Heard at the Country Music Hall of Fame: CFPB Director Performs in Nashville

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Among the displays offering tribute to Reba and The Man in Black, Richard Cordray and some of his fans at the CFPB held a public hearing at the Country Music Hall of Fame in Nashville on March 25, 2014. Rather than the typical cowboy hat and boot-clad tourists that normally frequent the Hall, the shelter from the cold, rainy day outside protected throngs of well-dressed citizens who came to hear who the CFPB intended to save next.

Mr. Cordray led off the tense discussion by reading a prepared speech announcing the results of the CFPB's follow-up research study on payday lending, released by the CFPB that day. He indicated that the CFPB had chosen Nashville for the release on account of the prevalence of payday lenders both in Nashville and surrounding states. Since most of the crowd represented management and employees of the financial industry, he was at least correct about his immediate surroundings that day.

Mr. Cordray then began to give statistics and related two stories of customer abuses among his stated 12 million customers using payday lenders (one was about "Alice in Pennsylvania," despite the fact that Pennsylvania has outlawed payday loans for years), but he did state that it was important to encourage small loan products as long as "the markets for those services are fair, transparent and competitive." As this phrase was repeated a number of times during the hearing, it was encouraging to the industry representatives. Mr. Cordray indicated that the payday loan industry, in particular, had been developed to meet the short-term, emergency financial needs of consumers who intended to repay the loans from their next paycheck.

Most of the statistics Mr. Cordray quoted from the study were directed at the fact that many of these short-term loans turned into long-term loans. For example:

- For about half of initial payday loans, borrowers are able to repay the loan with no more than one renewal.
- One in five (20 percent) initial loans are made in loan sequences that involve seven or more loans, and fees "eclipse the actual payday loan itself."
- He gave what seemed a conflicting statistic stating that 4 out of 5 (80 percent) payday loans are rolled over or renewed within two weeks and roughly half of all loans are made in loan sequences lasting 10 or more loans in a row. (Of course, if you add up all the loans of one borrower in a sequence, rather than counting the number of borrowers or sequences as he did in the statistic above, it is easy for him to make the numbers look much worse than what the study was showing. This 80 percent rollover statistic was the one quoted in all the national and local media outlets and has been misinterpreted by the media.)
- In states requiring a 14-day "cooling off" period, renewal rates are nearly identical.

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As a result of these statistics, Mr. Cordray said that payday loans had turned into a "revolving door of debt" and a "slippery slope toward a debt trap." He stated that the efforts of the CFPB would be to prevent this "perpetuating sequence." He took pride in the CFPB's initial efforts to fine a couple of large companies for unfair and deceptive practices and for the new guidelines which had been released on military lending. The CFPB is working on issuing new rules for payday lenders. He concluded that he did not intend to eliminate the payday lending industry, but just to eliminate some of these concerns raised by the study.

After Mr. Cordray spoke, a panel was seated, which included representatives of the payday industry, consumer groups and regulators. Each person had an opportunity to speak before the floor was opened to questions from the audience.

The consumer groups reiterated many of the "abuses" in the payday lending industry and cited additional examples. One of the representatives seemed to prefer that the industry be terminated altogether. One suggestion was to require the lender to determine the ability of the borrower to repay the debt and review credit reports and financials on the borrower. This particular representative indicated her belief that the industry fought this requirement because the payday lenders depended upon the inability of the borrowers to repay so that the lenders could then clean out the borrowers' bank account through electronic funds transfers. She called payday lending "debt trap loans." Another consumer group spokesperson stated that the industry and its state legislative efforts were an attempt at "a systematic dissembling of state usury laws."

Industry representatives on the panel stated that they encourage state regulation and plan to adopt best practices for their industry. Tennessee actually was the first state to adopt such statutory requirements, and the industry trade groups have worked with legislators in 36 states to adopt laws. They indicated that many of the abusive examples given during the hearing were in states where laws had not been passed. They also indicated they were appalled by the bank regulatory efforts to stop the commercial banking industry from offering small loan products, since the payday industry representatives felt that more competition was actually good for the industry and helped control abuse. Even the U.S. Postal Office's Service's consideration of offering small loans was welcome (which, by the way, is also supported by former CFPB advisor and current Democratic Senator Elizabeth Warren). Statistics were quoted that 93 percent of payday borrowers intelligently weighed the risks of taking out these small loans and that 95 percent had indicated that they were very satisfied with the product.

Finally, Paige Marta Skiba, a Vanderbilt professor who represents the Center for Responsible Lending and who has conducted studies on payday lending, discussed her research and the "unrelenting demand for small dollar credit." While many payday borrowers ultimately file for bankruptcy, those persons using these services typically are in the bottom 20 percent of credit scores and have already incurred credit card and mortgage delinquencies. She stated that many of the mechanisms adopted by states to try to control the industry were not effective. Information disclosures were too complicated to understand and did not really address the issues anyway. Financial literacy was very expensive and was not being

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sought out by those who needed it the most. Limitations on the number of loans or cooling-off periods between loans "makes no difference in the probability of whether people default on their loans." While she did not offer a solution to the abuses, she did conclude that banning payday loans would place these borrowers in an even worse situation.

When the hearing was opened for public comment, most of the comment was made by industry employees, who obviously supported payday lending and gave many examples of their very happy customers. Their major point was to let the consumer decide what products they want. Many members of the audience wore badges that said "My Credit, My Decision." Comments from consumer advocates reiterated the high cost of loans, how the loans were designed to create a long-term cycle of debt, and how the loans ignore the borrower's ability to repay.

Nobody threw physical paper or stones, there were no placard-carrying protesters, and there was general civility in the room. As everyone left the auditorium to go back to work, we could hear Hank on the background speakers still singing "these silver tears you're sheddin' now is just interest on the loan."

Supreme Court to Rule on Controversial Right of Rescission Timeline for Mortgages

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The Supreme Court agreed this month to resolve a stark divide in the United State Courts of Appeals regarding the time bar for residential mortgage borrowers to file suits related to mortgage loan rescissions under the Truth in Lending Act (TILA). *Jesinoski v. Countrywide Home Loans, Inc.*, Docket No. 13-684 (U.S. Sup. Ct.). The circuit split the Court will resolve is whether a three-year deadline for borrowers to rescind certain loans also bars lawsuits against lenders for violations of the same statutory provision more than three years from origination of the loan.

The Consumer Financial Protection Bureau (CFPB) has taken a keen interest in the issue, filing amicus curiae briefs in each Court of Appeals case that considered the issue. The CFPB argued that the three-year deadline for borrowers to effectuate rescission is not a time bar for lawsuits or a statute of repose for claims arising out of Section 1635(a) of TILA. The CFPB's position would not only expand beyond three years the time in which lenders could face rescission lawsuits, but it could also create enormous uncertainty, because even the Bureau recognizes that its position does not provide for a clear time bar to litigation, with the result that courts may have to fashion one over time.

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The CFPB's amicus briefs highlighted its current and future role in interpretation and enforcement of TILA, and it pointed out that in the Dodd-Frank enforcement world, the CFPB is charged with promulgating regulations regarding loan rescission under TILA. The Supreme Court also may address for the first time whether the CFPB's interpretation of TILA should be given deference by the Courts. Petitioners have argued that the CFPB's litigation position and its interpretation of TILA through regulation deserves full agency deference. If the Supreme Court gives agency deference to the CFPB's amicus brief, then the CFPB's interpretation of the statute would control so long as there was an ambiguity in the statute and the CFPB's interpretation was permitted by the text. This deference would be significant because the pending appeal arises from a private lawsuit and not from an administrative proceeding. At a minimum, the CFPB's interest in this matter implies potential growth in rescission-related enforcement actions. In addition, the CFPB's interpretations of TILA, if given deference, could lead to an increase in TILA litigation from borrowers.

This dispute concerns TILA's provision that borrowers can rescind certain non-purchase money mortgage loans can in two situations: (1) within three days of origination for any reason; or (2) within three years of origination when the originator fails to provide the borrower with complete and accurate statutory disclosures at closing. Borrowers rescind by notifying the originator or an acquiring lender in writing of their intent pursuant to Regulation Z, 12 C.F.R. § 226.23(a)(2). The lender must then return all funds received from the borrower, and the borrower must return the balance of the loan itself. This process can be at best tricky and at worst nearly impossible for lenders to administer without litigation.

Most lenders have believed that the three-year deadline acted as a bar for rescission lawsuits based on the United State Supreme Court's ruling of *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), in which the Court held that a borrower who tendered notice of rescission and filed suit after the three-year deadline was barred from pursuing the action. The Beach Court seemed to imply that the three-year deadline acted as statute of repose, barring any action filed more than three years after origination. The Eighth Circuit, joined by the First, Sixth, Ninth and Tenth Circuits, agreed with that interpretation. However, the Third, Fourth and Eleventh Circuits held that the text of TILA does not bar lawsuits filed more than three years after origination and the statute requires only that the borrower send notices of rescission within three years.

At stake in this case is first certainty and repose for lenders dealing with potential rescission lawsuits filed years after origination. And beneath the surface of this case is the specter of potential agency deference to the CFPB's interpretation of TILA and other consumer loan statutes.

CFPB's Proposed Rule Promotes More Efficient and Effective Privacy Disclosures

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The Consumer Financial Protection Bureau (CFPB) has proposed a rule that would promote more effective privacy disclosures from financial institutions to its respective customers. Currently, the Gramm-Leach-Bliley Act (GLBA) holds that financial institutions such as national and regional banks must provide their customers with initial and annual privacy disclosure statements regarding any and all privacy policies that apply to their customers. Additionally, if the financial institution participates in data sharing with third parties, the institution must also provide its customers with a notice and opportunity to "opt out" of such sharing.

However, with the newly proposed rule, financial institutions that do not engage in certain types of information sharing activities may stop mailing these annual disclosures if they provide them on their websites and meet certain other conditions.

What does an institution need to do to qualify? Specifically, the CFPB has laid out five cardinal requirements to be eligible for the proposed amendment:

1. The financial institution must not share its customers' non-public personal information with non-affiliated third parties in a manner that triggers the required GLBA opt-out opportunity.
2. The financial institution cannot include on its annual privacy statement an opt-out notice pursuant to the Fair Credit Reporting Act (FCRA).
3. The financial institution's annual privacy statement must not be the only notice provided to its customers regarding the requirements of section 624 of the FCRA.
4. The information included in the institution's privacy statement has not changed since the customers received the previous statement.
5. The financial institution must use the model form provided in the GLBA's implementing Regulation P.

If the financial institution satisfies the requirements above, it need only provide to its customers, in writing once a year, a notice that the institution's privacy notice is available online and will be mailed to any customer upon request by the use of a toll-free number. Notably, there are distinct benefits to this proposed rule for both the customers affected and the financial institutions that qualify.

By making privacy disclosure statements available online, customers will have unlimited and constant access to the respective privacy policy. Also, the online privacy disclosure would be available to all consumers and thereby would not require a login to view. Additionally, it does not affect a consumer's right to a written opt-out notice if the institution participates in data sharing activity, thereby maintaining the customer's right to maintain the privacy of their non-public information. Under this proposal, financial institutions opting to use online privacy disclosures must use the GLBA Regulation P form.

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CFPB's Proposed Rule Promotes More Efficient and Effective Privacy Disclosures, *continued*

This model disclosure would allow customers who are concerned about privacy to "comparison shop" when determining which financial institution to use. Lastly, this proposed rule clearly reduces the cost for institutions that currently provide written privacy notices. The Bureau estimates that about $17 million could be saved annually in the entire industry if institutions choose to use the proposed online disclosure method.

Are eClosings for Residential Loans the Future?

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Noting that the residential mortgage origination process is often "fraught with anxiety" for consumers, CFPB Director Richard Cordray announced an upcoming pilot project that would assess how electronic closings could streamline the closing process and ease the concerns and frustrations of borrowers.

According to an April 23, 2014, news release, the CFPB hopes that electronic closings will help address what the CFPB sees as the major "pain points" in the closing process. These include the limited time consumers may have to review the closing documents, the volume of necessary paperwork, and the complexity of many closing documents. The news release can be found here.

While electronic closings are already being conducted in the market, they remain rare. One reason for the low adoption rate, according to the CFPB, is simple misinformation about the feasibility and legality of conducting electronic closings. The CFPB also cited concerns that electronic closings may actually increase the risk to consumers by reducing their engagement in the closing process. The pilot project is reportedly designed to evaluate and address these issues.

Lenders interested in participating in the pilot project must partner with a technology vendor and they must submit a joint proposal. The proposed projects must meet minimum guidelines for functionality, including a secure software solution for storing and transferring documents and data, the ability to audit, and the ability to mask sensitive data fields. The full set of guidelines can be found here. Additional details on the procedure for joining the program are available in the Broad Agency Announcement that can be found here.

The CFPB highlighted the pilot project as an important part of their "Know Before You Owe" mortgage initiative. The highest profile aspect of the initiative to date is a rule issued by the CFPB in November 2013 requiring the use of two new mortgage disclosure forms: a loan estimate, and a new closing disclosure which must be provided to consumers at least three days prior to closing. It is expected that this new rule will be implemented in August 2015.

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Are eClosings for Residential Loans the Future?, *continued*

With both the pilot project and the broader initiative, it is clear that the CFPB expects the mortgage origination and closing process to evolve in order to address what the CFPB sees as failure to properly serve consumers. Whether that evolution requires the regular use of an electronic closing platform remains to be seen.