HUDSON COOK

The CFPB's New Payday Rule

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In October, the Consumer Financial Protection Bureau issued its much-anticipated final Payday Rule. The Payday Rule, designed by the CFPB to end so-called "payday debt traps," can be broadly divided into two sets of requirements:

(1) Lenders must make an ability to repay determination and comply with related credit reporting obligations before making certain covered loans; and

(2) Lenders must comply with limitations and disclosure requirements in connection with processing payments on covered loans.

The final Payday Rule regulates three different types of "Covered Loans":

(1) *Short-term Loans*: closed- or open-end loans where the consumer is required to pay within 45 days;

(2) *Longer-term Balloon Loans*: closed- or open-end loans where the consumer has longer than 45 days to pay, and either the loan must be repaid in a single payment, or has a "balloon payment" (*e.g.* at least one payment owed is more than twice as large as any other payment); and

(3) *Covered Longer-Term Loans*: closed- or open-end loans longer than 45 days, where the APR during any term of the loan exceeds 36% (as defined by Regulation Z) and the creditor obtains a "leveraged payment mechanism." "Leveraged payment mechanism" is defined as the right to initiate a payment transfer, through any means, from a consumer's account, either on a single occasion or on a recurring basis. This could include checks that are not deposited immediately by the lender or an electronic fund transfer authorization for a future date.

The ability to repay requirements and related credit reporting obligations apply only to the first two types of Covered Loans - short-term loans and longer-term balloon loans. The payments requirements apply to all three types of Covered Loans -- short-term loans, longer-term balloon loans, and covered longer-term loans.

The Rule requires any lender making a short-term loan or a longer-term balloon loan to first determine that the consumer has the ability to repay the loan, while still meeting their basic living expenses during the term of the loan. A lender making these types of loans must also comply with a number of special credit reporting requirements. As compared to the proposal, the final Rule provides more flexibility regarding the income and debt verification requirements by allowing the lender to rely on written statements from the borrower.

The limitations on processing payments apply to all three types of covered loans -- short-term loans, longer-term balloon loans, and longer-term covered loans. In connection with these loans, a lender is prohibited from attempting to withdraw a payment from consumer's account after two consecutive failed payments, unless the consumer provides a new payment authorization. The lender may, however, initiate a payment transfer to collect a late fee or returned check fee without obtaining a new authorization. The rule also prescribes model disclosures for lenders prior to making payment transfer attempts.

Lenders making covered loans must comply with the rule's 36-month record retention requirement, and develop robust compliance policies and procedures related to their covered lending activity.

There are a number of exemptions from the rule, including purchase money loans, real-estate secured loans, credit cards, student loans, pawn loans, overdraft, wage advance programs and no cost advances. The rule also exempts (1) "alternative loans," which are closed-end loans of $200 - $1,000, paid off in one to six months in two or more fully amortizing, equal payments, are exempt if the lender follows the rates and fees permitted under the National Credit Union Administration Payday Alternative Loan Program (*e.g.* 28% interest and a $20 application fee); (2) "principal payoff loans," which are short-term fully amortizing loans of $500 or less, with the option of up to two loan renewals, so long as the borrower does not have a recent short-term or balloon-payment loans; and (3) "accommodation loans" where a lender makes fewer than 2,500 covered loans per year, where the income from the loans does not exceed 10% of its gross profits.

The Final Rule was published in the Federal Register on November 17. Ac-cordingly, the compliance deadline for the provisions of the final rule concern-ing the ability to repay analysis and limi-tations on payment attempts is August 19, 2019. In case it may be helpful, the final publication in the Federal Regis-ter can be found at www.federalregister.gov/d/2017-21808/page-54472.

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