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# Credit Union *Law Update*

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## Updated Manual Contains New Bank Secrecy, AML Regulations

By Gary Butler, Esq.

The Federal Financial Institutions Examination Council (FFIEC) has released the 2007 version of the Bank Secrecy Act/Anti-Money Laundering (BSA/AML) Examination Manual. The Manual contains several changes.

As most of us know, the manual is designed to provide financial institutions, governmental regulators, and law enforcement officials (LEOs) with guidance on how to comply with the complex world of the Bank Secrecy Act (BSA) and the Anti-Money Laundering Act (AMLA). The new Manual includes several changes which I will discuss in this article.

One change in the Manual is to clarify how the financial institution is to

handle grand jury subpoenas that involve an incident that is also reported in a Suspicious Activity Report (SAR). Of course, under Federal law the contents of the SAR cannot be disclosed; even the fact that the SAR has been filed with the appropriate governmental agency cannot be disclosed. However, grand jury proceedings are also covered by confidentiality provisions and LEOs discourage institutions from disclosing they have been served with a subpoena.

Consequently, the 2007 Manual makes clear that when a financial institution files an SAR on a transaction that is also covered by a grand jury

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## Protecting the Credit Union when it is a second-mortgage holder

There is only one thing worse than a foreclosure: being second in line in a foreclosure. It is a predicament many of our CU clients are learning from experience in this turbulent marketplace. This article will give you an overview of your options if you find yourself in that unfortunate position.

As the junior secured lender, you have essentially four options in the face of a foreclosure by the first mortgage. Those four options are: (1) do nothing; (2) bid for the property at the foreclosure sale; (3) immediately pay off or buy the first mortgage; or (4) pay off or buy the first mortgage the day before the foreclosure sale. The core questions are: what actions can you take to enforce your lien rights against the property and will those actions result in paying off at least a portion of the credit union's loan?

The first option is the simplest, but often riskiest: do nothing. If the borrower does not cure the default, the property will be sold to the highest bidder. Only if someone pays more than the judgment amount at the foreclosure sale will junior lien holders receive any money. While your lien against the property will no longer exist, the foreclosure does not extinguish the underlying debt (unless it was a non-

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subpoena, the institution should make no mention of the grand jury subpoena. The SAR “should reference only those facts and activities that support a finding of suspicious transactions indentified by the [institution].”

Another change is recognition that sometimes LEOs will request that a financial institution leave an account open even after there is suspicious or potentially criminal activity involving the account. The new Manual recommends that the institution ask the requesting LEO to make a written request to leave the account open and to explain the LEO’s purpose and the duration of the request. The Manual goes on to say that the eventual decision as to whether the account should remain open “should be made by [the institution] in accordance with its own standards and guidelines.”

Another change in the 2007 Manual relating to SARs deals with the supporting documentation for the SAR. When filing an SAR, the institution is required to specifically reference all documents supporting the SAR. The institution then must maintain those supporting documents for the prescribed period of time in accordance with the institution’s record retention policy. Our recommendation is that a separate file, either physical or electronic, be maintained that includes the documents referenced in the SAR.

The Manual also points out that if the Financial Crimes Enforcement Network (FinCEN) or other LEO agency requests a copy of the SAR and all supporting documents, the institution is obligated to provide copies of the documents. This is an exception to the general rule in the Right to Financial Privacy Act.

### **Second Mortgages, from page 1.**

recourse note or had other unusual terms), leaving you with an unsecured claim against your borrower.

The second option is to do nothing until the property goes to foreclosure sale and then bid on the property. This option is viable if there is a chance that the senior lender will not bid the full amount of its judgment, thus giving you the chance to “buy” the property for less than what is owed on the judgment. However, if the property is worth more than the balance owed on the first mortgage, the senior lender is not likely to allow the property to be sold for less than the judgment amount. If it is worth less, you probably will not want to spend extra money on this loan. Thus, this option carries substantial risks that often make it impractical.

The third option is to immediately pay off or buy the first mortgage. There are several different ways to structure this option, but the gist of it is to pay the holder of the first mortgage what is owed and step into its position, completing the first lender’s foreclosure. The main advantage is that you have now moved “to the front of the line” with respect to the subject property. There are some disadvantages, however. First, you will be subject to any defenses the borrower may have against the senior lender on that debt (usually a relatively small risk in residential lending, but a risk nonetheless). Further, if the first mortgage is the standard FannieMae / FreddieMac loan form or has similar terms, the borrower could force you to reinstate the mortgage if the borrower pays the past due payments (plus any costs such as attorneys’ fees, court costs, costs of appraisal, etc.). A further risk is that the borrower could file a Chapter 13

bankruptcy, forcing you to accept reinstatement over the life of the bankruptcy plan. Therefore, if the borrower reinstates the mortgage or files Chapter 13, you will not be repaid the amount you paid to satisfy the first mortgage except as it is paid back in accordance with the terms of the first note.

The fourth option, like the third, is to pay off or purchase the senior loan, but this time not immediately upon being served the foreclosure complaint. Under this option, you wait until just before the foreclosure sale. This strategy should be coupled with filing foreclosure on the second mortgage in order to force the borrower to deal with the default on the junior mortgage (assuming there has been a default) as well as the default on the first mortgage. By waiting until just before sale, you lessen the risk that the borrower will force you to carry the first note and mortgage to term either by reinstating under the first mortgage or by filing for bankruptcy. By bringing a foreclosure of the second mortgage, you will force the borrower to deal with you and you will bring home to the borrower the importance of bringing and keeping both mortgages current.

Before you select among these four options, however, you need one piece of critical information. That information is the value of the property. As soon as you are served with the foreclosure complaint, you should contact your attorney and hire an appraiser to give you an up-to-date appraisal of the value of the property.

Please be sure to consult an attorney about the best choice. While these options offer no guarantees, we can assist in your efforts to salvage less-than-perfect situations.

## **Gary Butler, Credit Union Lawyer**

Gary L. Butler, Esq. has been representing credit unions for over 20 years. His clients include Credit Unions across the state of Florida.

Before being admitted to the Florida bar in 1986, Gary attended The University of Florida’s Levin College of Law, from which he graduated with honors. He holds an MBA, also from the University of Florida. Gary is a member of the Florida Bar’s Business Law Section. He is also on the Bankruptcy and Uniform Commercial Code Committees. You can e-mail Gary at [gbutler@floridalawyer.com](mailto:gbutler@floridalawyer.com) or call Gary at (800) 934-5999.



## **Examples of our Capabilities:**

Robbins Equitas™ is dedicated to the needs of Federal Credit Unions. Here are a few examples of our typical services:

**General Legal Advice:** Assistance with secured transactions, the Uniform Commercial Code, foreclosures, forgery, bond claims, and more;

**Litigation:** Foreclosures, bankruptcy, and federal and state claims;

**Regulation and Compliance:** Assistance with federal and state regulations, bank examiners, branch operations, and lender liability issues;

**Human Resources:** Employee dishonesty, employment discrimination, sexual harassment, drafting of policies and procedures, and much more;

**Investigations:** In-house or external investigations and confidential employee investigations;

**Formation of New Credit Unions:** Organization of start-ups.