

CFPB Observer: Recent Developments from Oct. 1-16, 2015

CFPB Enforcement Action Against Indirect Auto Finance Company

On Oct. 1, the CFPB [announced an enforcement action](#) against an indirect auto finance company and its auto title lending subsidiary for alleged violations of the Fair Debt Collection Practices Act (FDCPA), the Truth in Lending Act (TILA), and the Consumer Financial Protection Act (CFPA).

According to the [consent order](#), the company allegedly deceived consumers, in violation of the CFPA, by calling them under false pretenses, including by impersonating repossession companies and using a Web-based service to place calls to borrowers that appeared to come from pizza delivery services, flower shops, and the borrowers' family and friends. The company also allegedly violated the FDCPA by threatening to refer borrowers for investigation or criminal prosecution, and disclosing information about debts to borrowers' employers, friends, and family. According to the consent order, the company's auto title lending subsidiary allegedly violated TILA by failing to disclose the annual percentage rate of loans in advertisements.

Under the terms of the consent order, the company must revise its debt collection practices and provide consumers \$44.1 million in relief. The company also must pay a \$4.25 million civil monetary penalty to the CFPB.

CFPB Issues Letter to Industry on TRID Good Faith Compliance

On Oct. 2, the CFPB sent a [letter](#) to mortgage industry trade groups regarding compliance with the recently-effective TILA-RESPA Integrated Disclosure rule (TRID). The letter states that during initial compliance exams, the CFPB's examiners will not cite institutions that make good faith efforts at compliance with TRID. The letter states that the CFPB recognizes the scope and scale of changes necessary for each supervised institution to achieve effective compliance when assessing an institution's compliance management system and overall efforts to come into compliance. Specifically, examiners will consider the following in determining good faith compliance efforts: "the institution's implementation plan, including actions taken to update policies, procedures, and processes; its training of appropriate staff; and, its handling of early technical problems or other implementation challenges."

CFPB Issues Guidance on Marketing Services Agreements and RESPA Compliance

On Oct. 8, the CFPB issued a [compliance bulletin](#) on the use of marketing services agreements and compliance with the Real Estate Settlement Procedures Act (RESPA). Section 8 of RESPA prohibits the payment of kickbacks and referral fees for settlement services provided in mortgage transactions. With respect to this exception, Section 8 permits the payment of bona fide compensation for goods or facilities actually furnished or for services actually performed. Despite this explicit language, marketing services agreements have been a frequent focus of CFPB enforcement actions over the past few years.

The bulletin explains these enforcement actions by stating that the CFPB has “grave concerns” regarding marketing services agreements. The CFPB has found that institutions frequently use these agreements to provide kickbacks by paying fees for marketing services that are not actually provided, that vary based upon the number of referrals, or by paying fees that are not set at market rates. The bulletin further notes that the risks associated with marketing services agreements may not be adequately mitigated even when the parties set the prices for marketing services at arm’s length: “Especially in view of the strong financial incentives and pressures that exist in the mortgage and settlement service markets, the risk of behaviors that may violate RESPA are likely to remain significant. That can be true even where the terms of the MSA have been carefully drafted to be technically compliant with the provisions of RESPA.”

The bulletin makes clear that the CFPB intends to continue actively scrutinizing marketing services agreements. Several major mortgage industry participants have already terminated their marketing services arrangements in response to the bulletin and the preceding enforcement actions.

CFPB Considering Proposal to Ban Certain Arbitration Clauses

On Oct. 7, the CFPB [announced a proposed](#) outline of a rule that would ban financial institutions from including in their contracts mandatory arbitration clauses that ban consumers from pursuing class action lawsuits and require institutions to report individual arbitration outcomes to the CFPB.

Section 1028 of the Dodd-Frank Act required the CFPB to conduct a study of pre-dispute arbitration clauses and authorized the CFPB to restrict or prohibit the use of such clauses if, consistent with the study, the CFPB finds that doing so is in the public interest and for the protection of consumers.

The CFPB conducted a three-year study of arbitration clauses and released the results of its efforts in March 2015. It concluded that mandatory pre-dispute arbitration clauses are ubiquitous, they are not well understood by consumers, consumers rarely avail themselves of the arbitration process, and that limits on participation in class actions reduce consumers’ ability to pressure institutions to change harmful practices.

On the basis of CFPB’s findings in these studies, the CFPB is now considering a proposal that would not ban the use of mandatory pre-dispute arbitration clauses in consumer contracts, but it would ban the use of class action waivers in such clauses. The proposal would require arbitration clauses to state explicitly that they do not apply to cases filed in court on behalf of classes of consumers unless and until class certification is denied or the class claims are dismissed. The proposal would also require institutions to report the outcomes of individual arbitration proceedings to the CFPB. The CFPB is considering publishing these outcomes on its website to promote further study of the efficacy of consumer arbitration.

The CFPB issued an outline of its proposal in preparation for convening a [small business review panel](#), which is the first step in the process of a potential rulemaking. Whenever a rule under development may have a significant economic impact on a substantial number of small businesses, the CFPB is required to convene a panel of government representatives and a selected group of small businesses representatives from the affected industry. The small

business representatives provide the panel with [feedback on the potential economic impact of the proposed regulations](#).

The CFPB also recently announced that it will include a discussion of arbitration agreements during its Consumer Advisory Board meeting, which is scheduled for Oct. 22 at the CFPB's offices in Washington, D.C. The meeting is open to the public, but an [RSVP](#) is required to attend.

CFPB Issues Final Rule Amending HMDA Reporting Requirements

On Oct. 15, the CFPB issued a [final rule](#) amending the reporting requirements of the Home Mortgage Disclosure Act (HMDA). HMDA requires mortgage lenders to report certain information about the loans for which they receive applications or that they originate or purchase. Regulators and the public may use this information to assess lenders' compliance with fair lending laws. The Dodd-Frank Act mandated specific new data points be collected and reported under HMDA. The CFPB used its discretionary rulemaking authority to expand the requirements further by adding additional data points not explicitly required by the Dodd-Frank Act.

The final rule adopts many of the provisions from the proposed rule, which was originally issued in 2014. The final rule requires lenders to report new information, including the property value, term of the loan, and the duration of any introductory interest rates. Lenders will also have to report loan pricing information, such as the borrower's debt-to-income ratio, the interest rate of the loan, and the discount points charged for the loan. The rule also eases reporting requirements for certain small depository institutions.

Most of the provisions of the final rule take effect on Jan. 1, 2018. Mortgage lenders will therefore need to collect the new information in 2018 and then report that information by March 1, 2019.

CFPB Issues Annual Report on Student Loan Complaints

On Oct. 14, the CFPB's Student Loan Ombudsman issued [his annual report on student loan complaints](#). The report covers approximately 6,400 private student loan complaints and approximately 2,300 debt collection complaints related to private and federal student loan debt received by the CFPB between Oct. 1, 2014, and Sept. 30, 2015. The Ombudsman stated that the report showed that federal student loans made by private lenders may have a greater delinquency rate than the broader student loan market. According to the report, at least 30 percent of borrowers of such loans (more than 5 million in total) are delinquent. Also according to the report, 95 percent of these borrowers are not enrolled in income-based repayment plans. The Ombudsman stated that this should raise concerns about whether delinquent borrowers are properly receiving income-based repayment options from their servicers.

The Ombudsman noted that the results of the report support an argument for industry-wide servicing standards. Earlier this month, the CFPB, Department of Education, and Department of Treasury issued a [Joint Statement of Principles on Student Loan Servicing](#) to serve "as a framework to improve student loan servicing practices, promote borrower success, and minimize defaults."

The Consumer Financial Protection Bureau (CFPB), created by the Dodd-Frank Wall Street Reform and Consumer Protection Act, implements and enforces federal consumer financial law. Greenberg Traurig monitors the CFPB's activities, including the almost daily movement on multiple industry fronts that the CFPB makes as it redefines consumer finance law. An entirely new system has been and is being created for the consumer financial services industry. Once complete, the question will be, "How does our clients' business match up?" Our GT CFPB Team regularly observes and analyzes the actions of the CFPB in order to advise clients in best practices, risk management and compliance procedures.

This *GT Alert* was prepared by **Gil Rudolph, Brett Kitt, Scott Sheehan** and **Peter Cockrell**. Questions about this information can be directed to any member of Greenberg Traurig's **Consumer Financial Protection Bureau (CFPB)** team of professionals:

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