CONSUMER PROTECTION

AND ACCESS TO CREDIT

The Consumer Financial Protection Bureau (CFPB) was created in 2010 by the Dodd-Frank Act. This new regulator is intended to protect consumers from unlawful financial products and services. Its creation also contributed to significant uncertainty for providers of consumer financial products and dampened innovation given the bureau's broad regulatory authority, its opaque approach to enforcement, and the overall tone it struck with market participants.

The Dodd-Frank Act clearly defines the purpose and objectives of the CFPB. The purpose of the bureau is to seek to implement—and, where applicable, enforce—federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for financial products and services and that markets for financial products and services are fair, transparent, and competitive. The bureau should always take steps to protect consumers but should not lose sight of how competition in the marketplace provides consumers access to the products they need to thrive, at affordable prices.

Banks, credit unions, and other providers of financial products and services are prepared to embrace regulations that provide clear rules of the road and empower consumers to responsibly access credit, especially in uncertain times. It is important the CFPB remain focused on understanding innovation in the financial sector. New products and services should not be met with skepticism but embraced as the future for meeting the evolving needs of consumers.

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CFPB: ISSUE NEW NO-ACTION LETTERS

No-Action Letters (NALs) provide increased regulatory certainty through a statement that the CFPB will not bring a supervisory or enforcement action against a company for providing a product or service under certain facts and circumstances. The bureau issued a revised NAL Policy in September 2019, which improved on its 2016 NAL Policy by having, among other things, a more streamlined review process focusing on the consumer benefits and risks of the product or service in question. As of this writing, the bureau had issued only one NAL.

ACTION: The CFPB should issue additional NALs in accordance with its recently updated policy.

CFPB: ISSUE NEW ADVISORY OPINIONS

There is oftentimes confusion about how to interpret laws and regulations that could be clarified via a more streamlined process, such as an Advisory Opinion (AO), to provide more certainty to market participants about how to comply with them. There are countless examples of ambiguities in regulations issued by the CFPB, partly because many are new and because there is not established precedent for how they will be enforced. AOs would permit the bureau to clarify laws and regulations instead of relying on enforcement actions to communicate its interpretation of ambiguities in them.

The bureau announced in June 2020 the establishment of an Advisory Opinion Pilot Program as a mechanism through which parties will be able to request interpretive guidance, in the form of an AO, to resolve regulatory uncertainty. The bureau will publish AOs in the Federal Register and on consumerfinance.gov, including its summary of the material facts and its legal analysis of the issue. Unless otherwise stated, each AO will be applicable to the requestor and to similarly situated parties to the extent that their circumstances conform to the bureau's summary of material facts in the AO.

ACTION: The CFPB should be timely, and thoughtful, in its response to requests for Advisory Opinions.

CONGRESS: ELIMINATE THE CFPB'S AUTHORITY TO REGULATE PRE-DISPUTE ARBITRATION CLAUSES

The Dodd-Frank Act conferred authority for the CFPB to limit the use of pre-dispute arbitration clauses. Arbitration is an important means of resolving disputes that provides significant benefits to consumers and businesses. Arbitration of consumer disputes has been common practice for decades; there are perhaps hundreds of millions of consumer contracts currently in force that include arbitration agreements—many of them relating to consumer financial products or services.

In July 2017, the bureau finalized a rule effectively banning the use of pre-dispute arbitration clauses. The rule was based on a flawed analysis that ignored the practical benefits of arbitration and exaggerated the supposed benefits of class action lawsuits. In November 2017, legislation was enacted via the Congressional Review Act overturning the bureau's Arbitration Agreement Rule.

ACTION: Congress should enact legislation repealing Section 1028 of the Dodd-Frank Act, thereby eliminating the CFPB's authority to regulate pre-dispute arbitration clauses.

CFPB: CLARIFY UDAAP AUTHORITY AND USE OF "ABUSIVE"

The Dodd-Frank Act provided broad authority to the bureau to enforce consumer financial protection law, including over Unfair, Deceptive, or Abusive Acts and Practices (UDAAP). Similar authority exists with other consumer protection regulators, such as the Federal Trade Commission (FTC) which has authority over "unfair or deceptive acts or practices," which is well established and understood through substantial case law. However, the CFPB's "abusive" authority is extremely vague, creating significant uncertainty for providers of consumer financial products, especially those with innovative concepts. The bureau's application of its "abusive" authority has been frequently used as a "catch-all" rather than a separate cause of action, making it extremely difficult for market participants to interpret how the bureau defines "abusive" or intends to apply its authority.

The CFPB announced a new policy in January 2020 regarding its interpretation of the prohibition on abusive acts or practices. The policy statement clarifies that the bureau intends to apply certain principles during its supervision and enforcement work.

ACTION: The CFPB's interpretation of "abusive" through use of its UDAAP authority should align with the policy statement it published in January 2020.

ACTION: Pre-dispute arbitration clauses.

CONGRESS AND CFPB: IMPROVE CIVIL PENALTY FUND ACCOUNTABILITY

The proceeds of litigation settlements and judgments are placed into the CFPB's Civil Penalty Fund rather than the general treasury. While the ostensible purpose of the Civil Penalty Fund is to compensate the victims of consumer protection violations, the statute is conveniently quiet on this subject, theoretically permitting the bureau to fund any of its activities by pursuing enforcement matters. The CFPB's current rules allow it to use the funds for "consumer education and financial literacy programs;" but it could theoretically utilize the fund to pay for almost anything. The conflict of interest and circumvention of proper oversight by Congress is obvious.

ACTION: The CFPB should use civil payments exclusively to make payments to victims. Any remaining funds should be returned to taxpayers through regular remittances to the Treasury.

ACTION: Congress should enact legislation clarifying the permissible uses of the Civil Penalty Fund.

SUPPORT RISK-BASED UNDERWRITING FOR CONSUMER CREDIT

Risk-based pricing in consumer finance tailors the price and terms of a loan to a borrower's likelihood of repayment, allowing lenders to extend credit to more consumers. All creditors face a risk spectrum of potential borrowers. Each borrower has unique characteristics that influence the probability of default on a loan. Higher-risk borrowers are significantly more costly for lenders to serve than lower-risk borrowers. Risk-based pricing attempts to match the price a borrower pays to the cost incurred by the lender by adjusting the price of the loan to each borrower's probability of default. Compared with the one-price-fits-all practice that was common in consumer lending in earlier decades, risk-based pricing lowers the cost of credit for the majority of borrowers but also expands credit availability to higher-risk borrowers and leads to a broader array of loan products available to all income groups.

ACTION: Support data and methodologies that promote risk-based pricing and innovation in order to lower the cost of credit and expand access to more consumers.

ACTION: Support furnishing of accurate information to credit bureaus and the independence of credit scoring methodologies in order to protect borrowers, creditors, and the financial system.

CFPB: IMPROVE CONSUMER COMPLAINT DATABASE TRANSPARENCY

The CFPB established a mechanism on its website for consumers to report their interactions with financial services providers. The CFPB uses this data to create a publicly viewable Consumer Complaint Database with the ostensible goal of promoting transparency about the market of financial products to inform consumers, the business community, and policymakers. The Consumer Complaint Database, which is not required by law, has undergone some important reforms since first being unveiled in 2012, such as underscoring that the data is not a representative sample of the market, normalizing the data (e.g., explaining that the number of complaints should be considered in the context of total accounts managed by a financial institution), and providing more granularity to the data to show steps taken by financial services providers to address complaints. However, additional transparency would greatly improve the data so it can be used to accurately inform the public.

ACTION: The CFPB should encourage consumers to attempt to resolve disputes with a company before filing a complaint given that this is the least complicated path to resolution.

ACTION: The CFPB should specify if a consumer first tried to resolve a dispute with a company before filing a complaint given that the vast majority of disputes can be addressed without intervention by the bureau.

ACTION: The CFPB should specify if a complaint was filed by a consumer, or if another organization filed the complaint on behalf of a consumer, to ensure consumers are not taken advantage of by intermediaries.

CONGRESS: UPDATE RESPA'S AFFILIATED BUSINESS ENTITY REQUIREMENTS

Rules for Affiliated Business Arrangement (AfBA) disclosures under the Real Estate Settlement Procedures Act (RESPA) restrict how affiliated businesses can communicate with customers. This affects all real estate brokers, title companies, and mortgage lenders who have affiliated settlement service providers, as RESPA mandates consumers must be provided written disclosures prior to being informed of the services of any affiliate. In online and digital environments, this requirement disrupts user experience with dense legal text that can be confusing.

Current AfBA provisions are outdated and reflect a 1980s era mentality. Significant changes in technology—including electronic transactions and the availability of the internet—make the current provisions burdensome to both industry and consumers. To maximize the benefits to consumers, RESPA modernization is necessary to allow for digital delivery of similar information without delivery of the statutory model form. Digital settlement service providers and providers operating in online environments should be able to inform consumers of key information pertinent to their shopping decision without the need for burdensome postal mail or electronic consent requirements.

ACTION: Congress should modify and modernize RESPA's AfBA provisions to improve the consumer's digital experience by updating antiquated rules regarding postal mail delivery and electronic consent for disclosure.

CFPB: UPDATE TILA/RESPA INTEGRATED DISCLOSURES

The Dodd-Frank Act required the CFPB to issue rules to clarify the disclosures provided to consumers during the mortgage process, and combine those required under the Truth in Lending Act (TILA) and RESPA. These changes—updated under a new TILA/RESPA Integrated Disclosure (TRID) rule—required significant updates to compliance systems, and the new disclosures are now a well-established feature of the mortgage market.

In January 2020, the CFPB issued a Request for Information assessing the TRID rule. The Chamber identified a number of opportunities to clarify the rule, such as ending disclosure of lender-paid items (e.g., appraisal) and the treatment of electronic communications, but cautioned against broad changes that would cause the costs to exceed the benefits.

ACTION: The CFPB should make modest clarifications to the TRID rule if the benefits clearly exceed the costs.

CFPB: UPDATE QUALIFIED MORTGAGE DEFINITION

Creditors that make a reasonable, good faith determination of a consumer's ability to repay a residential mortgage generally meet the standard for "Qualified Mortgages," which provides lenders certain liability protections.

Loans that are eligible for purchase or guarantee by either Fannie Mae or Freddie Mac also meet the definition of "qualified mortgage" until the earlier of January 10, 2021, or when the Government Sponsored Enterprises (GSEs) exit government conservatorship. There is uncertainty about how long the GSEs will remain in conservatorship. Therefore, liability protection under the "GSE patch" is uncertain.

Additionally, the Qualified Mortgage (QM) rule's limitation of a debt to income (DTI) ratio of 43% has limited access to credit for mortgage borrowers and instituted unnecessary underwriting costs on lenders. The 43% DTI arbitrarily restricts access to mortgages for creditworthy borrowers. Furthermore, the standards in Appendix Q of the QM rule include complicated and burdensome requirements for calculating debt and income.

In June 2020, the CFPB issued two notices of proposed rulemaking to address the GSE patch. The first proposal suggests changes to the definition of "qualified mortgage"— changes supported by the Chamber include moving away from a strict debt-to-income requirement. The second proposal suggests extending the expiration of the GSE patch to ensure responsible access to credit remains available.

ACTION: The CFPB should temporarily extend the GSE patch in the QM definition before it expires to ensure consumers maintain access to credit.

ACTION: The CFPB should eliminate the debt to income requirement in the QM definition and move toward a price-based solution, as it proposed in June 2020.

CFPB AND CONGRESS: INCREASE OVERSIGHT OF CREDIT REPAIR ORGANIZATIONS

Credit repair organizations are ostensibly intended to help consumers resolve inaccuracies in their credit report. Legitimate inaccuracies are those that may have resulted from fraud, such as unpaid debt incurred via a stolen credit card, or other nefarious activity. Most credit repair organizations operate in accordance with the Credit Repair Organizations Act—including a prohibition against untrue or misleading representations. There are unfortunately nefarious actors that overstate the services they can render on behalf of consumers, such as promising to have adverse information that is accurate, removed from credit reports (e.g., missed payments). As a result, consumers incur a fee, without realizing any improvements to their credit reports, and credit bureaus are compelled to respond to illegitimate claims instead of focusing their resources on assisting consumers.

ACTION: Federal regulators and Congress should increase their oversight over unscrupulous credit repair organizations to ensure they are not overstating their services or pursuing changes to accurate credit reports.

CFPB: DEBT COLLECTION PRACTICES

Debt collection is a critical component of the consumer credit system. Enabling effective collections is essential to maintaining consumers' access to affordable credit. At the same time, collections often occur at moments of significant stress in consumers' lives, making it important for debt collectors to act in a respectful and professional manner. Any debt collection policy must simultaneously allow debt collectors to serve their important function in the credit system while ensuring that consumers are treated with dignity and respect. CCMC supports a final debt collection rule that:

- Clearly reflect the benefits and importance of collections;
- Maximizes the benefit of collections to the credit system and all the consumers it serves;
- Bases the rule on the Bureau's clear authority under the FDCPA, not the Bureau's UDAAP authority;
- Clarifies that the rule does not apply—directly or indirectly—to first-party collections;
- Alters the proposed "know or should know" standard for disclosing that a debt is time-barred because it is unworkable in its current form and will chill legitimate collections activities; and
- Avoids imposing liability based on minor technical flaws in collector communications.

ACTION: Consistent with the above principles, the CFPB should finalize its debt collection practices rule.