

2011 Legislative Changes
August 5, 2011

The 2011 legislative session saw the passage by the General Assembly of HEA 1528, generally known as the Department of Financial Institution's ("DFI" or "department") "omnibus" bill relating to financial institutions and consumer credit organizations. HEA 1528 was comprised of a number of provisions assembled by the DFI staff during the previous year consisting of corrections and improvements to the several acts which we administer: First Lien Mortgage Act (IC 24-4.4 *et seq.*); Uniform Consumer Credit Code (IC 24-4.5 *et seq.*); Rental Purchase Agreement Act (IC 24-7 *et seq.*); Debt Management Company Act (IC 28-1-29 *et seq.*); Pawnbrokers Act (IC 28-7-5 *et seq.*); Money Transmitters Act (IC 28-8-4 *et seq.*); and Check Cashers Act (IC 28-8-5 *et seq.*). There are, however, several substantive provisions, largely the result of actions by Congress in the adoption of Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in July, 2010. The Governor signed HEA 1528 on April 28, 2011 with most provisions becoming effective as of July 1, 2011.

The following is a summary of HEA 1528 as well as a brief description of several other bills relevant to the department.

CONSUMER CREDIT:

Exclusions from First Lien Mortgage Act ("FLMA") and Uniform Consumer Credit Code ("UCCC")

Affected Sections: IC 24-4.4-1-202; IC 24-4.5-1-202

- HEA 1528 made certain revisions to the exclusions from the FLMA including expanding and revising the "governmental exemption" so that it still exempts the federal government, including United States government sponsored enterprises, but also exempts any state or local government, or any agency or instrumentality of any governmental entity. In the UCCC, a similar governmental exemption was added.
- The 2011 General Assembly also clarified a specific exemption from licensing by adding subsection (13) to IC 24-4.4-1-202 which provides that the FLMA does not apply to "[a] person in whose name a tablefunded transaction is closed, as described in section 301(34)(a) of this chapter."
 - The definition found in IC 24-4.4-1-301(34) has been amended to provide that "[t]ablefunded" means a transaction in which:
 - (a) a person closes a first lien mortgage transaction in the person's own name as a mortgagee with funds provided by one (1) or more other persons; and
 - (b) the transaction is assigned, not later than one (1) business day after the funding of the transaction, to the mortgage creditor providing the funding.
- Further, to clarify how the tablefunding exemption relates to the manufactured housing industry, subsection (13) includes the following language:

However, the exemption provided by this subsection does not apply if:

 - (a) the transaction:
 - (i) is secured by a dwelling that is a mobile home, a manufactured home, or a trailer; and

- (ii) is *not* also secured by an interest in land; *and*
- (b) the person in whose name the transaction is closed, as described in section 301(34)(a), sells the dwelling to the debtor through a retail installment contract or other similar transaction. [Emphasis added.]

Disclosures Required by Federal Consumer Credit Protection Act

Affected Section: IC 24-4.4-2-202

- This provision clarifies that creditors under the FLMA are required to comply with disclosure requirements applicable to first lien mortgage transactions under Truth in Lending.

Changes of Control

Affected Sections: IC 24-4.4-2-406 (first lien mortgage creditors), IC 24-4.5-3-515 (consumer loan creditors), IC 28-1-29-3.1 (debt management companies), IC 28-7-5-9.1 (pawnbrokers), IC 28-8-4-40.2 (money transmitters) and IC 28-8-5-13.1 (check cashers)

- HEA 1528 added change of control provisions similar to those found in IC 28-1-2-23 relating to depository institutions (excluding credit unions) to the consumer credit acts listed above.
- If the change of control is approved by the department (or by the director under delegated authority), then the license is transferred to the acquirer.
 - Each of the above referenced consumer credit acts does provide that depending upon the circumstances of the transaction, the director may reserve the right to require the acquirer to apply for a new license instead of acquiring control of the licensee. IC 24-4.4-2-406(7), IC 24-4.5-3-515(7), IC 28-1-29-3.1(g), IC 28-7-5-9.1(g), IC 28-8-4-40.2(g) and IC 28-8-5-13.1(g).
- The director may determine, in the director's discretion that the change of control provisions do not apply to a transaction if the director determines that the direct or beneficial ownership of the licensee will not change as a result of the transaction. IC 24-4.4-2-406(5), IC 24-4.5-3-515(5), IC 28-1-29-3.1(e), IC 28-7-5-9.1(e), IC 28-8-4-40.2(e) and IC 28-8-5-13.1(e).
- The president or other chief executive officer of a licensee is required to report to the director any transfer or sale of securities of the licensee that results in direct or indirect ownership by a holder or an affiliated group of holders of at least ten percent (10%) of the outstanding securities of the licensee. The report required by this provision must be made not later than ten (10) days after the transfer of the securities on the books of the licensee. IC 24-4.4-2-406(6), IC 24-4.5-3-515(6), IC 28-1-29-3.1(f), IC 28-7-5-9.1(f), IC 28-8-4-40.2(f) and IC 28-8-5-13.1(f).

Mortgage Payoff Statements

Affected Sections: IC 24-4.4-2-201; IC 24-4.5-2-209; IC 24-4.5-3-209

- In order to comply with amendments Dodd-Frank made to the federal Truth in Lending Act, the amendments to IC 24-4.4-2-201, IC 24-4.5-2-209 and IC 24-4.5-3-209 change the time period that an accurate payoff statement must be provided from 10 calendar days to 7 business day (excluding legal public holidays, Saturdays, and Sundays).

- Also, due to Dodd-Frank, the time the creditor, servicer or the creditor’s agent is required to acknowledge a written offer made in connection with a proposed short sale has been reduced from 10 business days to 5 days (excluding legal public holidays, Saturdays, and Sundays) after the date of the offer if the offer complies with the requirements for a written request set forth in 12 U.S.C. 2605(e)(1)(B) (“RESPA”).
- Based upon consumer complaints, the DFI staff recommended to the General Assembly that consumers who are about to pay off or refinance a mortgage loan be informed on the payoff statement all of the items comprising the payoff amount. This language is based upon similar language from North Carolina.

License renewals

Affected Sections: IC 28-7-5-11 (pawnbrokers); IC 28-8-5-15 (check cashers)

- These provisions clarify the procedure and requirements for submission of a renewal application, payment of fees and assessment of late fees.

Revocation or Suspension of Licenses

Affected Sections: IC 28-1-29-4.1 (debt management companies) IC 28-7-5-13.1(pawnbrokers); IC 28-8-4-48.1(money transmitters); IC 28-8-5-22.5 (check cashers)

- The consumer credit acts now have uniform provisions for the revocation or suspension by the department of licenses if they are not renewed within 60 days of the renewal date.
- Each consumer credit act also has reinstatement provisions if the licensee files the required application and pays the fees or requests an administrative hearing to appeal the revocation or suspension.

Civil Penalties

Affected Sections: IC 24-7-7-1(rental purchase agreements); IC 28-1-29-13 (debt management companies); IC 28-8-4-53 (money transmitters); IC 28-8-5-24 (check cashers)

- The provisions of the consumer credit acts have been revised to clarify that before the department may impose a civil penalty of not greater than \$10,000 per violation upon a person, the person must first receive notice and an opportunity to be heard relating to alleged violations of the applicable act.

Rental Purchase Agreements

Affected Sections: IC 24-7-1-7

- A new section was added to clarify that the Rental Purchase Agreement Act (“Rental Purchase Act”) does not apply to the rental purchase of a dwelling (as defined in IC 24-4.4-1-301(11)), regardless of whether the dwelling is assessed as real or personal property for property tax purposes.

Pawnbrokers

Affected Section: IC 28-7-5-8

- The amendment to IC 28-7-5-8 clarifies that the DFI can investigate the financial standing, competence, business experience, and character of any employee who will be working for a pawnbroker, not just the owners and managers of the pawnbroker.

Money Transmitters

Affected Sections: IC 28-8-4-13; IC 28-8-4-25; IC 28-8-4-40

- This amendment to IC 28-8-4-13 clarifies that the money transmission law applies only to the sale or issuance of payment instruments that are primarily for personal, family, or household purposes.
- This amendment to IC 28-8-4-25 clarifies the standards applicable to the financial statements required to be filed.
- IC 28-8-4-40 (reporting changes of control and acquisitions) was repealed because it replaced by IC 28-8-4-40.2.

Check Cashers

Affected Sections: IC 28-8-5-1; IC 28-8-5-5

- IC 28-8-5-1, as amended, provides that check cashers licensing does not apply to a person principally engaged in the bona fide retail sale of goods or services if:
 - (1) the person, either incidental to or independent of a retail sale of goods or services, from time to time cashes checks; and
 - (2) the consideration (as defined in IC 28-8-5-3) charged for cashing checks does not exceed five dollars (\$5).
- The changes to IC 28-8-5-1 made IC 28-8-5-5 (defining “incidental to the retail sale of goods or services”) unnecessary and, therefore, it was repealed.

DEPOSITORY INSTITUTIONS

Definitions

Affected Section: IC 28-1-1-3

- The term “financial institution” was amended to add licensees under the FLMA since licensees under the UCCC was already included in the definition.

Voluntary Supervisory Conversions for Mutual Depository Financial Institutions (Excluding Credit Unions)

Affected Sections: IC 28-1-7.1 et seq.

- The 2011 General Assembly adopted a new chapter found at IC 28-1-7.1 in the Financial Institutions Act which establishes procedures that allow the director of the DFI to expedite certain supervisory transactions for mutual depository financial institutions (excluding credit unions) which are troubled or in need of assistance to avoid receivership by converting to a

stock commercial or savings bank. Similar procedures are available for certain federal thrifts.

Securities Rating Services

Affected Sections: IC 28-1-11-4 (banks); IC 28-6.1-10-8.5 (savings banks); IC 28-7-1-9(3)(J) (credit unions); IC 28-14-5-6.5 (corporate fiduciaries); IC 28-15-2-1 (savings associations)

- Dodd-Frank mandates certain changes relating to the use of securities rating services. The amendments permit the director to determine that securities are not speculative.

Dormant Charges

Affected Section: IC 28-1-20-1.1

- With respect to dormant charges assessed by depository institutions, this section has been clarified to use the definition of “transaction account” from Regulation Z instead of the terms “demand” and “time” deposits.

Civil Penalties

Affected Sections: IC 28-11-2-9; IC 28-11-4-9

- IC 28-11-2-9 was amended to provide that civil penalties assessed by the department shall be paid into the financial institutions fund.
- Also, if the department is required to defend the constitutionality of any of the statutes or rules it administers, the costs and expenses incurred in connection with the defense may not be paid from the fund or be assessed in any way to the department's budget.
- As a result of a certification audit by the Conference of State Bank Supervisors (“CSBS”), the department was advised that CSBS “best practices” suggest that the regulator levy civil monetary penalties on a daily basis per violation to provide incentives for the licensee to make a speedy remedy of violations.

Effectiveness of final order; stay, modification, or vacation

Affected Section: IC 28-11-4-8

- This section was amended to clarify that an order becomes final 10 days after service of the order unless another date is specified in the order.

Credit Unions - Trusts

Affected Section: IC 28-7-1-10.6

- This is a new section which allows a credit union to issue shares in a revocable or irrevocable trust, subject to the following:
 - (1) If shares are issued in a revocable trust, at least one of the settlors must be a member of the credit union in the settlor's own right.
 - (2) If shares are issued in an irrevocable trust, at least the settlor or a beneficiary must be a member of the credit union in the settlor's or the beneficiary's own right.
 - (3) The name of each beneficiary must be listed for the trust, whether the trust is revocable or irrevocable.

The following sections relating to depository institutions were deleted by HEA 1528:

Merger with or acquisition of bank existing and operating for less than five years

Affected Section: IC 28-2-17-20.1

- Repeal of this section eliminates the “five-year” rule as unnecessary due to the interstate branching provisions of Dodd-Frank.

Interstate Bank Branching

Affected Section: IC 28-2-18-29

- This section was repealed consistent with the interstate branching provisions included in Dodd-Frank.

OTHER BILLS OF INTEREST:

HB1024 *Property insurance.*

HEA 1024 removes a requirement that the insurance producer's contact information be included in written notice concerning a change in a residential policy and requires that the notice indicate that the insurance producer or insurer may be contacted concerning the change. Exempts coverage for certain motor vehicles used for authorized purposes in connection with a commercial policy from the law requiring an insurer to make available uninsured and underinsured motorist coverage. Requires an insurer to provide a written notice of residential policy cancellation in a foreclosure action under certain circumstances. Requires the creditor in a residential property foreclosure action to send a copy of the complaint to the insurance company of record.

HB1180 *Zero interest mortgages by nonprofit entities.*

HEA 1180 specifies that: (1) the statute concerning first lien mortgage lending; and (2) the uniform consumer credit code do not apply to a bona fide nonprofit entity that does not operate in a commercial context and that meets other specified criteria. (This bill is directed to organizations such as Habitat for Humanity.)

HB1182 *Consumer protection assistance fund.*

HEA 1182 establishes the consumer protection assistance fund (“fund”) to be administered by the office of the attorney general (“office”). Provides that money in the fund may be used to make payments to qualifying individuals who: (1) are awarded restitution by a court in a case instituted or maintained by the office in connection with a violation of certain specified consumer protection statutes; and (2) assist or otherwise cooperate with the office in the investigation, prosecution, or enforcement of the case. Provides that the office may not make a payment to a qualifying individual unless the party ordered to pay restitution to the qualifying individual has not paid the full amount ordered by the court. Provides that upon receiving a qualifying claim, the office shall pay, from money available in the fund, to each qualifying individual identified in the claim an amount that: (1) is determined at the discretion of the office; (2) may be up to the amount of the restitution awarded to the qualifying individual but not paid by the party ordered to pay the restitution; and (3) may not exceed \$3,000. Provides that a qualifying individual is not prohibited from seeking to recover, in any action or through any other lawful remedy available, any amount of

the restitution that is awarded by the court and exceeds the amount paid to the individual by the office.

HB 1211 *Arrest Records.*

HEA 1211 provides that a person charged with a crime may petition a court to restrict disclosure of arrest records related to the arrest if the person: (1) is not prosecuted or if charges against the person are dismissed; (2) is acquitted of all criminal charges; or (3) is convicted of the crime and the conviction is subsequently vacated. Provides that eight years after the date a person completes a sentence, if the person has not been convicted of another felony and satisfies any other obligations imposed on the person as a part of the sentence, the person may petition the sentencing court to restrict access to the person's arrest and criminal records.

HB1297 *Public depositories.* (SEA 205 is the Senate counterpart.)

HEA 1297 provides that in order to serve as a depository of public funds, a financial institution does not have to maintain a capital ratio in excess of the minimum required by the institution's governmental supervisory body if the institution has fully collateralized the institution's public funds on deposit by pledging and delivering acceptable collateral to the board for depositories. Provides that a service charge to be paid by a political subdivision to a public depository in which the political subdivision's funds are deposited may be paid from interest earned on the funds in the political subdivision's account with the public depository. Provides that a service charge to be paid by a political subdivision to a public depository for the depository's management of an investment cash management system for the political subdivision may be paid from interest earned on the funds in the political subdivision's account with the public depository that manages the system.

SB0059 *Credit agreements.*

SEA 59 specifies that for purposes of the law governing credit agreements, a credit agreement includes an agreement to: (1) amend or modify a credit agreement; (2) enter into a new credit agreement; (3) forbear from exercising rights under a credit agreement; or (4) grant an extension under a credit agreement.

SB0582 *Settlement conferences in residential foreclosures.*

As a result of SEA 582, the Indiana General Assembly has made a number of procedural changes to the foreclosure process effective July 1, 2011. These changes include the following:

- For all residential foreclosure actions filed after June 30, 2011, the lender must provide to the Court, at the time of filing the foreclosure complaint, the debtors' most recent contact information, such as phone number, e-mail address, and last known property address, if different than the mortgaged property address. This basically makes it an across-the-board requirement for all counties.
- After June 30, 2011, the language regarding the debtor's right to a settlement conference is to be included on the first page of the summons that is to be issued with the foreclosure complaint. Currently, the settlement conference notice is included as a separate page to the foreclosure complaint. The Courts are to also send a separate settlement conference notice to the debtor, upon the filing of the foreclosure complaint. Additionally, SB 582 charged the Indiana Housing and Community Development Authority (“IHCDA”) with drafting the settlement conference notice language that is to be included on the first page of the summons. Per the bill, IHCDA is required to post that new language on its website on or before June 1, 2011.

- If after receiving the settlement conference notice, a debtor requests a settlement conference with the court, the request is treated as an official appearance by the debtor in the foreclosure case.
- Once the debtor requests a settlement conference, the Court will stay the granting of any dispositive motions in the foreclosure case until the Court receives notice that the settlement conference concluded and that the parties have either entered into a foreclosure prevention agreement or were unable to agree on the terms of an agreement.
- SB 582 charges IHCDA to come up with a prescribed list of loss mitigation documents to use in foreclosure cases, on or before June 1, 2011. The bill also authorizes the IHCDA to amend this list in response to any changes in the federal loan modification programs, or as IHCDA deems otherwise to be necessary.
- In all residential foreclosure cases after June 30, 2011, where the debtor requested a settlement conference, the debtor is required to provide to the creditor's attorney and the court with a complete package of the loss mitigation documents, as provided by the IHCDA, by certified mail at least 30 days prior to the settlement conference. The creditor is required to provide the debtor a copy of the payment history via certified mail, substantiating the debt, plus an itemization of all amounts owed (payoff statement), at least 30 days prior to the settlement conference.
- Any cost associated with the settlement conference, or any fines imposed by the courts on the lender for violating a court order, may not be forwarded or passed onto the debtor.
- SB 582 authorizes the courts in foreclosure cases where the debtor continues to occupy the property, to require the debtor to make monthly payments. These payments are to be based on the debtor's ability to pay, may not exceed the debtor's monthly payments under the terms of the mortgage, the payments shall be held in trust for the parties by the clerk of the court, and payments can only be disbursed upon order of the court. Payments will be disbursed to the creditor if a foreclosure prevention agreement is reached or if the case proceeds to judgment, and the debtor shall receive a credit for any payments disbursed.
- SB 582 allows a non-owner of a property to come onto the property in order to visually inspect the property to see if it has been abandoned or vacated. If that individual feels that the property is abandoned or vacated, he/she may contact the necessary authorities and will be immune from any civil liability for trespassing due to the inspection.
- SB 582 removes a requirement that the insurance producer's contact information be included in written notice concerning a change in a residential policy and requires that the notice indicate that the insurance producer or insurer may be contacted concerning the change. Exempts coverage for certain motor vehicles used for authorized purposes in connection with a commercial policy from the law requiring an insurer to make available uninsured and underinsured motorist coverage. Requires an insurer to provide a written notice of residential policy cancellation in a foreclosure action under certain circumstances. Requires the creditor in a residential property foreclosure action to send a copy of the complaint to the insurance company of record.