



## COUNSELOR'S CORNER

# Five Legal Topics for Washington Bankers to Consider This Fall

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Summer vacations are over, and now bank management and directors need to focus on compliance. Below are five current legal topics that Washington bankers should be considering this fall.

**1. Loans Secured by Residential Real Estate.** With the Senate's approval of Director Cordray's appointment, the Consumer Financial Protection Bureau's ("CFPB") extensive rulemaking is likely not subject to challenge. As a result, it's time to review again the laundry list of new CFPB rules. Probably the most complex are the new mortgage rules. While some of the new regulations are already effective, mortgage lenders and servicers will need to comply with eight new residential real estate rules by January 2014, including the Ability-to-Re-

pay/Qualified Mortgage Rule and the new servicing rules. While the scope and complexity of these rules cannot be fully explored in this brief discussion, the new regulations apply to both closed-end and open-end loans secured by either principal- or non-principal dwellings, and the penalties for certain violations (including a material violation of the Ability-to-Repay Rule) can result in forfeiture of all fees and finance charges.

**2. Uniform Commercial Code Article 9.** Changes have been made across the country regarding Uniform Commercial Code Article 9, governing security interests in personal property. Effective July 1, 2013, in Washington:

- The form of the UCC-1 has changed.

- With regard to the correct name of an individual debtor on a UCC-1, if the person has an unexpired Washington driver's license or state-issued identification card, the name on the financing statement must be the name of the individual as indicated on the driver's license or identification card.
- For organizations (including some types of business trusts), the only correct name on a UCC-1 is the name used on the "public organic record" of the entity, i.e., a record that is available to the public for inspection and was filed as part of the formation of the entity (like articles of incorporation, not a certificate of existence or good standing certificate).

**NOTE:** *These changes have not been adopted in all states, nor are all effective dates for changes the same in every state adopting them. Therefore, it remains important to verify what the law is in the state where the interest is to be perfected.*


**3. Don't Forget Domestic Partnerships.** Notwithstanding the recent change in Washington law permitting same-sex marriage, some registered domestic partnerships survive in this state. That will matter to banks in dealing with loans, guaranties and survivorship rights since such partnerships have the same community property rights and signature requirements as married couples. Until June 30, 2014, same-sex couples, and couples where one of the partners is 62 or older, may still enter into a state registered domestic partnership in Washington. Registered domestic partnerships where both partners are the same sex are being phased out; however, any Washington registered domestic partnership in which (a) the parties are the same sex and (b) neither party is 62-years of age or older and which has not been dissolved or converted into a marriage by the parties is automatically deemed



a marriage as of June 30, 2014. *However, age-dependent registered domestic partnerships will still be available after the change in the law.*

4. **Overdraft Charges.** In June, the CFPB issued a comprehensive “white paper” review of bank overdraft and non-sufficient funds programs and practices. In the report, the CFPB indicates that it is concerned about “serious economic harm” inflicted by these charges and hints that their use may result in a disparate impact on minorities and lower income people. It is likely the CFPB will issue rulemaking restricting these fees. This is an area that Washington bankers should follow carefully (including providing comments to the CFPB, as appropriate).
5. **Arbitration Clauses.** The use of arbitration clauses, especially to avoid class action litigation, remains controversial. As of June 2013, Regulation Z prohibits pre-dispute arbitration agreements in residential mortgage loans or home equity line of credit agreements, and the CFPB is studying pre-dispute arbitration provisions in other consumer transactions. In two recent decisions, the U.S. Supreme Court upheld the use of individual arbitration provisions, but the Washington Supreme Court recently handed down a unanimous decision rejecting an arbitration provision in an employment-related agreement. While a well-drafted arbitration clause should avoid both class

action litigation and class action arbitration, the area is rapidly changing and extremely complex, particularly with respect to consumer preprinted forms. Regardless, Washington bankers should consider using carefully drafted arbitration clauses in at least commercial documentation.

These are a few of the many compliance challenges that Washington bankers will need to deal with this fall, as many of the new federal and state statutes and regulatory changes become effective. 



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