the West Virginia Bankers Association filed a similar request that the laws of Virginia conflict with the Act and prevent or significantly interfere with bank insurance sales. The OCC is in the process of seeking public comment on both the request by the West Virginia Bankers Association and the Massachusetts Bankers Association.

Collective Investment Funds

In Interpretive Letter No. 884, the Office of the Comptroller of the Currency ("OCC") held pursuant to 12 C.F.R. § 9.18 (a)(2)(ii) that assets of tax-exempt employee benefit plans held by a national bank in any capacity (including agent) may be invested in collective investment funds so long as the fund itself qualifies for an exemption from federal tax. The relevant portion of § 9.18 (a) provides "... Where consistent with applicable law, a national bank may invest assets that it holds as fiduciary in the following collective investment funds: ...(2) A fund consisting solely of assets of retirement, pension, profit sharing, stock bonus, or other trusts that are exempt from Federal income tax ... (ii) A national bank may invest assets of retirement, pension, profit sharing, stock bonus, or other employee benefit trusts exempt from Federal income tax and that the <u>bank holds in any capacity (including agent)</u>, in a collective fund established under this paragraph (a)(2) if the fund itself qualifies for exemption from Federal income tax (emphasis added)." In its request, the bank represented that it acts as a directed agent or a non-discretionary custodian to certain tax-exempt employee benefit planned accounts ("EB Accounts"), and another entity acts as the main fiduciary to the EB Accounts and makes the decisions. The EB Accounts may include corporate pension and profit-sharing plans, which are tax-exempt by reason of being described in Section 401 (a) of the Internal Revenue Code with the bank having no investment discretion over the assets held in the plans. However, the OCC concluded that the bank, as trustee of the fund, acts as a fiduciary to the assets once they are invested in a collective investment fund. The Interpretive Letter is reprinted in Fed. Banking L. Rep. (CCH) ¶ 81-403.

Digital Signatures

On June 30, 2000, President Clinton signed into law the digital signature bill (HR 1714, S 761) known as The Electronic Signatures in Global and National Commerce Act (the "Act"). The Act permits contracts to be signed electronically beginning October 1st with the implementation of other parts of the Act being delayed. The Act makes contracts signed online as legally binding as manually signed paper contracts. The Act does not endorse any specific technology that must be used for digital signatures. The parties to a contract have the discretion to determine the technology to be utilized. The Act also permits financial service companies to make disclosures electronically.

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