

Compliance Update
Virginia Credit Union League
October 28, 2020

Joseph E. Spruill, III
Woods Rogers PLC

I. 2020 Virginia Legislation of Significance to Share Account Operations

A. Multiple-Fiduciary Accounts – S.B. 293 – This bill provides that financial institutions may enter into multiple-fiduciary accounts with more than one fiduciary to the same extent that they may enter into fiduciary accounts with one fiduciary. A “fiduciary account” is defined to include (i) an estate account for a decedent, (ii) an account established by one or more agents under a power of attorney or an existing account of a principal to which one or more agents under a power of attorney are added, (iii) an account established by one or more conservators, (iv) an account established by one or more committees, (v) a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account, or (vi) an account arising from a fiduciary relationship such as an attorney-client relationship. The bill defines "multiple-fiduciary account" as a fiduciary account where more than one fiduciary is authorized to act. The bill allows any multiple-fiduciary account to be paid, on request, to any one or more fiduciaries, including any successor fiduciary upon proof showing that the successor fiduciary is duly authorized to act, or at the direction of any one or more of the fiduciaries.

B. Good Faith Reliance on Certificate of Qualification of Personal Representative/Conservator – H.B. 1411 - This bill provides that any individual or entity, such as a credit union, conducting business in good faith with a personal representative who presents a currently effective certificate of qualification may presume that the personal representative is properly authorized to act as to any matter or transaction. The bill further provides that if such individual or entity refuses to accept a certificate of qualification for a personal representative or a guardian or conservator who has been appointed for an incapacitated person, such individual or entity is subject to (i) a court order mandating acceptance of the certificate of qualification and (ii) liability for reasonable attorney fees and costs incurred in any action or proceeding that confirms the validity of the certificate of qualification or mandates acceptance of the certificate of qualification. The bill further provides that any individual or entity shall either accept or reject a certificate of qualification of such personal representative or such guardian or conservator no later than seven business days after presentation of such certificate. The bill specifies certain circumstances under which an individual or entity is not required to accept such a certificate for a transaction.

C. Adult Abuse; Financial Exploitation; Reporting – S.B. 391 – This bill requires financial institutions to report to the local department of social services or the adult protective services hotline within five business days any refusal to execute a transaction, delay of a transaction, or refusal to disburse funds based on a good faith belief that such transaction or disbursement may involve financial exploitation of an adult.

II. Recurring Hotline Issues

A. Powers of Attorney – Five important rules under Virginia’s Uniform Power of Attorney Act:

1. **Notarization.** A credit union should ensure a POA is notarized before accepting it. A notarized signature is presumed genuine and a credit union is afforded protection in accepting a POA only if it is notarized. A credit union that acts in good faith in accepting a POA without actual knowledge that the POA is void or terminated is protected from liability. Credit unions may request a certification from the agent under oath as to any factual matter with respect to the POA.
2. **Liability.** A credit union may be subject to liability for refusing to accept a notarized POA, subject to certain exceptions. Liability includes reasonable attorney fees and court costs in any court action that confirms the validity of the POA.
3. **Authority to Conduct Financial Transactions.** A general grant of authority by reference to a particular subject, such as “banking,” authorizes the agent to engage in virtually all banking transactions as described in the Act.
4. **Durability/Incapacity of Principal.** A POA executed on or after July 1, 2010 is treated as durable unless the POA expressly provides that it terminates upon the principal’s incapacity. A POA executed before July 1, 2010 is durable only if there is language so indicating.
5. **Photocopy.** A credit union may rely on a photocopy or an electronically submitted copy of a POA.
6. **Beneficiary Designations.** A credit union generally should not allow an agent under a POA to add or change a right of survivorship or payable-on-death designation, unless the POA expressly allows it.
7. **Co-Agents.** Unless the POA provides otherwise, co-agents appointed under the POA may act independently of the other.

B. Equal Housing Logotype and Legend - While the NCUA has regulations (12 CFR §701.31(d)(1)) requiring federal credit unions to include the Equal Housing logotype and legend in their advertisements, there is no similar requirement under Virginia law or other federal law that applies to state-chartered credit unions.

In this regard, while Virginia's fair housing statutes (*Va. Code §36-96.1 et seq.*) apply to state-chartered credit unions, the fair housing regulations of the Virginia Real Estate Board ("Board"), where Virginia's equal housing logo disclosure requirement (*18 VAC135-50-290*) is found, do not. In particular, the Board has jurisdiction and regulatory authority only over real estate salespersons, and real estate brokerage firms licensed by the Board, but not credit unions that are not licensed by the Board. Note that the statute speaks to the board's authority to handle complaints and conduct investigations with respect to real estate licensees. *See Va. Code §36-96.20*. In addition, the Board's regulations state that "[t]his chapter provides the board's interpretation of conduct that is unlawful housing discrimination under §36-96.3 of the Code of Virginia." That section - §36-96.3 – deals with the sale or rental of dwellings, the principal activities in which real estate licensees engage. Accordingly, I'm of the opinion that the equal housing logo disclosure requirement in Virginia's regulations do not apply to credit unions. Moreover, there are no other laws that impose such a disclosure requirement applicable to state-chartered credit unions.

C. E-Sign Act - Credit union seeking to establish and maintain their accounts electronically must comply with the E-Sign Act (the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001 *et seq.*) to ensure that electronic disclosures and notices are given legal effect. Here are the key points of the law:

1. Informing Consumer. A credit union that seeks to have a consumer consent to electronic disclosures must provide a clear and conspicuous statement setting forth the following prior to obtaining such consent:

- Inform the consumer of any right or option to have the disclosure provided or made available in paper form.
- Inform the consumer of the right to withdraw the consent, and any conditions, consequences, or fees in the event of such withdrawal.
- Inform the consumer of whether the consent applies only to particular transactions (e.g., account opening disclosures) or to ongoing disclosures over the course of the relationship.
- Describe the procedures the consumer must follow to withdraw consent.
- Describe the procedures the consumer must follow to update information needed to contact the consumer electronically.
- Describe how the consumer may request and obtain a paper copy of an electronic record and whether any fee will be charged for such copy.
- Outline the hardware and software requirements for accepting and retaining electronic records.

2. Consent, The consumer must consent electronically, or confirm his or her consent electronically, in a manner that reasonably demonstrates that the consumer can

access information electronically. This means the consumer must consent through the same electronic means (e.g., the consumer's computer) that will be used to view and retain electronic documents.

3. Hardware. If a change in the credit union's hardware or software requirements needed to access or retain electronic disclosures creates a material risk that a consumer will not be able to access or retain a subsequent electronic disclosure based on the consumer's initial consent, the credit union must provide the consumer with a statement of the new hardware or software requirements and the consumer's right to withdraw his or her prior consent.

4. Disclosure Risks. Various consumer financial protection laws (e.g., Truth in Lending Act, Electronic Fund Transfers Act) require disclosures in "writing." A disclosure made under any such law in electronic form will not be deemed a "writing" unless it satisfies the E-Sign Act's requirements. Thus, a credit union that does not deliver an electronic disclosure in compliance with the E-Sign Act will be in violation of the particular consumer financial protection law for failing to give the disclosure.

5. System Changes. A credit union's system change can result in inadvertent violations of the E-Sign Act. Remember, changes to a credit union's hardware or software may create a material risk that a member will not be able to access and retain electronic documents. Members must be notified of a credit union's hardware or software changes that may affect the electronic delivery of disclosures and notices, so it's important to have compliance personnel involved in connection with such hardware or software changes.

D. Adult Protective Services – Department of Social Services – Requests for Member Information

Credit unions report receiving requests by representatives of local department of social services for member account information in connection with investigations into possible financial exploitation. Virginia statutes dealing with the authority of local departments of social services (adult protective services) do not authorize a local department to get financial records from a financial institution absent a subpoena or court order. Importantly, there is nothing in Virginia law to protect a credit union from a claim from its member whose records are disclosed in response to such a request. The law does allow a credit union to disclose records to a local department if the credit union suspects financial abuse or exploitation and to receive protection from liability, but this must be based on transactions on an account that make the credit union suspect abuse.

E. Legal and Regulatory Considerations for Credit Unions to Serve Hemp Businesses

1. Registration. Review and record VDACS registration for each business.

2. Good Standing. Verify the registrant's good standing.
3. Certificate of Compliance. Obtain a certificate of compliance with the law and require periodic updates.
4. Understanding. Have a thorough understanding of the particular business enterprise.
5. THC. Obtain THC test results..
6. Indemnification. Obtain indemnification agreement.
7. Monitoring. Engage in ongoing monitoring.