

RECENT CHANGES TO OHIO STATUTES AFFECTING OHIO CREDIT UNIONS

On December 19, 2018, Ohio's Governor Kasich signed Ohio House Bill 489 (the "Bill") resulting in changes to the regulatory requirements for credit unions, mortgage servicers and mortgage creditors. **The new requirements are effective March 20, 2019.** Below are some of most notable changes to the statutes affecting primarily Ohio chartered credit unions.¹

A. New Demand Letter Requirements For Second Mortgages/Junior Liens – R.C. §1349.72

This new statute requires a specific written notice to be **sent to a debtor** who is **in default** on a **second mortgage or junior lien on residential real property** **prior** to attempting to collect the debt.

The Notice **must** be in **12-point font**, be sent via U.S. Mail to the residential address of the debtor and contain **all** of the following information:

1. The name and contact information of the person collecting the debt;
2. The amount of the debt;
3. A statement that the debtor has a right to an attorney;
4. A statement that the debtor may qualify for debt relief under Chapter 7 or 13 of the United States Bankruptcy Code, 11 U.S.C. Chapter 7 or 13, as amended;
5. A statement that a debtor that qualifies under Chapter 13 of the United States Bankruptcy Code may be able to protect their residential real property from foreclosure.

Upon request of the debtor, the owner of the debt is to provide a copy of the note and loan history to the debtor.

Failure to comply with this new notice requirement can give rise to a private right cause of action by the debtor for damages; however, **a class action is prohibited.**

Notwithstanding, any owner of debt who **fails to meet the above requirements** shall not be held civilly liable in any action, if **all** of the following are met:

¹ This summary of the Bill is not intended to replace a thorough reading of same and is not to be considered legal advice. While the information presented herein is accurate as of the date of publication (02/01/2019), it should not be cited or relied upon as legal authority and should not substitute for the advice of competent legal counsel in regard to your particular circumstances.

- (a) The owner of the debt shows **by a preponderance of evidence** that the compliance failure was **not intentional** and resulted from a **bona fide error** notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
- (b) Within **sixty days after discovering the error**, and prior to the initiation of any action, the owner of the debt **notifies the debtor** of the error and the manner in which the owner of the debt intends to make **full restitution** to the debtor.
- (c) The owner of the debt promptly makes reasonable restitution to the debtor.

As applied to R.C. §1349.72, “bona fide error” means an unintentional clerical, calculation, computer malfunction or programming, or printing error.

All mortgage creditors should consider sending the notice as soon as the loan is in default and law firms should consider sending the required notices prior to initiating any foreclosure actions as the true priority status of the mortgage may not be known at the time of default due to the possibility of unknown tax liens or other possible liens that could take priority over an assumed first mortgage. This statute applies to all holders of residential second mortgage/junior lien debt.

B. Registration And Physical Office Requirement For Mortgage Servicers – R.C. §1322.07

R.C. §1322.07 which now requires mortgage servicers to register like lenders and brokers. The statute now requires servicers to maintain an office location in the state.

C. Membership Shares - R.C. §1733.05

Under prior law, the subscription to or purchase of a “membership share” of a credit union was a prerequisite for membership in the credit union. The Bill removed this requirement and now permits a person otherwise qualified for membership to become a member **if** the person does **any** of the following:

- (1) The purchase of a membership in the credit union as provided in the credit union’s bylaws;
- (2) The payment of an entrance fee established from time to time by the board of directors of the credit union;
- (3) The purchase of one or more shares in the credit union as provided in the credit union’s bylaws.

D. Termination Of Membership – R.C. §1733.051

Under this new section created by the Bill, the senior management officials of a credit union now **may terminate the membership** of, or some or all services to, a member of the credit union, if the member does **any** of the following:

- (1) Causes a loss to the credit union;
- (2) Commits fraud or any similar misdeed against the credit union or against any person on the premises of the credit union;
- (3) Engages in inappropriate behavior involving another person, such as physical or verbal abuse of another member or an employee of the credit union;
- (4) Otherwise engages in conduct detrimental to the credit union.

A member that has its membership terminated or services suspended under the above may, **within ninety days** after the termination or suspension, **appeal the action** to the board of directors of the credit union. The board may affirm, disaffirm, or modify the action, and **its decision is final**.

E. Authority; Restrictions – Purchase of Real Estate – R.C. §1733.04(C)(2)

Under previous law, in order for a credit union to purchase real estate for present or future operations, a credit union was required to notify the Superintendent in writing and obtain the Superintendent's prior approval. The new law retains the notification requirement but **removes** the necessity of obtaining approval of the purchase.

F. Misleading Use Of Credit Union Name – R.C. §1733.441

The Bill prohibits any person from using the name of a credit union without its written express permission in any advertisement, solicitation, or other promotional material in any way that may mislead another person, or cause another person to be misled into believing that the person issuing the promotional material is associated with the credit union. A person who violates this provision is subject to a civil penalty of up to \$10,000 for each day the violation committed is continued. Further, a credit union may bring an action at law or equity for recovery of damages, temporary restraining order, an injunction or any other available remedy.

G. The Definition Of A "Person" Now Includes Estate Of Deceased Individual – R.C. §1733.01(G)

With regards to 1733.01 *et seq.*, the term "person" now specifically includes the estate of a deceased individual.

H. Voting By Members – Use of Electronic Ballot R.C. §1733.13

The Bill amended this section to provide for the use of electronic ballots.

I. Quorum; Majority Vote – R.C. §1733.14

The Bill amended this section to provide that the quorum for a members' meeting, which may be set forth in the articles or regulations of a credit union, shall include those members present and eligible to vote as provided in section 1733.13 of the Revised Code.

Unless the articles or regulations otherwise provide:

- (1) **One per cent** of the voting members of a credit union, **or twenty-five, whichever is lower**, constitutes a quorum at any meeting of members.
- (2) The act of a majority of the voting members represented in person, by mail ballot, **by electronic ballot**, by proxy, **or as otherwise prescribed by a credit union's bylaws**, at a meeting at which a quorum is present shall control, but no action required by law, the articles, or regulations to be authorized or taken by a designated proportion of the members may be authorized or taken by a lesser proportion.

J. New Section: Associate Directors – R.C. §1733.152

This new section created by the Bill provides for the **discretionary appointment** of associate directors. In particular, the new law provides:

- (A) The board of directors of a credit union **may**, in its discretion, appoint one or more associate directors to serve in an advisory, ex officio capacity. The board shall prescribe the duties of an associate director and the manner in which associate directors are appointed and removed.
- (B) Prior to appointing an associate director, the board shall confirm that the person **meets all of the requirements to serve as a director**.
- (C) An associate director may participate in meetings of the board but **may not vote or otherwise act as a director**. An associate director shall **not be considered a director** for purposes of this chapter.
- (D) The board shall require each associate director to **sign a confidentiality agreement** to ensure that information concerning the credit union remains confidential.

K. Meeting Of Board Of Directors – R.C. §1733.16

Section 1733.16 was amended to add the following language with respect to the scheduling of director meetings: “Regularly scheduled meetings of the directors shall be held in the manner prescribed by the credit union's code of regulations, **but not less frequently than quarterly.**”

L. Committees Of Board – R.C. §1733.19(E)

Section 1733.19(E) was amended by the Bill to include the following new language permitting a **limited delegation of authority from the credit committee to** one or more **loan officers** relating to approval of loans

(E)(2) The credit committee **may be delegated** the authority to **appoint one or more loan officers**, and **delegate to them power to approve loans** within limits fixed by the regulations, bylaws, or resolutions of the board of directors. Such loan officers **also may be loan originators** registered with the nationwide mortgage licensing system and registry as provided in section 1733.352 of the Revised Code.

(E)(3) If loan officers are appointed pursuant to division (E)(2) of this section, all applications for **loans denied by a loan officer may be reviewed by the credit committee**, and the approval of the majority of the members of the committee who are present at the meeting when the review is undertaken shall be required to reverse the decision of the loan officer, provided that a majority of the full committee is present.

(E)(4) In the absence of a credit committee, the board shall, upon the written request of a member, review a loan application denied by a loan officer.

M. Director And Committee Member Compensation, Gifts, Insurance, And Expense Reimbursement – R.C. §1733.22

Section 1733.22 was amended to provide that a credit union may provide **any** of the following to its director and supervisory audit committee members:

- (1) Reasonable compensation for their service as directors or supervisory audit committee members;
- (2) Gifts of minimal value;
- (3) Insurance coverage or other benefits that are available to employees generally;
- (4) Reimbursement for reasonable expenses incurred on behalf of themselves and their spouses in the performance of their duties as directors or supervisory audit committee members.

N. Shares And Share Accounts – R.C. §1733.24(K)

The Bill revised §1733.24 by adding new provision (K). This new provision provides that notwithstanding any provision of law to the contrary, funds deposited in a share account, share certificate, or in any other manner pursuant to a program offered by a credit union to promote consumer savings **do not constitute valuable consideration** for purposes of **a scheme of chance** under Chapter 2915 of the Revised Code.

O. Examination Frequency – R.C. §1733.328

The Bill added this entire new section relating to the frequency of financial examinations. In particular, the new language provides in relevant part, that the superintendent of financial institutions **shall not conduct an examination of a credit union more frequently than once every twenty-four-month cycle**, if the credit union meets both of the following conditions:

- (1) It has assets of ten billion dollars or less.
- (2) Under the uniform financial institutions rating system, it maintains a composite rating of one.

Notwithstanding, the superintendent **may conduct more** frequent examinations **if either** of the following applies:

- (1) The superintendent has **reasonable cause to believe** that there is a risk of harm to the credit union and the examination of the credit union is necessary to fully determine the risk to the credit union or to determine how best to address the risk.
- (2) The superintendent participates with financial institution regulatory authorities of other states or the United States in a joint, concurrent, or coordinated examination.

A credit union's composite rating used for purposes of this section **is not** considered a public record under R.C. §149.43.

P. Bona Fide Errors; Liability; Civil Actions – R.C. §1733.53

Section 1733.53 is a new expansive section which attempts to significantly shield credit unions from civil liability for “bona fide errors” and from class action litigation. This new statute is likely to have a **significant impact on reducing class action litigation**.

In particular, the new section provides that:

- (A) As used in this section, “bona fide error” means an unintentional clerical, calculation, computer malfunction or programming, or printing error.
- (B) A credit union or regulated individual **shall not be held civilly liable in any action** brought under this chapter [**§1733 Credit Union Statute**] or Chapter 1309 [**Secured Transactions**], 1317 [**the Retail Installment Act**], or 1345 [**Consumer Sales Practice**]. of the Revised Code, and shall not be subject to any sanction by the superintendent of financial institutions, **if all** of the following conditions are met:
- (1) The credit union or individual shows by a preponderance of evidence that the compliance failure was not intentional and **resulted from a bona fide error** notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.
 - (2) Within **sixty days after discovering the error**, and **prior to** the initiation of any action by the superintendent or the receipt of written notice of the error from the member, the credit union or individual notifies the superintendent and the member of the error and the manner in which the credit union or individual intends to make full restitution to the member.
 - (3) The credit union or individual **promptly** makes **reasonable** restitution to the member.
- (C) If, in the event of a compliance failure, the credit union or regulated individual does not meet the conditions set forth in division (B) of this section, a member injured by the error has a cause of action to recover damages. **Such an action may not, however, be maintained as a class action.**

Donald W. Mallory, Esq.
Wood + Lamping, LLP
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202
Telephone: 513.852.6000
Facsimile: 513.419.6494
Email: DWMallory@woodlamping.com