Consumer Financial Protection Bureau (and Other Federal Regulators) Updates: A 2016 Chronological Review

By Eric L. Johnson

Eric L. Johnson is a partner with Hudson Cook, LLP in its Oklahoma City, Oklahoma office. He practices in the areas of: automotive finance law; banking, commercial and consumer financial services law; financial institution regulation; and e-commerce and information technology.

Eric also teaches Consumer Law as an Adjunct Professor at Oklahoma City University School of Law. He was admitted to the Oklahoma Bar Association in 1994, after graduation from Oklahoma City University School of Law (J.D., 1994) and Oklahoma State University (B.S. in Accounting, 1991).

Mr. Johnson is admitted to practice in all Oklahoma courts and the U.S. District Court, for the Northern and Western Districts of Oklahoma, and is a member of: the American Bar Association (Business Law Section; Banking, Consumer and Commercial Financial Services Committees); the National Automotive Finance Association (Legal Committee, Chair 2006 – present); the National Association of Dealer Counsel; and the Oklahoma Bar Association. His publications include: articles on "negative equity" and other auto finance issues for the *Quarterly Report*; updates for Chapters 1 and 2 of the American Bar Association's TRUTH IN LENDING treatise by Rohner & Miller; and annual updates to VERNON'S OKLA. FORMS. He is also a frequent speaker at bar association and industry conferences, and Program Chair of the Oklahoma Bar Association Financial Institutions and Commercial Law Section.

I. Introduction – the Year in Review

This article provides a partial month-by-month review of selected federal agency initiatives, proposals and regulations (mostly from the Bureau of Consumer Financial Protection, or CFPB) issued during 2016. The review is necessarily selective, seeking to highlight only a small number of such actions in order to focus on those of the broadest impact and interest.

II. February 2016

A. CFPB Issues Bulletin Reminding Furnishers of Obligations Regarding Information Provided to Consumer Reporting Agencies

On February 3, 2016, the CFPB issued a new compliance bulletin[1] reminding furnishers of their obligations under Regulation V (implementing the Fair Credit Reporting Act)[2] to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of information furnished to consumer reporting agencies (CRAs). The bulletin was issued in conjunction with a field hearing on access to checking accounts and the announcement of letters to a number of top banks encouraging them to offer "lower risk" checking accounts to consumers who may have had a prior negative history with handling accounts (such as overdrafts). In the bulletin, the CFPB noted its focus on the accuracy of information in consumer reports about banking history, past non-sufficient funds (NSF) activity, unpaid or outstanding bounced checks, overdrafts, involuntary account closures, and fraud.

The CFPB notes in the bulletin that its supervisory experience suggests that some financial institutions are not compliant with their obligations with regard to furnishing information to specialty CRAs. The bulletin emphasizes that a furnisher's obligation to have policies and procedures that satisfy Regulation V's requirement extends to information furnished to *all* types of CRAs, including the furnishing of deposit account information to specialty CRAs. The bulletin states that the CFPB will continue to monitor furnishers' compliance with the Regulation V requirement to establish and implement reasonable written policies and procedures regarding the accuracy and integrity of all furnished information.

B. CFPB Announces Priorities at Consumer Advisory Board Meeting

On February 25, 2016, the CFPB convened a meeting of its Consumer Advisory Board. At the meeting, it announced nine policy priorities it planned to focus on over the next two years. The CFPB's near-term priority goals are:

- Arbitration;
- Consumer Reporting;
- Debt Collection;

1. CFPB Compliance Bulletin 2016-01, dated February 3, 2016, Subject: The FCRA's Requirement that Furnishers Establish and Implement Reasonable Written Policies and Procedures Regarding the Accuracy and Integrity of Information Furnished to all Consumer Reporting Agencies.[the bulletin].

2. 15 U.S.C. §§ 1681 *et seq.*

- Demand-Side Consumer Behavior;
- Household Balance Sheets;
- Mortgages;
- Open-Use Credit;
- Small Business Lending; and
- Student Lending.[3]

Of note, this list introduced the term "open-use credit," which is intended to capture any non-purpose credit products, including credit cards, overdraft products, installment lending, payday loans, and title loans.[4] Some members of the Consumer Advisory Board expressed concern about the term "open-use credit," explaining that each of these products works differently and is used by different types of consumers in different circumstances. The CFPB did not indicate it would regulate all of these products in the same way, but officials explained that because most consumers of open-use credit products have a low- to moderate-income and are disproportionately female and persons of color, the CFPB is particularly concerned about issues of fairness and non-discrimination in connection with these products.

With respect to the mortgage market, CFPB officials emphasized their expectation that lenders must serve the entire array of creditworthy borrowers in a way that produces fair and efficient outcomes for consumers. These officials did not elaborate what was meant by "serving the entire array of borrowers" other than to note that discrimination and credit access remain significant risks for people of color. The CFPB also noted that half of consumers do not shop for a mortgage loan even though it might result in significant savings.

CFPB officials also addressed debt collection issues and indicated that they will continue to focus on this area, with the goal over the next two years of ensuring that "debt collectors" substantiate debts, identify debtors, and provide information about debtors' rights. The officials emphasized that the CFPB's debt collection rule will cover both first- and third-party collections.

Finally, with respect to credit reporting, the CFPB will explore ways to incorporate alternative data into the credit reporting system in order to help consumers who do not have a traditional credit report obtain credit.

Officials emphasized that the CFPB plans to continue its work in other areas, which would include fair lending oversight of "indirect" auto finance and its rulemaking on prepaid cards.

III. March 2016

A. Data Security Practices and Safety of the Online Payment System

On March 2, 2016 the CFPB took action against online payment platform Dwolla for allegedly deceiving consumers about its data security practices and the safety of its online payment system. Dwolla, Inc. operates an online payment system. Since December 2009, Dwolla has collected and stored consumers' sensitive personal information and provided a platform for financial transactions. As of May 2015, it had more than 650,000 users and had transferred as much as $5 million daily. For each account, Dwolla collects personal information including the consumer's name, address, date of birth, phone number, Social Security number, bank account and routing numbers, a password, and a unique four-digit personal identification number (PIN).

From December 2010 until 2014, Dwolla claimed to protect consumer data from unauthorized access with "safe" and "secure" transactions. On its website and in communications with consumers, Dwolla made representations about its data security practices. In this enforcement action, the CFPB alleged that Dwolla's data security practices fell far short of its claims. Specifically, the CFPB alleged that Dwolla misrepresented its data-security practices by:

- falsely claiming that its practices "exceed" or "surpass" industry security standards. Contrary to its claims, Dwolla allegedly failed to employ reasonable and appropriate measures to protect consumers' data from unauthorized access; and
- falsely claiming its "information is securely encrypted and stored"; instead, Dwolla did not encrypt some sensitive consumer data, and released applications to the public before testing whether they were secure.

Notably, the CFPB did not claim that any consumers were harmed by Dwolla's allegedly deceptive behavior. Under the terms of the CFPB's order, Dwolla must:

- ensure that information provided to consumers about the security of its online payment system is accurate, and must enact comprehensive data security measures and policies, including a program of risk assessments and audits;
- train employees on the company's data security policies and procedures, and on how to protect consumers' sensitive personal information. Dwolla also must fix any security weaknesses it finds in its web and mobile applications, and must securely store and transmit consumer data; and
- pay a $100,000 penalty to the CFPB's Civil Penalty Fund.[5]

3. *See* http://www.counselorlibrary.com/library/alerts/alerts_03012016050335_838.pdf.

4. *Id.*

5. CFPB Press Release dated March 2, 2016 at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-

(Continued on next page)

IV. May 2016

A. CFPB Targets Individual Bank Employee

On May 26, 2016, the CFPB took action against a former Wells Fargo employee for an allegedly illegal mortgage-fee shifting scheme. The CFPB asserted that the employee referred a substantial number of loan closings to a single escrow company, which shifted its fees from some customers to others at the employee's request. The scheme allegedly allowed the employee to manipulate loan costs and ultimately increase the number of loans he closed, which increased his commissions. The CFPB filed an administrative consent order requiring the employee to pay an $85,000 penalty and banning him from working in the mortgage industry for one year.[6]

B. CFPB Proposes Rule Prohibiting Mandatory Arbitration Clauses

The CFPB issued proposed and final rules prohibiting mandatory arbitration clauses in a wide variety of contracts.[7] The rules came as no surprise to industry watchers. The rules prohibit companies from using mandatory arbitration clauses in their arbitration agreements with consumers. Companies are still able to include arbitration clauses in their contracts, but for contracts subject to the rules the clauses will have to say explicitly that they cannot be used to stop consumers from being part of a class action in court. The rules provide the specific language that companies must use. The rules also require companies that use pre-dispute arbitration agreements to submit to the CFPB claims, awards, and certain related materials filed in arbitration cases. This will allow the CFPB to monitor consumer finance arbitrations to ensure that the arbitration process is fair for consumers. The CFPB is also considering publishing information it would collect in some form so the public can monitor the arbitration process as well.

V. June 2016

A. CFPB Sues Intercepts Payment Processer

On June 6, 2016 the CFPB announced that it had sued Intercept Corporation, a third-party payment processor, and two of its executives for allegedly violating the Dodd-Frank Act's prohibition against unfair acts and practices by processing payments from consumer bank accounts on behalf of clients without adequately investigating, monitoring, or responding to signs of potential fraud by its clients and complaints from banks and consumers.[8] Intercept transmits electronic funds transfers through the Automated Clearing House for its clients, which include title lenders, payday lenders, debt collectors, and sales financing companies, among others. Specifically, the CFPB alleged that Intercept ignored the high rate of returned payments for insufficient funds or invalid or closed accounts, which, according to the CFPB, signaled that consumers may not have consented to the withdrawals or were misled about the terms of their payments. The CFPB also alleged that Intercept ignored other warning signs such as state and federal enforcement actions against its clients. The CFPB's complaint sought monetary relief, injunctive relief, and penalties.

VI. July 2016

A. CFPB Releases Outline of Its Debt Collection Rulemaking Proposals under Consideration

On July 28, 2016 the CFPB released an "outline" of the proposed rules under consideration for its long-anticipated debt collection rulemaking.[9] The outline covers a lot of ground, the high points of which are summarized briefly below.

1. Creditors and Servicers

Importantly, the CFPB advised that it is not going to try to regulate creditors and servicers of current debt together with third-party debt collectors and debt buyers subject to the federal Fair Debt Collection Practices Act (FDCPA).[10] The CFPB indicated that it would, however, begin a similar rulemaking process separately "in several months" for "creditors and others engaged in collection activity who are covered persons under the Dodd-Frank Act but who may not be 'debt collectors' under the FDCPA." The CFPB did not suggest which of the areas addressed in this outline it might later propose to apply to creditors and servicers, or whether it will define "collection" for purposes of any substantive conduct limitations or requirements of its proposed regulation in a way that distinguishes collection activity from ordinary, routine servicing of performing accounts.

5. *(Continued from previous page)*

action-against-dwolla-for-misrepresenting-data-security-practices/ and CFPB Consent Order dated February 27, 2016 at: http://files.consumerfinance.gov/f/201603_cfpb_consent-order-dwolla-inc.pdf.

6. *See*: CFPB Press Release dated May 26, 2016, at https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-former-wells-fargo-employee-illegal-mortgage-fee-shifting/; and CFPB Consent Order dated May 25, 2016, at: http://files.consumerfinance.gov/f/documents/201605_cfpb_consent-order-david-eghbali.pdf.

7. *See* Proposed Rule, 81 Fed. Reg. 32829 (May 24, 2016). The CFPB published its final rule on July 20, 2017. *See* 82 Fed. Reg. 33210 (July 20, 2017). The final rule became effective September 18, 2017. Compliance is mandatory for pre-dispute arbitration agreements entered into on or after March 19, 2018.

8. *See* CFPB Press Release dated June 6, 2017, at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-sues-payment-processor-enabling-unauthroized-withdrawals-and-other-illegal-acts-clients/.

9. *See*: CFPB Press Release dated July 28, 2016, at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-considers-proposal-overhaul-debt-collection-market/; and Small Business Review Panel for Debt Collector and Debt Buyer Rulemaking Outline of Proposals Under Consideration and Alternatives Considered, at: http://files.consumerfinance.gov/f/documents/20160727_cfpb_Outline_of_proposals.pdf. Note that on June 8, 2017, CFPB Director Cordray provided some clarity on the status of the CFPB's debt collector rulemaking by announcing that the CFPB will carve certain "right consumer, right amount" rules out of the debt collector rulemaking, and instead address such rules in a separate rulemaking for first-party creditors. *See* Prepared Remarks of CFPB Director Richard Cordray at the Consumer Advisory Board Meeting, at: https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-consumer-advisory-board-meeting-june-2017/.

10. 15 U.S.C. §§ 1692 *et seq*.

2. Information Integrity and Related Concerns

The CFPB described debt collection errors – primarily pursuit of the wrong debtor or wrong debt amount – as its most common complaint related to collections. Instead of requiring debt collectors to obtain account-level documentation for every account (which was considered), the CFPB may propose to require third-party debt collectors to "substantiate" the debt before trying to collect it, by establishing a "reasonable basis" for a claim. As part of that process, the CFPB may require debt collectors to: (1) obtain a representation from the creditor that it has policies and procedures to ensure that the creditor transfers accurate account information; and (2) review certain information about the debtor and the account for "warning signs" of data errors. The information currently under consideration by the CFPB is:

- the full name, last known address, and last known telephone number of the consumer;
- the account number of the consumer with the debt owner at the time the account went into default;
- the date of default, the amount owed at default, and the date and amount of any payment or credit applied after default;
- each charge for interest or fees imposed after default and the contractual or statutory source for such interest or fees; and
- the complete chain of title from the debt owner at the time of default to the collector.

If the debt collector detects an error in that fundamental information, the debt collector would have to take further steps before attempting to collect.

3. Disclosure Requirements

a. Debt Validation Notice

The CFPB is considering requiring a more detailed debt validation notice that includes a tear-off portion that allows the debtor to request validation, ask for the identification of the original creditor, or make a payment. The CFPB proposes to have debt collectors briefly identify the account that gave rise to the debt, and itemize the debt in some way. In Appendix F of the outline, the CFPB indicates what it might propose as a "model" debt validation notice. A model form of debt validation notice would offer debt collectors relief from litigation over a letter the contents of which, today, is prescribed largely by common law interpreting the brief requirements stated in 15 U.S.C. section 1692g. The CFPB is also proposing to require debt collectors to include a one-page Statement of Rights document in the envelope with the debt validation notice.

b. Litigation Disclosure

The CFPB is considering a proposal that would require debt collectors to give a "litigation disclosure" in any written or oral correspondence in which the debt collector expressly or implicitly represents an intention to sue. The disclosure would inform the consumer that: the debt collector intends to sue; a court could rule against the consumer if he or she fails to defend the suit; and certain information about debt collection litigation is available on the CFPB's website. The CFPB did not develop model language, but is asking small businesses to advise it about the potential usefulness of model language.

c. Time-Barred Debt Disclosure

The CFPB is considering requiring debt collectors to give certain disclosures when they seek payment on time-barred (out-of-statute) debts. The CFPB is considering requiring specific disclosures about: (1) whether the debt collector could sue to collect a time-barred debt; and (2) whether the debt can or cannot appear on her credit report (whether it is obsolete). Further, under the proposal, one debt collector that provides the time-barred debt disclosure would bar all subsequent debt collectors from suing on the debt even if the debtor revives the debt -- the proposal hinges only on whether the earlier collector provided the disclosure, and not on the actual status of the debt.

4. Collection Contact Frequency

The CFPB is also proposing dramatic limits on collection contact frequency. The proposal begins by differentiating between contacts prior to "confirmed consumer contact" and contacts after "confirmed consumer contact." "Confirmed consumer contact" means that any collector – either the current collector or a prior one – has communicated with the consumer about the debt, and the consumer has answered when contacted that she is the debtor. Essentially, the CFPB acknowledges that collectors need more leeway when communicating with consumers with whom they have not yet made contact.

The contact frequency restrictions would apply per account (not per consumer) and would apply on a per-weekly basis. Prior to confirmed consumer contact, the collector could make three attempts per unique address or unique phone number, up to a total of six *attempted* contacts over the course of the week. Once the collector makes "confirmed consumer contact," however, its ability to continue to contact the consumer is limited. Specifically, the collector could only make two attempts per unique address or phone number, up to a total of three attempted contacts over the course of a week. Finally, the collector is limited to one live communication per account per week. By way of reference, the only state that currently regulates attempts (West Virginia) limits a debt collector to thirty attempts in a week. A couple of states limit collectors to two contacts in a week in the context of collection. If the CFPB proposes the contact frequency

limitations as they appear in the outline, debt collectors will have a bright-line FDCPA test for where to draw the contact frequency line, but will be allowed far fewer contact attempts than are allowed under any current collection law or rule.

While the CFPB did not define "attempt," it did provide that the contact caps would limit both successful and attempted contacts (*e.g.*, if the collector leaves a "limited-contact message," this would count toward the cap). The CFPB left open whether to apply the caps equally to all communication channels or whether to create separate limits per unique contact channel.

5. Skip-Tracing

Like the consumer contact restrictions, the proposed third party skip-tracing contact restrictions the CFPB outlines adopt the "confirmed consumer contact" as a line of demarcation. And, like the debtor contact restrictions, the third party skip-tracing contact restrictions would apply on a per-account and per-week basis. Specifically, prior to confirmed consumer contact, the collector could make three attempts to each third party's unique address or phone number per week, for a total of no more than six attempts to each third party per week. Consistent with the FDCPA's skip-tracing requirements, the collector can engage in no more than one live communication with a third party for skip-tracing purposes over the life of the account. There is no limit on the total number of contact attempts across all third parties for a specific account. Once there is confirmed consumer contact, the collector cannot contact any third parties for skip-tracing purposes.

6. Time, Place, and Manner Restrictions

The CFPB is also considering more specific requirements to regulate when, where, and how a collector can contact a debtor. Among other restrictions, the CFPB has proposed that debt collectors take into account both the area code of the debtor's phone number and any other indicators of where he or she is located when determining the permissible times to call the debtor (absent information to the contrary). Further, the CFPB may propose that if the collector knows or has reason to know that the debtor is in a "presumptively inconvenient" place (like the hospital, a place of worship or grieving, or a childcare facility), the debt collector cannot communicate with the debtor while he or she is in that place. Notably, the CFPB expressly declined to propose that the workplace be considered an inconvenient place to contact the debtor. However, the CFPB stressed that work email addresses may be an inconvenient way of reaching the debtor, and may also reveal the existence of the debt to a third party, and therefore the CFPB may propose a ban on such contacts absent the debtor's prior consent.

7. Decedent Debt

The CFPB also indicated that it may propose a thirty-day waiting period for attempts to collect a debt where the obligated debtor has died. The waiting period would begin to run from the date the debtor passes away. The moratorium on collection attempts during the thirty-day period would only apply if the debt collector is or should be aware that the debtor is deceased. The CFPB also solicited comments on a proposed sixty-day waiting period. Many of these and the other proposed restrictions on collecting from the estate of a deceased debtor closely mirror the FTC's policy statement on collecting decedents' debts.[11]

8. Consumer Consent

The CFPB also proposed that consent from the debtor to communications at inconvenient times or places, with third parties, or when the debtor is represented by an attorney, will not extend to subsequent debt collectors. For instance, if one debt collector obtains the debtor's consent to contact third parties regarding the debt, a subsequent debt collector cannot rely on that consent to contact third parties regarding the debt. The CFPB does not propose to require written consent, but emphasized that debt collectors should memorialize the consent, either in writing or by recording phone calls.

B. FDIC Interested in Third-Party Lending

On July 29, the Federal Deposit Insurance Corporation (FDIC) requested comments on a number of proposals, including draft guidance for third-party lending.[12] The proposed third-party lending guidance outlines risks that may be associated with third-party lending as well as expectations for a risk-management program, supervisory considerations, and examination procedures related to third-party lending.

In third-party lending, a bank contracts with an outside source to perform a significant aspect of the lending process, as where the bank originates loans on behalf of third parties, originates loans through third parties or jointly with third parties, or originates loans using platforms developed by third parties. The draft guidance supplements and expands on previous guidance and would apply to all FDIC-supervised institutions engaging in third-party lending programs. Comments on the guidance were due by October 27, 2016. This issue has the potential to impact dealers who sell their retail installment contracts to federally-insured banks regulated by the FDIC.

11. It can be noted, however, that issuance of a rule in the form of a regulation escalates the legal risks and burdens, *e.g.*, increasing the likelihood of expanded litigation on potentially difficult issues such as whether a debt collector should have been aware that the debtor has died.

12. *See*: FDIC Press Release dated July 29, 2016, at https://www.fdic.gov/news/news/press/2016/pr16061.html; and FDIC Financial Institution Letter FIL-50-2016, dated July 29, 2016, at: https://www.fdic.gov/news/news/financial/2016/fil16050b.pdf.

VII. August 2016

A. CFPB Proposed Amendments to the "Know Before You Owe" Mortgage Disclosure Rule

On July 29, 2016 the CFPB announced a proposed rule to amend the "Know Before You Owe" mortgage disclosure rule (the rule).[13] The proposed amendments memorialize certain past informal guidance issued by the CFPB and make additional clarifications and technical amendments. Among the various amendments, the CFPB noted the following proposed changes:

- *Tolerances for the total of payments*: The CFPB proposes to establish tolerances for the total of payments that parallel existing tolerances for the finance charge and disclosures affected by the finance charge.

- *Partial exemption affecting housing assistance lending*: The existing rule provides a partial exemption for certain housing assistance loans. The CFPB proposes to amend the rule to clarify that recording fees and transfer taxes may be charged in connection with those loans without losing eligibility for the partial exemption. In addition, recording fees and transfer taxes would be excluded from the exemption's limits on costs.

- *Cooperative units*: The CFPB proposes to extend the rule's coverage to include transactions involving cooperative units regardless of whether the cooperative unit is classified as real property under state law.

- *Privacy and information sharing*: The CFPB proposes to incorporate and expand upon its previous webinar guidance concerning the sharing of disclosures with sellers and various other parties, by additional commentary clarifying how a creditor may provide separate disclosure forms to the consumer and the seller.

Comments on the proposed rule were due by October 18, 2016.

B. CFPB Updates Mortgage Servicing Rules and Outlines Principles for the Future of Loss Mitigation

In separate press releases, the CFPB announced new measures to ensure that struggling homeowners are treated fairly by mortgage servicers and outlined consumer protection principles to guide mortgage servicers, investors, government housing agencies, and policymakers in their efforts to develop new foreclosure relief solutions as the Home Affordable Modification Program (HAMP) is nearing its expiration date.[14]

The CFPB's updated servicing rules:

- require servicers to provide certain borrowers with foreclosure protections more than once over the lives of their loans;

- expand consumer protections to surviving family members and other homeowners;

- provide more information to borrowers in bankruptcy;

- require servicers to notify borrowers when loss mitigation applications are complete;

- protect struggling borrowers during servicing transfers;

- clarify servicers' obligations to avoid dual-tracking and prevent wrongful foreclosures;

- clarify when a borrower becomes delinquent;

- provide flexibility for servicers to comply with certain force-placed insurance and periodic statement disclosure requirements;

- clarify requirements regarding early intervention, loss mitigation, information requests, prompt crediting of payments, and the small servicer exemption; and

- exempt servicers from providing periodic statements under certain circumstances when the servicers have charged off mortgages.[15]

Most of the revisions took effect on October 19, 2017, twelve months after publication in the *Federal Register*.[16]

Along with these changes to the servicing rules, the CFPB issued an interpretive rule under the Fair Debt Collection Practices Act relating to servicers' compliance with certain mortgage servicing provisions as amended by the new rules.[17] The CFPB's Principles for the Future of Loss Mitigation call for assistance to consumers facing foreclosure that is accessible, affordable, sustainable,

13. *See*: CFPB Press Release, dated July 29, 2016, at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-updates-know-you-owe-mortgage-disclosure-rule/; and Proposed Rule at 81 Fed. Reg. 54317 (Aug. 15, 2016).

14. *See*: CFPB Consumer Protection Principles Press Release, dated August 2, 2016, at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-outlines-guiding-principles-future-foreclosure-prevention/; and the CFPB Servicing Rules Press Release, dated August 4, 2016, at https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-expands-foreclosure-protections/.

15. 81 Fed. Reg. 72160 (Oct. 19, 2016).

16. The final rule became effective October 19, 2017, except that the following amendments are effective on April 19, 2018: Amendatory instructions 5, 6.b, 7, 8, 9, 11.b, 17.a.ii, 17.b.ii, 17.c, 17.d.ii, 17.f.i, 17.i.i, 17.k, 19, 20, 22, 23.c, 25.a, 25.b, 25.c.ii, and 25.d.ii.

17. 81 Fed. Reg. 71977 (Oct. 19, 2016).

and transparent. The principles span the spectrum of home-retention options, such as forbearance, repayment plans, and modifications, as well as home-disposition options, such as short sales and deeds in lieu of foreclosure. The CFPB noted that a fifth principle – accountability – is not addressed because its mortgage servicing rules provide standards for accountability when loss mitigation programs are offered.[18]

VIII. October 2016

A. CFPB Releases Updated Exam Procedures for Military Lending Act

The CFPB issued new procedures for examiners to use in identifying consumer harm and risks related to the Military Lending Act rule.[19] For most forms of credit subject to the updated Military Lending Act rule, creditors are required to comply with the amended regulation as of October 3, 2016; credit card providers must comply with the new rule as of October 3, 2017.

In 2006, Congress passed the Military Lending Act to help address the problem of high-cost credit as a threat to military personnel and readiness.[20] In July 2015, the Department of Defense issued a final rule expanding the types of credit products that are covered under the protections of the Military Lending Act.[21] The protections provided by the Military Lending Act extend to active-duty servicemembers (including those on active National Guard or active Reserve duty) and covered dependents. When lending to servicemembers and their dependents, creditors must abide by the following requirements:

- *Thirty-six percent rate cap*: Creditors cannot charge servicemembers or their covered dependents more than a thirty-six percent Military Annual Percentage Rate, which generally includes the following costs (with some exceptions): finance charges; credit insurance premiums and fees; add-on products sold in connection with the credit extended; and other fees such as application or participation fees.

- *No mandatory waivers of consumer protection laws*: Creditors cannot require servicemembers or their covered dependents to submit to mandatory arbitration or give up certain rights under state or federal law, such as the Servicemembers Civil Relief Act.[22]

- *No mandatory allotments*: Creditors cannot require servicemembers or their covered dependents to create a voluntary military allotment in order to qualify for a loan.

B. CFPB Structure Ruled Unconstitutional

On October 11, 2016, the United States Court of Appeals for the District of Columbia Circuit ruled in *PHH Corporation v. Consumer Financial Protection Bureau*[23] that the CFPB's structure is unconstitutional. In reaching this conclusion, the court found that the Director of the CFPB "enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President."[24] The court ruled that the CFPB can continue to operate, but "will do so as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury," and the Director will be removable by the President.[25]

The D.C. Circuit also rejected the $109 million penalty levied by the CFPB against PHH Corporation (PHH) for violations of the Real Estate Settlement Procedures Act (RESPA). In January 2014, the CFPB challenged PHH's captive reinsurance arrangement, whereby PHH referred customers to mortgage insurers that in turn purchased reinsurance from a PHH affiliate. The CFPB deemed the reinsurance payments improper kickbacks under RESPA and imposed a $109 million penalty.

The D.C. Circuit agreed with PHH that section 8 of RESPA allows captive reinsurance arrangements, provided that the amount paid by the mortgage insurer for the reinsurance does not exceed the reasonable market value of the reinsurance. The D.C. Circuit also found that the CFPB violated due process standards by retroactively applying a new interpretation of RESPA against PHH. Lastly, the appellate court disagreed with the CFPB's contention that, under the Dodd-Frank Act, there is no statute of limitations for any CFPB administrative action to enforce any consumer protection law, and found that there is a three year statute of limitations applicable to a CFPB enforcement action to enforce section 8 of RESPA.[26]

On February 16, 2017, the U.S. Court of Appeals for the District of Columbia Circuit granted the CFPB's petition for rehearing en banc of the court's decision in *PHH Corporation v. Consumer Financial Protection Bureau*, and vacated its October 11, 2016 judgment holding that the CFPB's structure is unconstitutional. Oral argument before the en banc court was heard on May 24, 2017.

18. *See* CFPB's Principles for the Future of Loss Mitigation, at http://files.consumerfinance.gov/f/documents/20160802_CFPB_Principles_for_Future_of_Loss_Mitigation.pdf.

19. *See* CFPB Military Lending Act (MLA) Interagency Examination Procedures–2015 Amendments, at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/092016_cfpb_MLAExamManualUPdate.pdf.

20. 10 U.S.C. § 987.

21. 32 CFR pt. 232. *See* 80 Fed. Reg. 43559 (July 22, 2015).

22. 50 U.S.C. §§ 3901 *et seq.*

23. PHH Corp. v. Consumer Financial Protection Bureau, 839 F.3d 1 (D.C. Cir. 2016), Rehearing En Banc Granted, Order Vacated, Feb. 16, 2017.

24. 839 F.3d 1, at 7.

25. *Id.* at 9.

26. *Id.* at 10.

C. CFPB Amends Compliance Bulletin on Service Providers

On October 26, 2016 the CFPB updated its compliance Bulletin on service providers (2016-02),[27] which can include skip-tracers, repossession agents and other firms that provide assistance to banks during the collateral recovery process. The CFPB stated that an amendment is needed to clarify that the depth and formality of the risk management program for service providers may vary depending upon the service being performed – its size, scope, complexity, importance and potential for consumer harm – and the performance of the service provider in carrying out its activities in compliance with Federal Consumer Financial Laws and regulations. The CFPB claimed that an amendment was needed to clarify that supervised entities have flexibility and to allow appropriate risk and management.[28]

The CFPB reiterated how supervised banks and nonbanks can take steps to ensure that their business arrangements with service providers do not present unwarranted risks to consumers. The CFPB stated that these steps should include, but are not limited to:

- conducting thorough due diligence to verify that the service provider understands and is capable of complying with Federal Consumer Financial Laws;
- requesting and reviewing the service provider's policies, procedures, internal controls and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities;
- including in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities, including engaging in unfair, deceptive, or abusive acts or practices;
- establishing internal controls and ongoing monitoring to determine whether the service provider is complying with Federal Consumer Financial Laws; and
- taking prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate.[29]

IX. November and December 2016

On December 2, 2016, Office of the Comptroller of the Currency (OCC) Thomas J. Curry announced that the OCC will consider applications from financial technology (fintech) companies to become special purpose national banks.

During remarks at the Georgetown University Law Center,[30] the Comptroller described several reasons for considering special purpose national bank charters. First, the Comptroller believes it is in the public interest, stating that "[f]intech companies hold great potential to expand financial inclusion, empower consumers, and help families and businesses take more control of their financial matters." Second, the Comptroller explained that fintech companies should have the choice to become national banks if they wish to do so, and that the OCC's consideration of fintech charter applications does not create a requirement to seek a charter. Third, the Comptroller noted that having a clear process and criteria for fintechs to become national banks ensures that companies that receive charters have a reasonable chance of success, appropriate risk management, effective consumer protection, and strong capital and liquidity.

The OCC also published a paper discussing the issues related to the agency's consideration of charter applications from fintech companies.[31] Comments on the paper, which describes the chartering process, were due January 15, 2017. On March 15, 2017, the OCC issued a draft licensing manual supplement for evaluating charter applications from fintech companies,[32] and comments were due April 14, 2017.[33] On April 26, 2017, the Conference of State Bank Supervisors sued the OCC arguing it lacks the legal authority to create a special-purpose nonbank charter.[34] Finally, on May 12, 2017, Maria T. Vullo, the Superintendent of the New York State Department of Financial Services sued the OCC claiming the OCC lacked legal authority to create the special-purpose charter.[35]

X. Conclusion

As noted above, this article provides a month-by-month review of selected CFPB and other federal prudential regulator initiatives, proposals, proposed and final rules issued during the calendar year 2016. Selected updates to the 2016 initiatives have been included, but a comprehensive summary of 2017 updates is outside the scope of this article.

27. 81 Fed. Reg. 74410 (Oct. 26, 2016) [Bulletin 2016-02].

28. *Id*. This may signal a foray into the rules governing the repossession and resale of personal property collateral, previously in large measure a matter of state law, *e.g.*, under Uniform Commercial Code Article 9 Part 6.

29. Bulletin 2016-02, *supra* note 27, at 74411.

30. *See* Remarks by Thomas J. Curry Comptroller of the Currency Regarding Special Purpose National Bank Charters for Fintech Companies, Georgetown University Law Center, December 2, 2016, at: https://occ.gov/news-issuances/speeches/2016/pub-speech-2016-152.pdf.

31. https://www.occ.gov/topics/responsible-innovation/comments/special-purpose-national-bank-charters-for-fintech.pdf.

32. https://www.occ.treas.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-fintech-licensing-manual-supplement.pdf.

33. *See* OCC press release, at https://www.occ.treas.gov/news-issuances/news-releases/2017/nr-occ-2017-31.html.

34. Conference of State Bank Supervisors v. Office of the Comptroller of the Currency, *et al*., U.S. District Court, District of Columbia, No. 1:17-cv-00763-JEB.

35. Vullo v. Office of the Comptroller of the Currency, *et al*., U.S. District Court, Southern District of New York, No. 1:17-cv-03574-NRB.

This article was first published in the *Consumer Finance Law Quarterly Report* (Vol. 71 Nos. 1 & 2), by the Conference on Consumer Finance Law. It is reprinted here with permission.