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CFPB Focus

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Happy Fifth Birthday, CFPB: It's Time for Your Check-Up

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This past July marked the five year anniversary of the CFPB. The industry has accumulated a laundry list of criticism for the regulator including the practice of regulation through enforcement, lack of issued guidance, an unacceptable "jurisdictional creep" over entities and businesses they were not intended to supervise and even an unconstitutional structure. The CFPB, however, marked the milestone by publishing five ways they have helped consumers in their first five years. They included the following accomplishments:

1. Their actions have resulted in $11.7 billion in relief for more than 27 million harmed consumers.
2. They have handled nearly one million consumer complaints.
3. They have empowered millions of consumers to "Know Before You Owe."
4. They put in place new rules to make the mortgage market safer for you.
5. They are curbing potentially harmful financial practices with new consumer protections nationwide.

The CFPB's top five accomplishments reflect a common criticism not mentioned earlier of the Bureau that the rules they promulgate are drafted with very little attention paid to the effect said rule has on the functioning of the consumer financial markets. This is unsurprising as CFPB states that its objectives under Dodd-Frank are to (1) Conduct rulemaking, supervision and enforcement with respect to the federal consumer financial laws; (2) Handle consumer complaints and inquiries; (3) Promote financial education; (4) Research consumer behavior; and (5) Monitor financial markets for risks to consumers. Dodd-Frank Section 1021 (b)(3), however, states that "the Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services – outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens."

To accomplish this goal, the architects of the Dodd-Frank included Section 1022(d) titled "Assessment of Significant Rules." This section states that the Bureau shall conduct an assessment of each significant rule or order adopted by the Bureau. The assessment shall address the effectiveness of the rule or order and the specific goals stated by the Bureau. The assessment shall reflect available evidence and any data that the Bureau reasonably may collect. The CFPB is also required to publish a report of its assessment not later than five years after the effective date of the subject rule or order and allow for public comment on recommendations for modifying, expanding or eliminating the newly adopted significant rule or order prior to publication of said report.

The Bureau has acknowledged its responsibilities under Section 1022(d) by stating in their FY13-17 strategic plan that they will complete all five-year regulation assessments on schedule. The look-back will present both an opportunity and a complication for the industry. The public comment on the recommendation will afford the industry the opportunity to voice their concern with certain regulations and to showcase any negative or unintended impact said regulation has had on operations. On the flip

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side, the Bureau can use the five-year look-back as yet another opportunity to redefine regulation that our industry has committed substantial funds in an effort to be compliant with. Changing said regulation will only cause less certainty in the marketplace, create a negative impact and force the industry to incur more cost.

As the CFPB started to promulgate rules in the mortgage space, mortgage lenders and servicers will be the first to experience the CFPB's look-back process. That said, no matter what line of businesses you or your institution participates in, you should pay attention to how this process is handled by the CFPB as it will eventually occur for every rule and order issued by the CFPB. If you have any regulatory or compliance concerns on any CFPB rule, exam or investigation, please contact a member of Baker Donelson's CFPB team.

CFPB Allies and Opponents Clash Over Arbitration Proposal

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The CFPB's recently-announced proposal to limit arbitration clauses in consumer finance contracts has drawn thousands of comments from groups and individuals on both sides of this issue. The deadline for submitting comments was August 22, 2016. To date, the Bureau is reporting more than 13,000 comments.

The CFPB's proposed rule, announced in May, has two main features: (1) it would prohibit financial companies from using pre-dispute arbitration agreements to block consumer class actions in court and would require them to insert language into their arbitration agreements reflecting this limitation, and (2) it would require companies that use pre-dispute arbitration agreements to submit certain records relating to arbitral proceedings to the Bureau.

The scale of public comments is not surprising given the potential reach of the proposed rule. The CFPB has stated that the rule would apply to "most consumer financial products and services that the CFPB oversees, including those related to the core consumer financial markets that involve lending money, storing money and moving or exchanging money." Among the products at issue are credit cards, automobile leases, debt management services, consumer reporting, checking and savings accounts, check cashing, payment processing, payday lending and debt collection services.

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CFPB Allies and Opponents Clash Over Arbitration Proposal, *continued*

Financial industry groups strongly oppose the proposed rule, as do those who contend it will benefit trial lawyers at consumers' expense. The American Bankers Association, Consumer Bankers Association and Financial Services Roundtable submitted a joint comment sharply critical of the rule, arguing it is "not in the public interest or for the protection of consumers" and "not consistent with the Bureau's March 2015 empirical Study of consumer arbitration." Citing the Bureau's own estimate that providers who currently use arbitration agreements will "incur between $2.62 billion and $5.23 billion on a continuing five year basis in defending against an additional 6,042 class actions that will be brought," the joint comment concludes that its "consumers...will truly suffer" as they will be "saddled with higher prices and/or reduced services."

The U.S. Chamber of Commerce is similarly urging the CFPB to abandon its current proposal, claiming that "rather than protecting consumers, the rule will harm them—and the public interest—by elevating the interests of the lawyers who benefit from class actions above those of consumers." The Chamber's letter argues that the proposed rule exceeds the Bureau's authority: "If promulgated, it would violate the procedural and substantive limits on the Bureau's authority imposed by both the Dodd-Frank Act and Administrative Procedure Act."

Advocates for industry reform, including Americans for Financial Reform (AFR), a coalition of consumer, civil rights, labor, faith-based and other groups, favor the proposed rule. According to the AFR, mandatory arbitration "effectively eradicates relief" for consumers. The CFPB's proposal would "limit forced arbitration by restoring consumers' right to join together in a class action and add much-needed transparency to individual proceedings by establishing a public record of claims." The AFR urges the CFPB to go even further by prohibiting arbitration in individual cases, as well as in class actions.

Lawmakers have come out on both sides of the issue, as have academics. A group of 19 state attorneys general submitted a letter claiming that the proposed rules "will restore significant and much-needed consumer protections that have been eroded through the inclusion by financial services companies of mandatory arbitration clauses in their contracts with consumers."

Opponents of the proposed rule will likely challenge the rule and/or the Bureau's authority to promulgate the rule. Given the CFPB's own estimate of the financial impact of the proposal, and given the broad scope of the rule, industry groups may not see much choice. The U.S. Supreme Court has recently upheld class action waivers in agreements to arbitrate in such cases as *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). Yet it could take years before any challenge reaches the Supreme Court. In the meantime, providers of consumer financial products need to prepare to revise their contracts and to comply with the proposed rule's reporting requirements about arbitration claims. Providers must also plan for the possibility of additional class action lawsuits and increased legal and compliance costs.

CFPB Wants to Share Its Confidential Information with the World

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On August 24, 2016, the CFPB published proposed amendments to broaden its ability to share confidential information with agencies. If the proposed rule is finalized, the CFPB would be permitted to share information with agencies, including state attorneys general, even if those agencies have no supervisory authority over financial institutions.

The proposed rule focuses on the disclosure of confidential supervisory information (CSI), a broad term including any documents and communications used by the CFPB in the exercise of supervisory authority, including exams and inspections, or any information provided to the CFPB by a financial institution to enable the CFPB to "monitor for risks to consumers." The current rule limits the disclosure of CSI to those agencies "having jurisdiction over a supervised financial institution.

Under the proposed rule, the need for an agency to have "jurisdiction" over a financial institution would be eliminated in order for the CFPB to disclose CSI. Instead, CSI could be disclosed as long as it is "relevant to the exercise of the agency's statutory or regulatory authority." As part of this proposed rule, the definition of "agency" would be modified to include "a Federal, State, or foreign governmental authority or an entity exercising governmental authority."

The CFPB stated that its goal with the proposed rule is to create an "information sharing regime" that it believes is a better interpretation of the Dodd-Frank Act. The proposed amendments would also align the standard for disclosing CSI with the current standards for disclosing other confidential information. The CFPB contends that the current rule is too burdensome and the changes would better serve its "mission and overall objectives."

The potential impact of this rule is extensive. The removal of the requirement that an agency have jurisdiction over a company means that the CFPB can disclose CSI to nearly any agency as long as it is deemed "relevant" to the agency's authority. This opens the door for state attorneys general or local authorities to obtain CSI as long as it can satisfy the CFPB's broad standard. Additionally, the new definition of "agency" expands the number of entities which can receive CSI beyond just federal and state agencies. The inclusion of entities "exercising governmental authority" is expansive and would include state bar associations and other registration and disciplinary organizations.

The establishment of the CFPB's "information sharing regime" would certainly mean that more agencies would have more access to confidential information. It could also result in increased costs to financial institutions. Comments on the proposed rule are being accepted until October 24, 2016.

Update on the J.G. Wentworth CID Fight

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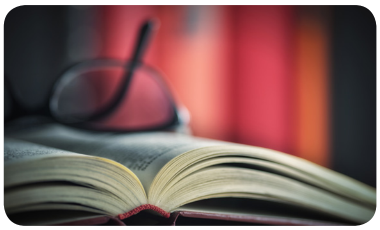

Earlier this summer we wrote about the challenge by J.G. Wentworth, LLC, to the CFPB's jurisdictional reach. Now, the U.S. Chamber of Commerce has asked that it be allowed to file an amicus brief in the case. The Chamber's briefing is supportive of the position of Wentworth and critical of the ever-expanding reach of the CFPB's jurisdiction.

The Chamber's brief attacks each of the bases asserted by the Bureaus in its pursuit against Wentworth. For example, in looking at UDAAP authority, which has quickly become the go-to basis for jurisdiction asserted by the CFPB, the Chamber notes that UDAAP authority requires a "connection with a transaction for a consumer financial product or service..." Here, the CID issued by the Bureau appeared to be focused on marketing statements generally made to consumers by Wentworth and not focused on instances where a consumer has actually engaged Wentworth and agreed to pay the company. The Chamber notes that this is an important distinction because marketing statements with regard to "consumer transactions" would be an exceedingly broad category – covering everything from home appliances to cars. If the word "transaction" does not have some meaning then the Bureau's attempt to use UDAAP authority to oversee marketing statements would be a massive enlargement of its jurisdictional reach.

The Chamber also looked at the Truth in Lending Act ("TILA") as a purported basis for CFPB jurisdiction and noted that TILA applies only to "extensions of credit." Pointing out that Wentworth does not extend credit, the Chamber argues that clearly TILA cannot be relied upon by the Bureau in this instance.

Finally, the Chamber asserts what many have been arguing for months (or even years) – the CFPB is continuing to seek to extend its jurisdiction beyond the scope set forth in the Dodd-Frank Act: "[A]llowing the CFPB to rely on its broad authority to issue CIDs and a virtually unlimited definition of the term 'financial advisory services' would grant the CFPB vast authority to burden companies outside its jurisdiction with expansive and intrusive investigatory demands." As a result, Chamber argues that enforcement of the CID would result in an expansion of the CFPB's authority far beyond the limits established by Congress in Dodd-Frank. Noting that Dodd-Frank specifically excluded certain businesses from the CFPB's authority except to the extent those businesses engage in offering consumer financial products and services, the Chamber argued that the limitations would be rendered meaningless under the approach advocated by the Bureau.

On September 8, 2016, Wentworth asked the District Court to set the matter for oral argument. We will continue to provide updates as the case proceeds.

FFIEC Releases Updates to Information Security Booklet

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The Federal Financial Institutions Examination Council (FFIEC) recently revised their Information Security Booklet. This moves the financial services industry one step closer to defining clear cybersecurity and data protection protocols to ensure regulatory compliance and furthers the implementation effort of the Cyber Security Tool the FFIEC announced in June of 2013. The booklet is one of 11 which together comprise the FFIEC IT Handbook. The FFIEC states that the "updates include the removal of redundant management material and a refocus on IT risk management and an update of information security processes. The revision reflects changes in the industry....The updates are consistent with the FFIEC Cybersecurity Assessment Tool (CAT) and the NIST Cybersecurity Framework as appropriate. The booklet contains updated examination procedures to help examiners measure the adequacy of an institution's culture, governance, information security program, security operations, and assurance processes."

Special focus should be paid to the updated Appendix A which was published as guidance for your regulator's field examiners to assess the level of security risks to your institution's information systems and the adequacy of your information security program's integration into overall risk management. The following 11 objectives are listed for said examiners within the appendix, but objectives 2-10 can be used as internal guidance to assess your own program:

1. Determine the appropriate scope and objectives for the examination.

2. Determine whether management promotes effective governance of the information security program through a strong information security culture, defined information security responsibilities and accountability, and adequate resources to support the program.

3. Determine whether management of the information security program is appropriate and supports the institution's ITRM process, integrates with lines of business and support functions, and integrates third-party service provider activities with the information security program.

4. As part of the information security program, determine whether management has established risk identification processes.

5. Determine whether management measures the risk to guide its recommendations for and use of mitigating controls.

6. Determine whether management effectively implements controls to mitigate identified risk.

7. Determine whether management has effective risk monitoring and reporting processes.

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FFIEC Releases Updates to Information Security Booklet, *continued*

8. Determine whether management has security operations that encompass necessary security-related functions, are guided by defined processes, are integrated with lines of business and activities outsourced to third-party service providers and have adequate resources (e.g., staff and technology).

9. Determine whether management has an effective information security program.

10. Determine whether assurance activities provide sufficient confidence that the security program is operating as expected and reaching intended goals.

11. Discuss corrective action and communicate findings.

The entire booklet should be studied, understood and utilized by your IT, compliance, and risk and audit operations in order to have your institution's compliance management system reflect the strongest integration of cyber and data security controls. This approach will not only allow your institution to avoid the regulatory risk that is associated with findings and/or fines in this space, but will position you to limit your litigation exposure in the event of a data breech through your ability to show pre-existing robust policies and procedures to limit risk as much as possible. It's also important to note that the FFIEC is comprised of a Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC) and the Consumer Financial Protection Bureau (CFPB). Certain institutions look at cybersecurity and data protection as a safety and soundness issue and only see regulatory exposure through the prudential regulators; but, that would be a mistake as the CFPB can just as easily utilize these protocols within a consumer regulatory exam. As we saw earlier this year in the CFPB's action against Dwolla, Inc. they are reviewing data security controls as well. If you have any questions regarding data security best practices, please contact any of the attorneys in Baker Donelson's Privacy and Information Security practice group.

The CFPB's Latest: Student Loans and Fix-It Forms

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The Consumer Financial Protection Bureau has taken two actions that are worthy of note. First, the Student Loan Ombudsman released his mid-year report, in which he focused his attention on complaints about servicer activity related to income-based repayment plans. And second, in conjunction with the Ombudsman's report, the CFPB published a "Fix-It Form" that is designed to help borrowers correct issues with their repayment plans.

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The CFPB's Latest: Student Loans and Fix-It Forms, *continued*

Student Loan Ombudsman Blames Servicers for Hindering Income-Based Repayment Plans.

The Student Loan Ombudsman is charged with, among other things, compiling and analyzing data on complaints related to student loan servicing and debt collection. In August 2016, the Ombudsman released his mid-year report, analyzing thousands of complaints received by the Bureau between October 1, 2015, and May 31, 2016. In this report, the Ombudsman focused his attention on complaints related to the enrollment process for income-dependent repayment plans, including, in particular, the processing of applications.

Most student loan borrowers with federal loans have a right to set their monthly payments according to their income, some of whom may qualify for a payment as low as $0. Yet borrowers complain about a plethora of issues with these plans, including poor customer service, delays, lost paperwork, inconsistent processing and inaccurate processing, which cause borrowers to suffer increased costs, reduced benefits and extended repayment terms. Delays during the application process lead to increased loan balances through capitalization of interest, loss of interest subsidies, decreased potential for loan forgiveness and exhaustion of forbearances. Erroneous application rejections lead to similar cost increases.

This report recommends immediate action from student loan servicers to correct the problems associated with income-derived repayment plans. First, the Ombudsman refers to recent policy guidance issued by the Department of Education for federal student aid as "industry standards" for all federal loans. The department's guidelines identify three well-defined circumstances under which a borrower may be denied enrollment in an income sensitive repayment plan: when the loan is ineligible for the chosen plan; when the borrower does not provide the necessary information for an accurate assessment; and when the borrower fails to respond within 60 days to a notice of deficiency. Second, the Ombudsman recommends that student loan servicers improve their communication with borrowers. Servicers should provide clear instructions to borrowers for the proper completion of income-driven replan applications. Likewise, servicers should review applications in a timely manner, provide prompt notice of any deficiencies and allow minor mistakes to be corrected by telephone. Additionally, servicers should provide clear communication concerning the payment consequences for a borrower's failure to correct an incomplete application.

In the beginning of the report, the Ombudsman noted that the Bureau "has repeatedly discussed widespread problems reported by consumers related to student loan servicing practices." The Ombudsman briefly reviewed the two previously discussed areas for servicer improvement. Now, with this report, student loan servicers should no longer discount the importance of corrective action and the Wells Fargo Consent Order should serve as a fair warning of the consequences for unfair and abusive practices that cause a financial detriment to borrowers.

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The CFPB's Latest: Student Loans and Fix-It Forms, *continued*

The Fix-It Form.

In conjunction with the Student Loan Ombudsman's mid-year report on income-driven repayment plans for student loan borrowers, the Bureau published an Income-Driven Repayment Application Fix-It Form (the Form) to guide servicers in improving their communication with student loan borrowers. The Form requires the service to clearly indicate whether the application is accepted, denied or incomplete. If the application is accepted, the Form indicates the amount of the borrower's new monthly payment and the due date. If the application is denied, the Form provides a choice of three explanations: (1) loan ineligibility; (2) higher resulting payment; and (3) lack of response to a request for more information. If the application is incomplete, the Form provides clear guidance on the nature of the deficiency and instructions on where to provide the information to correct the deficiency. The Form is most notable for its clarity and simplicity. It is designed to facilitate communication between servicers and borrowers about the application process by promoting consistency, transparency and accessibility. Although this form is not required, student loan servicers that take their obligations under the Act will give serious consideration to adopting it as their own.