# CFPB Focus

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This is an advertisement.

## Arbitration Update

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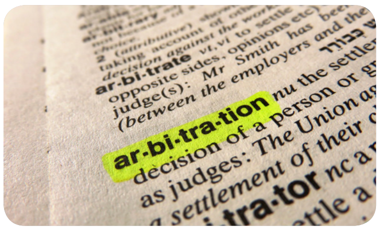


Following up on the Consumer Financial Protection Bureau (CFPB) announcement of controversial rulemaking on arbitration provisions, CFPB Director Richard Cordray offered further insight into the CFPB's intentions in remarks to a meeting of the Consumer Advisory Board. Importantly, he re-affirmed that the CFPB would not pursue a complete ban on all pre-dispute arbitration agreements for consumer financial products and services, but instead would focus on prohibiting the use of such agreements to block class action lawsuits.

The proposed rulemaking, announced on October 7, is the latest development stemming from the CFPB's multi-year study of consumer finance arbitration. Released in March of this year, the CFPB study concluded that very few consumers of financial services and products seek relief individually through arbitration or the courts. However, arbitration clauses were found to deter consumers from filing claims, and the CFPB believes that millions of consumers may have sought relief if class action lawsuits were available to them.

Director Cordray hopes the rulemaking will produce benefits for consumers by allowing consumers to "get their day in court." He also hopes that the proposals "would deter wrongdoing on a broader scale" and "restore to consumers the rights that most do not even know had been taken away from them." As we previously reported, the financial services industry has roundly condemned these conclusions, and many critics believe that the CFPB's rulemaking will harm both financial companies and consumers alike by encouraging meritless class action litigation and increasing the costs of credit for consumers.

Notably, Director Cordray left the door open for a complete ban of arbitration provisions in the future. He indicated, "...we will continue to monitor the effects of such clauses on the resolution of individual disputes" so that "over time we will be able to refine our evaluation of how such proceedings may affect consumer protection, if at all." To this end, the CFPB is considering proposals requiring companies to report all arbitration claims and awards, which may or may not be made publicly available by the CFPB.

As we have noted before, it remains to be seen how arbitration restrictions will fare in the face of inevitable challenges in court, particularly after a string of Supreme Court decisions favoring mandatory consumer arbitration provisions with class action bans.

Director Cordray's remarks are available in their entirety here. The CFPB has published an outline of the proposals under consideration here.

If you have questions about this or any other CFPB-related issue, please contact Will Routt, your regular Baker Donelson attorney or any member of our CFPB team.

# CFPB's October Complaint Snapshot Focuses on Credit Card Complaints

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The Consumer Financial Protection Bureau (CFPB) has been taking complaints from consumers about all financial service products, including credit cards, since its inception on July 21, 2011. As of October 1, 2015, the CFPB has handled more than 726,000 complaints related to various financial products. Recently the CFPB began releasing a monthly snapshot summarizing a specific sub-section of consumer-related complaints. The October snapshot highlighted credit card complaints. A copy of the October monthly complaint report can be found here.

A recent study found that U.S. consumers carried more than $700 billion in credit card debt. Therefore, it comes as no surprise that since the CFPB began accepting and tracking consumer complaints, approximately 79,500 of all complaints involved credit card products. Consumers most frequently complained about incurring late fees and credit report discrepancies because of confusing payment processing schedules and difficulty disputing bill inaccuracies. The monthly report highlighted the most reported complaints:

- The monthly snapshot showed that 16 percent of consumer credit card-related complaints were about problems making payments. Consumers complained that they were often charged surprise late fees because the company did not make it clear that payments would not be credited the day the payment was made.

- Credit card dispute issues were reported as a source of confusion and frustration for many consumers. Some consumers complained that they did not have clear information on the amount of time they had to dispute charges, while others expressed confusion that the credit card company would not assist in disputing charges with a merchant.

- Credit card account closures made up 7 percent of September credit card complaints. Consumers reported that their accounts were closed by the credit card company without any advance warning. Although many credit card companies explained that these closures were the result of suspected fraud, consumers said that they were not informed of the alleged fraud prior to the cards being deactivated.

The most complained-about companies were Citibank, Capital One, GE Capital Retail and JPMorgan Chase. These companies represented nearly 60 percent of complaints submitted to the CFPB between May and July 2015.

## CFPB's October Complaint Snapshot Focuses on Credit Card Complaints, *continued*

CFPB Director Richard Cordray emphasized the CFPB's dedication to overseeing the relationship between credit card companies and consumers, "Credit cards are an important financial tool for over half of the adults in this country. It is important for consumers to be able to control how their payments are applied and to have clear information about their rights as cardholders. The Bureau will continue to work to protect people as they are using credit cards."

This snapshot demonstrates the CFPB's continued involvement in the consumer complaint process. Whether realistic or not, the CFPB expects companies to respond to complaints and describe the steps they have taken or plan to take to resolve the complaint within 15 days of receipt of the complaint. Even more surprising, the CFPB expects companies to close most complaints within 60 days of receipt.

Baker Donelson attorneys are well equipped to handle any CFPB-related issue your company may face, ranging from routine CFPB consumer complaint responses to more complex CFPB audits. We encourage you to contact our team of attorneys should the CFPB come knocking at your door.

## Lessons for Smaller Creditors

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As we look back on 2015, it's not surprising that the CFPB's enforcement actions continued to focus on mortgage-related practices. What was surprising was that its actions were not confined to the nation's largest banks and non-bank institutions, but had expanded to smaller originators. Large and smaller originators alike were targeted for vendor practices.

For example, back in February 2015, the CFPB announced enforcement actions against three smaller mortgage lenders – Maryland-based All Financial Services LLC, Utah-based Flagship Financial Group LLC and California-based American Preferred Lending – because of their direct-mail marketing campaigns that had been handled by vendors. All three companies tried to make a selling point of government-guaranteed or government-insured mortgage loans.

Of the three smaller lenders, only All Financial Services attempted to dispute the allegations in the CFPB's complaint before reaching settlement. The complaint and answer in federal district court, therefore, provided a rare glimpse into how the CFPB's investigation and enforcement process plays out.

At issue was All Financial Services' HECM ("home equity conversion mortgage," a reverse mortgage product that is insured by the FHA) solicitations that were sent to consumers between November 2011 and December 2012. All Financial Services used a marketing company to create its solicitations.

The envelopes for the direct-mail solicitations simulated the look of an official government notice by depicting a symbol of an eagle with arrows as well as including various statements on the envelope that sounded official – such as "Home Saver – HECM Program Eligibility Notice," "Government Lending Division" and "Housing and Recovery Act of 2008 Eligibility Notice." The cover envelopes also conveyed

## Lessons for Smaller Creditors, *continued*

a sense of time limitation with statements such as "Important Document Enclosed" and "Open Immediately." Inside, the correspondence described how a reverse-mortgage loan worked, using an easy-to-read, colloquial explanation that amounted to imprecise statements about paying off the loan.

The CFPB asserted that the direct-mail solicitations: 1) misrepresented that the source of the advertisements was, or was affiliated with, a governmental entity; 2) misrepresented that the FHA-insured reverse-mortgage program was time-limited or had a deadline; and 3) falsely stated that no monthly payments are required "whatsoever" under a reverse mortgage "as long as you and your spouse live in the home."

In its response to the complaint, All Financial Services defended itself by arguing that the CFPB's claims were barred or attributable to acts of others over which the company had no control. The company also argued that the claims were time-barred; many of the alleged wrongs were corrected by the company before the investigation began; and many of these allegations were not part of the initial investigation and statement of alleged wrongs to be corrected.

Based on the allegations in the CFPB's complaint and the defenses raised by All Financial Services, however, there were a number of lessons for other creditors:

- First, All Financial Services had stopped the direct-mail solicitations at issue more than two years earlier, and had corrected many of the issues on its own before the CFPB's investigation. Apparently the CFPB did not consider the corrective steps sufficient to avoid an enforcement action. Therefore, the first lesson for smaller organizations is that if statutory violations are suspected by the entity as part of its own self-monitoring, an outside attorney should be retained to assist with the review and documentation. This provides attorney-client protection, and even if the results of the internal investigation are produced to the CFPB, the documentation will be in a useful format.

- Second, one of All Financial Services' affirmative defenses was that the outside marketing company that prepared the materials is directly responsible for the content of the direct-mail solicitations. From the CFPB's point of view, the investigated entity is responsible for a vendor's actions. In fact, the CFPB adopted the same position against U.S. Bank, N.A. in September 2014. Therefore, smaller organizations need to designate an employee to review and monitor services provided by vendors – whether marketing, billing or debt collection.

- Third, the mortgage lender complained that the allegations in the enforcement action were not part of the CFPB's findings submitted to the lender at the conclusion of the investigation. The implication here is that the CFPB's investigation process is more likely to ask for a lot of information, but not to be forthcoming with its findings during the course of the investigation. It is a heads-up that the investigation process is an opaque one.

Based on its actions in 2015, it is believed that the CFPB will continue to investigate and enforce mortgage rules against smaller institutions in the coming year. Therefore, it is important that smaller lenders stay abreast of enforcement actions against companies big and small alike.

# The Writing is On the Wall – The CFPB Wants MSAs Gone; What Does This Mean for You?

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The CFPB's mission is to promote policies and adopt regulations to allow consumers to make a fully educated decision when they purchase any consumer loan product, with the goal of such consumers taking control over their economic lives. The CFPB has made it clear that it believes Marketing Services Agreements (MSAs) can make that goal difficult to achieve. The CFPB has not adopted regulations that make MSAs illegal, but has recently issued guidance along with unofficial statements that convey a message to the industry that the CFPB is prepared to challenge the legality of such agreements. For example, in his address to the Mortgage Bankers Association (MBA) at its annual convention recently, Director Cordray stated, "We will remain active in scrutinizing the use of such agreements and related arrangements in the course of our enforcement and supervision work."

A week prior to Director Cordray's remarks to the MBA, the CFPB issued guidance on RESPA Compliance and MSAs. In the guidance the CFPB refers to Section 8(a) of the Real Estates Settlement Procedures Act (RESPA), which prohibits the giving and accepting of "any fee, kickback or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." The guidance then continues to illustrate that, through the CFPB's work, it has found various forms of MSAs to have violated RESPA.

The CFPB's guidance does not illustrate how an MSA can comply with RESPA, but is focused upon all the ways in which a MSA does not comply with RESPA. The guidance provides "the Bureau has received numerous inquiries and whistleblower tips from industry participants describing the harm that can stem from the use of MSAs, but has not received similar input suggesting the use of those agreements benefits either consumers or industry." While the guidance is a clear sign that the CFPB does not believe it is possible to comply with RESPA, the CFPB hasn't definitively ruled against MSAs. As a result, many banks with existing MSAs are left wondering whether to take action to terminate MSAs or keep them in place pending further guidance from the regulators. The risk, of course, is that regulators will criticize existing MSAs, even those arrangements carefully constructed to comply with former HUD guidance. However, prematurely terminating an MSA may also lead to negative consequences in terms of relationships with third parties as well as an uneven playing field where more aggressive institutions may continue such arrangements and obtain a competitive advantage compared to those institutions which heed the CFPB's advice and terminate such agreements. The MBA has stressed that "clear rules of the road are essential to a fair and competitive market to protect consumers."

# The Writing is On the Wall – The CFPB Wants MSAs Gone; What Does This Mean for You?, *continued*

In July of this year Wells Fargo and Prospect Mortgage both announced they were ceasing their use of MSAs. They pointed to the regulatory environment and penalties leveled to date as motivation for their change in approach. The fines can be huge. PHH Mortgage is currently appealing a case where the CFPB secured a $109 million disgorgement order in a matter where the CFPB found PHH had illegally referred consumers to mortgage insurers in exchange for kickbacks. For perspective, that is a little more that 9.25 percent of PHH's market cap. The CFPB filed a brief in the appeal, stating they "were correct in levying that penalty [referring to its size], which should serve as a necessary deterrent to other firms that might consider engaging in such actions."

You should review your current situation, and determine whether termination of an existing MSA is prudent given the current regulatory environment, in spite of the economic cost of doing so. Even if you do not have an MSA arrangement in place, the current regulatory environment warrants a review of your sales teams and marketing teams in the consumer lending divisions of your institution. These reviews should focus upon whether controls are sufficient in protecting your institution from employees creating their own MSA arrangements (whether written or oral) with any of the institution's vendors or referral sources.

If you have questions regarding MSA's you would like to discuss with us, feel free to reach out to a member of our Financial Services team.



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