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To the Point!

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Checking Account Disclosures, Overdraft Practices and Dispute Resolution

The PEW Charitable Trusts (*"PEW"*) has issued its third study of checking account disclosures (previously reported on in our June 15 and July 10, 2012 ***To the Point!*** publications). The study rated bank practices in three areas: disclosures, overdrafts and dispute resolution; and contains noteworthy market information and insight into possible regulatory action.

In this study, PEW expanded their review from 10 banks to 36 of the nation's 50 largest banks. The study noted that the remaining 14 banks out of the top 50 could not be included in the study because key terms and fees were not accessible online or through the mail, which is unfortunate given the emphasis in the study on availability of clear and complete disclosures.

In issuing the report, PEW summarized the checking account complaints received by the Consumer Financial Protection Bureau (*"CFPB")* noting that the CFPB receives approximately 1,000 such complaints each month, which represents 15% of the total financial product complaints received by the CFPB. Based on the CFPB data and the checking account disclosure information it obtained, PEW determined that regulatory action is needed and urged the CFPB to issue new rules to require banks to:

- standardize disclosures;
- provide consumers with clear and complete terms and pricing information for all available overdraft programs;
- make overdraft fees reasonable and proportional to the bank's costs in providing the service (similar to the standard applied to credit card penalty fees under the CARD Act);
- fully disclose posting and withdrawal order and require the order to be in a neutral manner that does not maximize overdraft fees (i.e., not using high to low posting order); and
- eliminate predispute mandatory binding arbitration terms in deposit account agreements which prohibit consumers from access to courts.

PEW included a model checking account disclosure box in its initial study in 2011. Since that time, PEW reported that it has worked with 18 financial institutions to adopt the checking account disclosure box, including seven of the 12 largest banks and two of the three largest credit unions, which collectively represent approximately 40 percent of domestic deposit volume.

In 2012, the CFPB initiated inquiries into overdraft practices and the use of arbitration clauses. Among other issues, the CFPB expressed concern about confusing disclosures and marketing materials regarding overdraft programs. It is anticipated that the CFPB will act on its overdraft practices and arbitration clause initiatives in the near future. In the interim, banks should review the model checking account disclosure suggested by PEW and the concerns identified by the CFPB and consider revising their disclosures as appropriate to increase clarity for their customers. In addition, banks should consider how their practices related to dispute resolution and overdraft treatment vary from these recommendations. Finally, while waiting for action from the CFPB, banks should ensure that their current practices are, at a minimum, compliant with all aspects of existing agency overdraft guidance and applicable regulations.

FDIC Settlements for Unfair and Deceptive Practices related to Reloadable Prepaid Cards

The Federal Deposit Insurance Corporation (*"FDIC"*) has announced a settlement with a bank and its institution-affiliated party for unfair and deceptive practices in violation of section 5 of the Federal Trade Commission Act related to inaccurate and misleading marketing of the bank's prepaid card program terms, the operation of error resolution procedures, and the use of the Automated Clearing House system to deliver federal benefit payments to prepaid cards. The entities were ordered to pay civil money penalties of over $700,000 and restitution payments of over $1 million to 64,000 cardholders. In addition to imposing civil money penalties and restitution awards, the FDIC orders prohibit the entities from using the word "free" if the prepaid card has fees or costs associated with its use and require the entities to implement enhanced compliance programs.

Under the Federal Deposit Insurance Act, the FDIC has the authority to take action against both a bank and any independent contractor that the FDIC determines to be an institution-affiliated party, as it did in this case. An institution-affiliated party is an independent contractor that knowingly or recklessly participates in any violation of any law or regulation or any unsafe or unsound practice. Banks that engage in prepaid card programs with third parties are obligated to ensure that the programs comply with all applicable laws. As noted by the FDIC in its order, the bank will ultimately be responsible for any unpaid restitution awards assessed against the vendor for violations of law. This action by the FDIC underscores the importance of each bank's review and continuing oversight of all third-party vendors.

CFPB Guidance on Refinancing Student Debts

In its continuing review of the student loan market, the Consumer Financial Protection Bureau *("CFPB")* recently published a report on student loan affordability which included its concerns related to the low level of activity in student loan refinancing. The CFPB criticized private student lenders for failing to offer meaningful loan modification options and encouraged such lenders to offer affordable options similar to those available for federal student loans, such as graduated repayment schedules, extended amortization periods and rehabilitation plans for delinquent borrowers.

Lenders engaged in the private student loan market should become familiar with the CFPB's most recent issuance and consider those adjustments to their programs related to refinancing options which may be appropriate.

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To the Point! is a summary of items of interest and current issues for financial institutions with primary focus on regulatory, consumer, and corporate issues. Chapman and Cutler LLP maintains a dedicated practice group with expertise to counsel on these issues and other enterprise risk management matters facing financial institutions. If you would like to discuss any of the items contained in these briefings or other legal, regulatory, or compliance issues facing your institution, please contact one of the partners in our Bank Regulatory Group:

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