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CFPB Hot Topics for 2015

Courtney H. Gilmer, 615.726.5747, cgilmer@bakerdonelson.com

Despite rumblings from the new Congress about reining in the Consumer Finance Protection Bureau (CFPB), the Bureau has indicated a packed agenda for 2015. Following an aggressive push in 2014, the attention of the CFPB continues to expand to the areas of payday loans, debt collection, student loans, overdraft protection and even virtual currency.

Payday loans have been in the Bureau's sights for years and proposed rules regarding such loans will be released in February 2015. A White Paper published by the Bureau in 2013 concluded that the results of its study of the payday loan market "raise substantial consumer protection concerns." It is anticipated that short-term lending products will also be addressed in rules released in the summer and that those rules will include changes to overdraft fees.

New rules governing debt collection practices will be released by the CFPB in April. The exact scope of the new rules is highly anticipated as banks have argued that the rules should be limited to third party debt collectors rather than a broader swath of entities undertaking debt collection activities.

The CFPB is expected to wrap up its study of arbitration clauses in early 2015. Based on prior commentary from the Bureau indicating a strong dislike for arbitration provisions, many observers expect new rules either banning arbitration provisions entirely or sharply limiting their scope and application.

Recent enforcement activity by the Bureau in the for-profit education area indicates that the CFPB will continue to focus on student loans and for-profit colleges. Examinations of student loan servicers are likely as the CFPB continues to explore this subject area and potential future rulemaking efforts.

Despite the robust agenda outlined above, there is little reason to believe that the CFPB will lessen its focus on the mortgage industry in 2015. Continuing review and enforcement of the 2014 mortgage servicing rules will likely remain a priority of the Bureau as well as mortgage origination oversight.

CFPB Seeking Public Comment on Proposed Amendments to 2013 Mortgage Rules

Amy L. Hanna, 404.221.6507, ahanna@bakerdonelson.com

The CFPB is currently seeking public comment on several proposed amendments to its final rules issued in 2013, which went into effect in January 2014. The comment period is open through March 16, 2015, so mortgage servicers, or any interested parties, still have about a month to chime in on the proposed amendments.

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CFPB Seeking Public Comment on Proposed Amendments to 2013 Mortgage Rules, *continued*

By now, servicers are all familiar with the final CFPB Rules promulgated in 2013 that modified the impact of the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA). In November 2014, the Bureau proposed amendments to those Rules. Several proposed amendments are noteworthy to those in the mortgage servicing industry:

- **An expansion of "borrower" to include successors in interest to collateral property**. Specifically, for the purposes of Regulation X, the Bureau is proposing to define "successor in interest" in § 1024.31 as "a member of any of the categories of successors in interest who acquired an ownership interest in the property securing a mortgage loan in a transfer protected by the Garn-St Germain Act." (See 12 U.S.C. § 1701j-3(d).) The expansion would include situations where the collateral property is transferred as a result of divorce. The effect of this would be that, for all intents and purposes of Regulation X, any successor in interest would now be considered a borrower.

- **A loosening of the requirement for servicers to identify both the trust name and the appropriate contact information for the trustee when requested by the borrower**. Currently, the Rules mandate that servicers must respond to a request for information regarding the owner or assignee of a loan by identifying both the name of the trust and the name, address and appropriate contact information for the trustee. Servicers have noted that providing detailed information about the trust is unnecessarily burdensome, especially when the trustee is Fannie Mae or Freddie Mac. Given these considerations, the CFPB is proposing that, "for loans for which Fannie Mae or Freddie Mac is the trustee, investor or guarantor, a servicer complies with § 1024.36(d) by responding to requests for information asking only for the owner or assignee of the loan by providing only the name and contact information for Fannie Mae or Freddie Mac, as applicable, without also providing the name of the trust." If a borrower explicitly requests the name or number of the trust or pool, however, the servicer is still required to identify that information, regardless of whether or not Fannie Mae or Freddie Mac is the trustee, investor or guarantor.

- **A requirement that lenders offer loss mitigation to borrowers more than once over the lifetime of a loan if a borrower becomes current after a previous delinquency**. Today, servicers are required to comply with the loss mitigation procedures in § 1024.41 only once over the life of a mortgage loan, regardless of the history of payment (or non-payment) by the borrower after an application has been evaluated. The CFPB is proposing changing § 1024.41(i) to require servicers to comply with § 1024.41, even if has previously already complied with the provision, if the borrower has been current on his payments at any time between the prior complete loss mitigation application and a subsequent application.

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CFPB Seeking Public Comment on Proposed Amendments to 2013 Mortgage Rules, *continued*

Several other proposed amendments merit note:

- An expansion of mandatory disclosures when a servicer wishes to force-place insurance where a borrower has insufficient – as opposed to expiring or expired – hazard insurance.

- A clarification that servicers have flexibility in determining the date by which borrowers must return documents and information to complete a loss mitigation application.

- A clarification of the rules governing some mortgage servicers when a borrower submits a cease-and-desist letter.

- A requirement that servicers provide written notice when it receives a complete loss mitigation application.

- A clarification that a servicer who has not taken, or has not caused its counsel to take, all reasonable affirmative steps to delay a foreclosure sale is required to dismiss the foreclosure action if necessary to avoid the sale.

- A clarification that servicers may stop collecting documents from a borrower for a specific loss mitigation option after receiving information confirming that the borrower is ineligible for that option.

- A requirement that servicers send modified periodic statements to consumers involved in bankruptcy.

If you would like more detail regarding the proposed amendments, click here.

As of the date of publication of this article, more than 40 comments have been submitted. The comments period is open through March 16, 2015.

Several of the CFPB's proposed amendments are the direct result of feedback received from the mortgage servicing industry. If nothing else, the proposal is an encouraging sign regarding the CFPB's willingness to engage with the industry it regulates.

See you at the MBA National Mortgage Servicing Conference!

Are you saddling up for MBA's latest Servicing Conference in Dallas, Texas, February 23 – 26? This year's event will focus on the industry's transition toward new procedures and increased efficiencies, as well as new opportunities in the future. Look for Baker Donelson attendees Linda Finley, Lee Lott, Sarah-Nell Walsh, Eve Cann, Catherine Long and Valerie Nelan while you're there. Say hello and get a sheriff's badge!

Whether you're a first-time attendee or an old hand, our Conference Survival Guide is sure to be a help. Check it out!

Sixteen Attorneys General from Coast to Coast Seek CFPB Regulation on Arbitration Clauses

Sharee Eriks, 954.768.1617, seriks@bakerdonelson.com

Attorneys General (AG) from 16 states – Delaware, Kentucky, Massachusetts, California, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington – have joined forces to write a letter to the Consumer Financial Protection Bureau (CFPB) encouraging the bureau to exercise its authority to regulate the use of pre-dispute mandatory arbitration clauses in consumer agreements for financial products and services. Pre-dispute arbitration clauses have been the source of boisterous opposition and extensive litigation in the employment and telecommunications spheres. Financial products and services is the next frontier in the battle.

In their letter, the AGs voice concern that pre-dispute mandatory arbitration clauses require consumers to waive "fundamental rights of Americans; the right to be heard and seek judicial redress" from the courts. The AGs cite "repeat player bias" as one of the reasons these provisions are unfair to the consumer, arguing that arbitrators favor the corporation in hopes of getting future cases. This arbitrator bias, combined with high arbitration costs, an imbalance in bargaining power between the consumer and the financial institution, inconvenient venues and the prevalence of class action waivers, has the effect of deterring individuals from pursuing their rights, according to the letter. The AGs encourage the CFPB to act in light of recent U.S. Supreme Court rulings that have rendered "arbitration clauses in all forms... virtually impenetrable – from even state legislation."

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Sixteen Attorneys General from Coast to Coast Seek CFPB Regulation on Arbitration Clauses, *continued*

The American Financial Services Association (AFSA), a national trade organization for the consumer credit industry, responded to the AGs' letter to provide balance to the discussion. AFSA argues that the AGs' letter "mischaracterizes how arbitration is used in practice and fails to consider the benefits consumers receive from resolving disputes without the expense of protracted litigation." AFSA also challenges the study cited by the AGs to support their "repeat player bias" argument. According to AFSA, this study was an atypical data set of limited application – it focused exclusively on consumer debt collection actions and provides no meaningful input into the conversation about arbitration generally. AFSA reminds the CFPB that there is plenty of existing research showing that arbitration provides results that are comparable, or even superior, to judicial remedies. Finally, AFSA's response letter argues that the AGs have overstated the impact of class action waivers, as class action lawsuits "have taken a back seat" to the CFPB's broad restitution powers used to address consumer injuries.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB is tasked with conducting a study of pre-dispute arbitration provisions in consumer financial markets. The CFPB is also vested with the power to regulate the use of mandatory arbitration clauses in consumer contracts. The CFPB issued preliminary results of its arbitration study back in December 2013 but has yet to release final results. The AGs' letter is significant because it could trigger increased CFPB scrutiny and regulation of mandatory arbitration provisions.

CFPB Takes Aim at Relationships between Universities and Credit and Debit Card Issuers

Stephen K. Pudner, 205.250.8318, spudner@bakerdonelson.com

Financial institutions marketing credit and debit cards to college and university students should prepare for likely investigations and enforcement actions by the Consumer Financial Protection Bureau and other regulatory bodies in the coming months and years.

Credit CARD Act of 2009 and Reduction of Colleges' Relationships with Credit Card Issuers

Anyone who attended a college or university in the United States in the 1990s or 2000s likely recalls tables throughout campus where representatives for credit card companies offered gifts and low introductory interest rates to induce students to sign up for their first credit card. What college students may not have realized was that their colleges and universities had entered into marketing agreements with those credit card companies and were compensated for allowing them to market directly to their students.

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CFPB Takes Aim at Relationships between Universities and Credit and Debit Card Issuers, *continued*

In response to these arrangements, Congress passed the Credit Card Accountability, Responsibility and Disclosure (CARD) Act of 2009. Pursuant to the CARD Act, credit card issuers must disclose to the CFPB all marketing agreements they have with colleges, universities and certain affiliated organizations, the number of new credit card accounts opened related to those agreements, and the compensation paid by the credit card issuers.

In December 2014, the CFPB submitted its latest report to Congress regarding the CARD Act, and noted that the number of credit card marketing agreements with institutions of higher learning and the amount of compensation paid to universities have both substantially declined from 2009 to 2013. In light of these decreases, the regulatory focus seems to have shifted to issuers of debit and pre-paid cards, which are not covered by the CARD Act's new requirements.

The CFPB's Monitoring of Debit Card Issuers

While the CFPB has not brought any enforcement actions in this area, in the past few years it has steadily increased its monitoring of debit card issuers, and sought "voluntary" disclosures of information based on its inherent powers under the Dodd-Frank Act. The CFPB also repeatedly hinted at future enforcement actions against what it sees as inappropriate relationships between debit card issuers and universities.

Specifically, the CFPB noted that "When financial institutions secretly give kickbacks to schools, they are engaging in risky practices," and that it had "alerted financial institutions about the potentially risky practice of not readily disclosing arrangements with colleges and universities to market bank accounts, prepaid cards, debit cards and other financial products to students." In December 2014, the CFPB again put debit card issuers and universities on notice that it is "closely monitoring the marketing arrangements many colleges and universities have with financial institutions related to deposit accounts, prepaid cards, debit cards and other financial products" and that investigations "have raised numerous concerns about conflicts of interest in these deals and their impact on students."

Despite these strongly worded statements, the CFPB has not yet brought any enforcement actions against debit card issuers or universities. However, in January 2015, the CFPB proposed new regulations relating to a voluntary "Safe Student Account Scorecard" that colleges and universities can use to request that financial institutions disclose the same information relating to debit card accounts as credit card issuers are required to do under the CARD Act.

Actions Against Debit Card Issuers by Other Bodies

While the CFPB has not brought any enforcement actions against debit card issuers, two other regulatory bodies have done so, and pressure is mounting on others to follow suit.

In 2012, the Federal Deposit Insurance Corporation (FDIC) brought an enforcement action alleging deceptive trade practices by a bank and affiliated company in marketing debit card accounts to college students and assessing fees that affected refunds of the students' education loans. That action resulted in an $11 million settlement, in addition to enhanced oversight requirements.

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CFPB Takes Aim at Relationships between Universities and Credit and Debit Card Issuers, *continued*

In July 2014, the Federal Reserve Board settled a similar enforcement action relating to the issuance and management of college students' debit card accounts, resulting in $3.5 million in penalties and restitution as well as increased oversight obligations.

Meanwhile, in February 2014, the U.S. Government Accountability Office (GAO) issued a lengthy report recommending that Congress increase oversight of debit and pre-paid card activities on college campuses, and noting multiple possible enforcement options for the Department of Education and CFPB. Congress has also increased pressure on the Department of Education to take action.

Further Enforcement Actions Are Likely

While the CFPB has only sought "voluntary" disclosures of information regarding the relationships among debit card issuers, universities and their students, it appears that it and other regulatory bodies are likely to bring further enforcement actions in this area in the months and years to come. Accordingly, debit card issuers and universities should review their current marketing agreements and practices and prepare to defend against any such investigations or enforcement actions.

Supreme Court Resolves Circuit Split Over TILA Rescissions Limitations Period

Amy L. Hanna, 404.221.6507, ahanna@bakerdonelson.com
Jay Buller, 678.406.8722, jbuller@bakerdonelson.com
Jonathan Green, 404.221.6518, jegreen@bakerdonelson.com

The United States Supreme Court ruled yesterday that a borrower relying on the Truth in Lending Act (TILA) to rescind his mortgage loan need only mail written notice of his intent to his lender within three years of the loan's origination – not file suit within that same time period. The pro-borrower opinion issued by the Supreme Court in *Jesinoski v. Countrywide Home Loans, Inc.*, Docket No. 13-684 (U.S. Sup. Ct.) was unanimous and was delivered by Justice Scalia. This opinion clarifies the Court's ruling in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998) to establish that the three-year deadline for rescission by borrowers contained in 15 U.S.C. § 1635(a) does not act as a statute of repose. The opinion resolves a circuit split and reverses precedent in the First, Sixth, Eighth, Ninth and Tenth Circuits.

Jesinoski concerns the Truth in Lending Act's provision allowing a borrower to rescind certain mortgage loans within three years of origination when the originator fails to provide the borrower with complete and accurate statutory disclosures at closing. Under the statute, a borrower may rescind by notifying the originator or an acquiring lender in writing of his intent pursuant to Regulation Z, 12 C.F.R. § 226.23(a)(2).

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Supreme Court Resolves Circuit Split Over TILA Rescissions Limitations Period, *continued*

Before yesterday's opinion, most lenders (and five Courts of Appeal) believed that the three-year deadline acted as a bar for rescission lawsuits, effectively barring any lawsuit seeking rescission that is not filed within three years of the loan's origination. The *Jesinoski* case turns this once widespread position on its head; now, a borrower need only mail written notice to his lender within three years to preserve his right to initiate a rescission suit later.

For lenders, the most troubling part of this opinion is not the ruling itself but what the Supreme Court failed to address. Although it is clear that a borrower has the right to notify lenders of his intent to rescind within three years after origination, it is not at all clear how long the borrower has to initiate a rescission lawsuit once notice is given. Lenders may need to face the prospect of many more rescission lawsuits in the future, and without a clear time frame in which to expect them.

If you have questions about this ruling or any other mortgage-related issues, please contact your Baker Donelson attorney or any member of the Firm's Residential Mortgage Litigation Group.