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To the Point!

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NACHA Operating Rules—New Unauthorized Entry Fee

Effective October 3, 2016, NACHA will implement a new Unauthorized Entry Fee of $4.50 charged to the originating depository financial institution (*"ODFI"*) for each ACH that is returned as unauthorized. This $4.50 fee will be in place until 2019, when NACHA can reconsider the fee amount according to principles contained in the new rule. The fee will be credited to the receiving depository financial institution (*"RDFI"*) in its settlement account. International ACH transactions will be exempt from the new Unauthorized Entry Fee.

The intent of this new fee is to reduce the number of unauthorized transactions, thus decreasing the RDFI's customer service issues related to disputed transactions. NACHA hopes that placing the risk on the ODFI will result in fewer data-entry errors and encourage enhanced risk management and monitoring by ODFIs of their customers. Banks should review their monitoring processes to ensure that excessive unauthorized transactions are identified quickly and consider revising their contracts with customers to allow appropriate actions to be taken in these cases, such as increasing fees, establishing reserve accounts, or terminating services.

Customer Due Diligence—Beneficial Ownership Rule

FinCEN recently issued its final Customer Due Diligence Rule amending the BSA regulations and requiring financial institutions to identify and verify the identity of beneficial owners of their legal entity customers (the *"CDD Rule"*). The CDD Rule will be effective on July 11, 2016, but compliance is not mandatory until May 11, 2018.

The CDD Rule defines "legal entity customer" as including corporations, LLCs, partnerships, business trusts, and other similar business entities. The term does not include sole proprietorships, unincorporated associations, or trusts (other than statutory trusts). It also does not include "intermediated account relationships," where existing FinCEN guidance provides that the financial institution should treat the intermediary, not its customers, as the financial institution's customer for customer due diligence (*"CDD"*) purposes (e.g., a broker-dealer that opens an account with a mutual fund to engage in transactions on behalf of its customers). Other exemptions from the definition of "legal entity customer" include financial institutions; public accounting firms registered under Sarbanes-Oxley; entities whose common stock is listed on the NYSE, NYSE MKT, or NASDAQ exchange; and investment companies and advisors registered with the SEC, among others.

The CDD Rule requires a financial institution to identify at least one beneficial owner for each legal entity customer. Beneficial owners include: (i) each individual (if any) that directly or indirectly owns 25 percent or more of the equity interests of the legal entity customer; and (ii) at least a single individual with significant responsibility to control, manage, or direct the customer (e.g., a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President, or Treasurer). This is a minimum requirement and a financial institution may establish a lower percentage threshold of beneficial ownership based on its risk assessment and BSA policy and procedures.

Beneficial ownership information can be obtained by the financial institution using the standard certification form issued by FinCEN as an appendix to the CDD Rule or by any other means. The information must be current, must be certified by a natural person authorized by the legal entity customer to open accounts, and must be accurate "to the best of the individual's knowledge." The CDD Rule does not provide a safe harbor for use of the standard certification form; however, it provides that a financial institution can rely on the beneficial ownership information provided by the individual opening the account on behalf of the legal entity customer if the financial institution "has no knowledge of facts that would reasonably call into question the reliability of such information."

In addition, the CDD Rule amends the AML Program requirements contained in the BSA regulations by identifying CDD as a fifth "pillar" of an AML Program. The AML Program requirements now include (1) internal controls, (2) independent testing, (3) designation of an individual responsible for day-to-day compliance, (4) training, and (5) CDD. Under the CDD requirements established by FinCEN, a financial institution must obtain beneficial ownership information, understand the nature and purpose of the customer relationship so that a customer profile can be created, engage in ongoing monitoring to identify and report suspicious transactions, and, on a risk basis, update customer information, including beneficial ownership information.

Financial institutions should begin to review their current practices to identify necessary changes to comply with the new CDD Rule, such as revisions to account opening procedures, including designation of the institution's minimum threshold for identification of beneficial owners, acceptable forms of beneficial ownership information, customer transaction monitoring, suspicious activity reporting, employee training, and changes to the BSA policy.

Limited English Language Proficiency Customers

As the number of U.S. residents who speak a foreign language as their primary language continues to grow, financial institutions are likely to see these limited English proficiency (*"LEP"*) customers as a market opportunity. Due to the lack of clear guidance as to the regulatory requirements that apply when soliciting and servicing LEP customers, careful consideration should be given to such initiatives.

The CFPB adopted its first Language Access Plan in 2014 to provide LEP consumers with meaningful access to the CFPB's programs and services. The Language Access Plan, which is subject to review every three years, includes translating consumer-facing documents into nine languages and establishing contact centers to handle consumer complaints that can assist consumers in 180 languages.

For a number of years, non-English-language disclosures have been permitted under TILA, RESPA, and the ECOA but do not replace mandatory English language disclosures. The CFPB now has rule-writing authority under these laws and has taken several actions consistent with its Language Access Plan that signal its desire for financial institutions to provide additional support and services for LEP customers. For example, under an amendment to Regulation E, the CFPB required a financial institution that chooses to market its remittance transfer services in a foreign language to provide its disclosures in both English and the language used to promote the service. Similarly, the CFPB has proposed that entities marketing prepaid cards in a foreign language must also provide disclosures in both English and the foreign language used to market that product.

In 2014, the CFPB issued a consent order alleging that a bank had violated the ECOA by failing to include customers with "Spanish-preferred" indicators on their accounts in certain direct-mail collection offers sent to other other customers. In addition, in its Supervision and Examination Manual, the CFPB has directed examiners to evaluate whether mortgage servicers: (i) flag files that require non-English assistance; (ii) provide customer service call center options for languages other than English; (iii) make available call center personnel who are fluent in languages other than English; (iv) train customer service personnel who assist in languages other than English; and (v) provide translations of English-language documents to LEP customers.

Financial institutions should consider the CFPB's unfair, deceptive, or abusive acts or practices (*"UDAAP"*) authority when deciding whether to market directly to LEP consumers and how to service their LEP customers. For example, a financial institution's failure to provide disclosures and related services in a language the customer can understand could result in a UDAAP claim even if such foreign language disclosure is not explicitly required under the applicable law. Financial institutions should also address LEP consumers in their policies and procedures to ensure that they are treated fairly and consistently in accordance with the CFPB's supervisory expectations.

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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 maintains a dedicated practice group with the experience 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 members of our Bank Regulatory Group:

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