Field Of Membership & Other Regulatory Issues Facing Community Credit Unions

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FOM

- NCUA Board Decisions (Oct 2016)
  - Final FOM Rule approved
  - Proposed FOM Rule also approved for publication
NCUA FOM Final Rule

• Effective (60 days from publication)

• Applies to FCUs
  – Many states updating FOM as well

• Greater Flexibility
FOM Final Rule Overview

• **Greater flexibility** in defining local communities

• Updated process for defining **underserved** areas

• Allows **rural district** CUs to serve up to 1 million people
FOM Final Rule Overview

• **Multiple Common Bond CUs**: paperwork streamlined for serving additional groups such as including independent contractors with a strong dependency relationship with an employee group

• Allows **honorably discharged members of armed services** to join CUs serving active duty counterparts
FOM Final Rule Overview

• Modifies type and extent of info required to support an application to expand FOM
FOM Final Rule
Community Common Bond

• “Core Service Area”
  – May convert to or expand w/o being required to serve the entire core area if electing to serve a portion of the core area.

• Population Limit for well-defined portion of CBSA
  – 2.5 mill limit applies to any well defined portion, regardless of population of the whole SA.
FOM Final Rule

Community Common Bond

• “Combined Statistical Area”
  – Can now serve a combined statistical area
  – Population cap of 2.5 million

• Addition of area adjacent to CBSA
  – Can now apply to serve area adjacent to existing CBSA
    or single political jurisdiction or may convert to
    community charter that includes an area adjacent to a
    CBSA.
    • Demonstrate interaction/common interests
FOM Final Rule

Rural District Defined

• Old rule: 250K people or 3% of population of the state in which majority of the district’s population is located
• New rule: May serve rural district up to 1 million regardless of state
• Multi-state Expansion: Can cross state lines;
  – may only serve states bordering state with FCU’s main office
FOM Final Rule

Underserved Areas

• NCUA will re-calculate the concentration of facilities ratio analysis, excluding non-depository institutions or non-community credit unions.

• Second analysis will still include other multiple common bond CUs already serving underserved as a community.

• Now accept CFPB designated “underserved county” and will consider alternative methods
FOM Final Rule
Multiple Common Bond

• Inclusion of SEG contractors
  – Parity with single common bond CUs

• Inclusion of office or industrial park tenants
  – Old rule: included as special community charter
  – New rule: Now eligible for MCB if:
    • 1) each Ee group has <3000 employees at facility
    • 2) Only Ees working regularly at park eligible
FOM Final Rule

Multiple Common Bond

• Streamlined documentation for groups <3000
• Less documentation for groups between 3000 and 5000 in determining whether group would be unable to form its own single common bond CU.

• Honorably discharged veterans of any branch listed in charter now eligible.
FOM Final Rule

TIP as Single Common Bond

• Inclusion of “strong dependency” vendors and suppliers in TIP definition
  – May include employees of entities with a strong dependency relationship with other entities within the same TIP.
Proposed FOM Rule

• Comments Due (12/9/16?)
• Responds to stakeholder suggestions
• Raises current population cap for a “well defined local community” from 2.5 million to 10 million people
• Allows use of narrative approach to create a new well defined local community
• Corrects an error that inadvertently restricts FOM inside core-based statistical areas to not more than 2.5 million people in a metropolitan division, rather than the CBS area.
• Open to more suggestions
Advertising

• 13-FCU-03
• Problem: FOM “open to anyone”
• Focus
  – Common Bond Requirements
    • Applicability to Community CU?
  – Accuracy of Advertising
  – Consequences
    • Supervisory contact, divest group, C&D
Other Hot Regulatory Topics

• CFPB Order Against Wells Fargo
  – Employee incentive plans

• CFPB Order Against Navy FCU
  – Collections Concerns
Account Verification
The Wells Fargo Scandal

• What happened?
  – Opened unauthorized deposit accounts and transferred funds w/o knowledge or consent;
  – Submitted applications for credit cards without knowledge or consent;
  – Enrolled in online banking services not requested; and
  – Ordered and activated debit cards w/o knowledge or consent.
Account Verification
The Wells Fargo Scandal

• CFPB Enforcement Action:
  – $100 million fine
  – Refund $2.5-$5 million to consumers
  – Ensure proper sales practices
    • Independent consultant
    • Ethical sales training
    • Review performance measurements and sales goals

• OCC Enforcement Action:
  – $50 million fine

• City & County of Los Angeles
  – $35 million fine
Account Verification
The Wells Fargo Scandal

• What can we learn?
  – Review compensation program
    • Heightened risk of unfair or abusive practices?
  – Assess any new or revised incentive structures prior to implementation
  – Review risk management and oversight program
    • Identify key risk indicators for unsafe and unsound sales practices
      – Customer surveys, complaints, employee ethics allegations.
  – Provide ongoing training to sales staff
  – Monitor sales practices
    • Policies, procedures, adequate staff and resources
Account Verification
The Wells Fargo Scandal

• What can we learn?
  – Provide system to report sales integrity issues
    • Escalate in a timely manner
  – Maintain adequate policies and procedures for:
    • Customer inquiries/complaints
    • Internal allegations
    • Identifying, tracking and addressing indicators of improper practices
    • Addressing the issues.
  – Review policies and procedures for member consent
    • Deposit accounts, credit cards, unsecured lines of credit etc.
Account Verification
The Wells Fargo Scandal

• NCUA Executive Compensation Proposal
  – Joint Agency Proposal under Dodd Frank
  – Comments were due in July
  – Plans in place would be grandfathered
  – Proposal would:
    • prohibit incentive-based payment arrangements that the Agencies determine encourage inappropriate risks by certain financial institutions by providing excessive compensation or that could lead to material financial loss; and
    • require those financial institutions to disclose information concerning incentive-based compensation arrangements to the appropriate Federal regulator.
CFPB Consent Order with Navy FCU

- Violated Consumer Financial Protection Act (UDAAP)
  - Deceptive representations in debt collection
    - Letters
    - Phone
  - Unfairly restricted consumers’ electronic account access
CFPB Consent Order with Navy FCU

- Ordered to pay $23 million to consumers
- CMP $5.5 million
- Cease and desist deceptive representations
- Establish compliance plan
- Board has ultimate responsibility
- Continued reporting to CFPB
- Record retention

PENALTY!
CFPB Consent Order with Navy FCU

• Lessons Learned:
  – No false threats of litigation or garnishment
    • Letters must be inline with actual practices
    • Test letter campaigns with actual practices
  – Review compliance management systems & policies and procedures for compliance with:
    • FDCPA / State collection laws
    • CFPB Bulletin 2013-07
  – Training
    • Update materials for Initial and periodic training
    • Document
    • Problems: Retrain and/or reprimand
CFPB Consent Order with Navy FCU

• Lessons Learned:
  – Test systems
  – Contractual/statutory right of set off vs. restriction of electronic account access
    • Concern: Freezing electronic account access and disabling electronic services once the consumer becomes delinquent, including debit or ATM card access and online account access.
    • In most cases consumers could not regain access until after debt was settled.
    • No exceptions for protected federal benefits.
Employment Issues

• DOL Overtime Rule
  − Effective 12/1/16
  − Raises standard salary threshold for exemptions; does NOT amend the duties side of the test.
  − Salary Threshold
    • Raised from $23,660/yr to $47,476/yr
    • Will increase over time
Employment Issues

DOL Overtime Rule

“White Collar” Exemption Test

1. Must be paid on salary basis

2. Salary must meet minimum threshold

3. Employee’s primary job duties must meet the “standard duties test” for the particular exemption.
   1. Executive, Administrative, Professional, Computer & Outside Sales
Employment Issues

• DOL Overtime Rule
  – Permits up to 10% of the salary threshold for non highly compensated employees to be met by non-discretionary bonuses, incentive pay, or commissions
  – Must be paid at least quarterly

• Recommendation
  – Review all exempt employees
  – Look not just at salary, but duties as well

• FAQs
  – Comp Time
Telephone Consumer Protection Act

• What is affected?
  – Calls to land lines and cell phones
  – Text messages

• Why The Focus Now
  – Passed by Congress in 1991
  – Amended the Communications Act of 1934
  – Changes Oct 2013
  – Declaratory Ruling July 2015
    • Altered aspects of the 2013 changes
    • Defined “auto-dialer”

• Changes in technology
Why Do We Care?

• TCPA Violations can be costly
  – Private right of action
    • 3,710 TCPA lawsuits in 2015
  – Statutory damages
    • $500 for each violation OR actual damages, whichever is greater
    • $1500 for each willful violation
    • No cap on damages
    • Can go back 4 years
  – Can have a LARGE number of calls and texts!
    • Class Action
Why Do We Care?

Under the 2015 Ruling...

• MOST METHODS OF CALLING OR MESSAGING MEET THE DEFINITION OF AUTO-DIALER
Key Points of the 2015 FCC Ruling

1. Broad definition of “autodialer”
2. Consumers must provide “express written consent” to be contacted using an “autodialer”
3. Right to revoke consent to receive calls and text messages in any reasonable manner at any time
4. Consent survives when porting a landline to a wireless phone
5. Callers are required to stop calling reassigned wireless numbers after a single call
2015 FCC Ruling

• Did not provide a list of covered equipment

• SAFEHARBOR:
WHAT SHOULD THE CU DO???

• CUs will have to examine the nature of their equipment
• Weigh the Risk
  – Cost of Compliance vs Potential Liability
Telephone Consumer Protection Act

• Applies to calls/texts made for a commercial purpose
• Prohibits:
  – 1) making telemarketing calls using an artificial or prerecorded voice to residential phone line without prior express consent; and
  – Making any non-emergency call using an “autodialer” or artificial/prerecorded voice to a wireless number without prior express consent.
Cell Phones

• Consumer can incur costs for making and receiving calls and texts ... this led to restrictions

• Consent in writing for most types of contact such as telemarketing

• Consent may be verbal if call is “informational”
  – Eg, package deliveries, airline notification
Telephone Consumer Protection Act

• “Autodialer”
  – Equipment that has the capacity:
    • To store or produce phone numbers to be called using a random or sequential number generator; and
    • To dial such numbers
    • Includes predictive dialers
    • Speed dialing not included

• “Capacity”
  – Broad: Both present capability and potential future capability of the equipment

• Equipment used to send internet-to-phone text messages is an autodialer
Obtaining Consent Under TCPA

- Description of messages covered by the consent
- State that message will/may be made using an autodialer and/or artificial prerecorded voice system
- List the specific phone number(s) for which the consumer is giving consent
- Explain that consumer is NOT required to give consent to receive any good or service
- Mention that consumer will have an opt out option during the call
- Signature line (no check box)
EXPRESS Written Consent

• Maybe is not good enough...
Obtaining Consent Under TCPA

• “Written Consent”
  – Wet Signature
  – Email
  – Website Form
  – Text
  – Telephone key press
  – Voice recording

• FCC says user agreements are NOT sufficient
Reminder on Revocation

Consent can be revoked at any time through *any reasonable means*
Track Consent AND Revocation

• Obtain and Retain written consent
• Retain documentation of opt-out feature
Limited Exceptions to TCPA Consent Requirement for Wireless Contact

• Urgent Circumstances / Pro Consumer

• Must be FREE to end user
Limited Exceptions to TCPA Consent Requirement for Wireless Contact

1. Risk of Fraud or Identity Theft

2. Possible Security Breach of Private Consumer Information

3. Steps Consumers Can Take to Prevent or Remedy Harm Caused by Data Security Breaches

4. Actions Needed to Arrange for Receipt of Money Transfers
Limited Exceptions to TCPA Consent Requirement for Wireless Contact

• Conditions for exceptions
  – 1) Voice calls and text must be sent only to the wireless telephone number provided

2) Calls and texts must state the name and contact information of the CU (for voice calls, these disclosures must be made at the beginning of the call);

3) Calls/Texts are strictly limited to purposes listed above and must not include any telemarketing, cross-marketing, solicitation, debt collection, or advertising content;
TCPA Consent Exceptions for Wireless

4) Calls/texts must be concise, generally one minute or less in length for voice calls (unless more time is needed to obtain customer responses or answer customer questions) and 160 characters or less in length for text messages;

5) A CU may initiate no more than three messages (whether by voice call or text message) per event over a three-day period for an affected account;
TCPA Consent Exceptions for Wireless

• 6) A CU must offer recipients within each message an easy means to opt out of future messages
  • voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call,
  • voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future calls,
  • text messages must inform recipients of the ability to opt out by replying “STOP,” which will be the exclusive means by which consumers may opt out of such messages;
– 7) A CU must honor opt-out requests immediately.
Beware of Reassigned Numbers

• Only one protected call before violating TCPA
• Need consent from CURRENT USER of the phone
• Can be liable for constructive knowledge
• Keep contact info updated!
TCPA Opt Out

• Opt out of pre recorded calls
  – Landline or cell
  – Need automated interactive voice and/or key press activated mechanism
  – Present at beginning of the call with instructions
  – Must automatically add them to the no call list
  – Call must terminate immediately

• Answering machine message
  – Must provide toll free number to opt out
TCPA and Debt Collection

• TCPA requires prior express consent to contact a consumer to collect a debt

• Consumer gives “express consent” to receive collection calls from creditors or third party debt collectors by providing a cell number if it was done so during the transaction that resulted in the debt owed (loan application).
  – But can be revoked!