NORTH DAKOTA BANKERS ASSOCIATION

LEGAL UPDATE

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TCF Wins Partial Dismissal of CFPB Overdraft Fee Case, but Must Defend Itself Against Claims of Unfair, Deceptive and Abusive Conduct

Although a Minnesota federal district court granted part of TCF's motion to dismiss the CFPB complaint challenging the manner in which TCF conducts its overdraft services, the court concluded TCF will have to defend itself against charges that the manner in which it organized required notices and signed up customers for its overdraft services were unfair, abusive and deceptive. According to CFPB, TCF used consumer testing which revealed consumers agree to overdraft services at a much higher rate if time elapses between being provided the opt-in notice and being asked to consent. CFPB also complains that TCF learned that the less it explained to customers about the services, the more likely it was that customers would consent. CFPB says TCF estimated approximately $182 million in annual revenue was "at risk" because of the opt-in rule and that, as of mid-2014, approximately 66 percent of TCF customers opted in to overdraft services, a rate more than triple that of other banks.

In response, TCF argued that its conduct was not abusive or deceptive because its employees neither advised customers not to read the opt-in notice nor provided information contradicting it. TCF also argued that Federal Reserve guidance only required the notice to be provided to consumers at a point "prior to or at account opening."

The district court held a written notice itself does not protect TCF from liability and that the entire transaction must be considered. Even though TCF gave the required notice, the court concluded the bank's overall conduct was "likely to deceive or confuse customers about its overdraft services." The court explained previous guidance suggesting the notice is to be provided "prior to" account opening also does not preclude liability. According to the court, the notice cannot be properly given when the terms of the overdraft service are obscured by other account information. The court noted TCF gave the notice as customers were pressed to initial a number of required items as they were also asked by TCF whether they wanted to opt-in to the overdraft service.

In a setback to CFPB, the court granted TCF's motion to dismiss the CFPB's Regulation E claims with prejudice.

Extra Space in Debtor's Name Renders UCC-1 Ineffective

A Wisconsin court has decided an extra space in the name of a debtor on a UCC-1 financing statement renders the filing ineffective for material error. United States SEC v. ISC Inc., WD WI. Civ. No. 15-cv-45-jdp, October, 2017. In the case, a creditor obtained judgment against a debtor in an enforcement proceeding filed by the U.S. Securities and Exchange Commission (SEC). The creditor filed a UCC-1 to perfect its security interest in the debtor's assets. The debtor filed for bankruptcy protection and a receiver was appointed. When the receiver performed a search no filings were found with the result that the creditor's interest was considered to be unsecured. The creditor objected. Examination of the documentation disclosed an extra space in the abbreviation for Incorporated (Inc.) on the filed financing statement. As a result, the debtor's name did not show up from the receiver's search.

The creditor argued that the search must be "reasonably diligent" and incorporate reasonable search terms and that reasonable search would have caused the creditor's interest to be revealed. But the court disagreed, finding computerized search logic has replaced the "reasonably diligent" standard one that is more precise: would a search for the correct name produce a record of the filing in the system? The court Applying this latter standard, the court found the UCC-1 to be "seriously misleading" due to the extra space and a search using the correct name did not reveal the filing. The upshot is that the effectiveness of a financing statement may now depend on each individual state's UCC search logic

Voicemail Is Covered By Fair Debt Collection Practices Act

In the first appeals court decision on the point, the Federal Court of Appeals for the 11th Circuit has concluded the Fair Debt Collection Practices Act definition of a communication includes a voicemail and that a voicemail communication may constitute a "meaningful disclosure" even if it does not specify the name of an individual making the call. Hart v. Credit Control LLC, 11th Cir, 16-cv-17126, September, 2017. The decision is a loss for debt collector, Credit Control LLC, which argued there was no meaningful disclosure. Here's the challenged voicemail: This is Credit Control calling with a message. This call is from a debt collector. Please call us at 866-784-1160. Thank you."

FDPCA kicks in to protect consumers when there is a communication from a debt collector and that communication includes a meaningful disclosure. The decision reverses a trial court dismissal and means the case will return to the district court for trial proceedings.

CFPB Changes Reg B to Reflect HMDA Data Collection Under Reg C

The Consumer Financial Protection Bureau has modified Reg B to give creditors some flexibility about the collection of applicants' demographic data under Reg C which implements the Home Mortgage Disclosure Act. The changes allow creditors to self-identify information using disaggregated categories beginning on Jan. 1, 2017, so that they may use Fannie Mae and Freddie Mac's new Uniform Residential Loan Application prior to January 2018. The rule includes additional optional model forms to assure compliance with Regulation B requirements. Effective in 2018 Institutions not subject to HMDA reporting requirements are also allowed to choose on an "application-by-application basis" between two approaches to collecting personal demographic data: the more limited, aggregate race and ethnicity category required by Reg B or the disaggregated and more expansive categories required for HMDA reporting institutions under Reg C.

Reg B previously prohibited creditors from collecting information on consumers' race or ethnicity, except to the extent required to monitor compliance with ECOA or comply with HMDA. The permissible inquiries under Reg B included only aggregate racial and ethnic categories. However, under the new HMDA rules, banks must permit applicants and borrowers to self-identify using disaggregated ethnic and racial categories.

The rule does not add the 2016 URLA to the Regulation B appendix. CFPB says the URLA form will be subject to a separate Federal Register notice that will be issued 2018. See the new provisions at *http://files.consumerfinance.gov/f/documents/201709_cfpb_final-rule_regulation-b.pdf?utm_campaign=ABA-Newsbytes-092117-HTML&utm_medium=email&utm_source=Eloqua*.

CFPB Issues Final Rule for Payday, Vehicle Title, and Certain High-Cost Installment Loan

CFPB has issued a final rule to regulate payday, vehicle title, and certain high-cost installment loans. It covers personal loans with short term or balloon-payment structures, lenders' payment withdrawal practices for those loans and some additional installment loan products. The final rule also prescribes processes and criteria for registration of information systems.

The final rule includes an important exemption for small-dollar "accommodation loans" to customers as sought by ABA in its comments to the proposed rule. Small-dollar loans are exempt entirely from the rule if made by a lender that has made fewer than 2,500 of these loans in each of the current and previous years and if these loans account for less than 10 percent of the lender's receipts. The accommodation loan exemption is not based on the size of the lender. The final rule preserves the ability of banks that exceed the threshold to offer installment loans of 46 days or more. In a related action OCC has repealed its earlier guidance on bank Direct Deposit Advance small dollar loan products. The rule also exempts completely certain types of credit, including non-recourse pawn loans, overdraft services and lines of credit, wage advance programs, no-cost advances, and loans similar to those made under the Payday Alternative Loan program administered by NCUA. Banks that are not exempt are required to evaluate the borrower's ability to pay before making any loan with a term of 45 days or less or a loan of 46 days or more with a "balloon" payment. The rule does not apply the ability to repay requirement to installment loans of 46 days or more (longer-term installment loans). The rule also imposes limitations on re-borrowing by prohibiting a lender from making a short-term loan to a borrower who has already received three short-term or longer-term balloon-payment loans within 30 days of each other. If it applies, the prohibition period is 30 days after the third loan has been paid off.

However, there is an exemption from the ATR requirements for sequential loans in specified circumstances. This is called the principal-payoff option. It allows up to three short-term loans to be made in close succession without an ability to pay evaluation, if first loan had a maximum principal amount of $500, the second loan had a principal amount that is one-third smaller than that of the first loan, and the third loan has a principal amount that is two-thirds smaller than that of the first loan. The exemption for sequential loans does not apply to situations where a borrower would have, during a 12-month period, more than six short-term loans or be in debt from short-term loans for more than 90 days.

Lenders must periodically file information about short-term and lengthier balloon-payment loans with a "registered information system": at loan consummation, while the loan is outstanding, and when the loan is paid off. A lender must also retain the loan agreement and other documentation and origination calculations in the format of "electronic records in tabular format."

The rule addresses repeated account debits and NSF fees by prohibiting withdrawal of payment from an account after two unsuccessful withdrawal attempts without a borrower's authorization for additional debits to the account. The lender must notify the borrower when this prohibition has been triggered and follow specific procedures in obtaining new authorizations. This provision applies to loans that are subject to the ATR requirements and also to longer-term installment loans where the simple interest rate exceeds 36% and the bank obtains a leveraged payment mechanism over the account. Withdrawals by lenders that also hold the consumer account from which the transfer is attempted are exempt from the withdrawal restriction if the financial institution's loan or account agreement with the borrower does not allow a charge or NSF or overdraft fee for an attempted withdrawal.

The rule is to be effective 21 months after publication in the Federal Register. CFPB has launched a web page where lenders can access compliance materials. Banks can access the final rule on the Bureau's website. The implementation web page is accessed here.

CFPB Issues New Proposals for Mortgage Servicing

On October 4, CFPB issued an interim final rule about the timing of modified written early intervention notices given by mortgage servicers under Regulation X when borrowers have invoked their cease communication rights under the Fair Debt Collection Practices Act. Comments on the interim final rule will be due 30 days after publication in the Federal Register. Details on the proposed interim rule are found at *https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/amendments-2016-amendments-2013-mortgage-servicing-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/*.

CFPB has also issued a notice of proposed rulemaking involving the timing for servicers to transition to providing modified or unmodified periodic statements and coupon books under Regulation Z when a consumer has filed for bankruptcy. Comments on the proposal are due 30 days after it is published in the Federal Register. The proposal may be accessed at *https://www.consumerfinance.gov/policy-compliance/rulemaking/rules-under-development/amendments-2016-amendments-2013-mortgage-servicing-rules-under-real-estate-settlement-procedures-act-regulation-x-and-truth-lending-act-regulation-z/*.

Feds Propose "Simplified" Capital Rules for Small and Mid-sized Banks

On September 27, bank regulatory agencies released a proposal to "simplify" capital requirements for community and mid-sized banks. The proposal intends to simplify the treatment of assets subject to common equity tier 1 capital threshold deductions and limitations on minority interest and replace the definition of high-volatility commercial real estate exposures with a more straightforward measure.

The proposal is to loosen the treatment of CET1 capital threshold deductions for mortgage servicing assets, temporary difference deferred tax assets not eligible for carryback and investments in the capital of unconsolidated financial institutions. It replaces a combined deduction limit of 15 percent of CET1 for MSAs and DTAs with a 25 percent limit that applies to each category of asset. Capital investments in unconsolidated financial institutions receive a 25 percent deduction limit, without regard for the significance of the investment. The proposed rule also replaces the definition of for "high volatility commercial real estate (HVCRE) with a definition for "high-volatility acquisition, development or construction loans" (HVADC). Loans to primarily finance or refinance ADC activities would have a 130 percent risk weight, rather than the 150 percent risk weight for HVCRE.

The proposal also would eliminate the current calculation for minority interests that may be included in regulatory capital. Minority interests would be allowed to count for up to 10 percent of the parent banking organization's CET1, tier 1 and total capital elements.

The FDIC has issued a community bank summary and an Excel-based tool for banks to use to estimate how regulatory capital would change under the proposal. Comments on the proposal are due 60 days after it is published in the Federal Register. For access to the proposed rule, FDIC Estimator and FDIC explanation for small banks go to https://www.fdic.gov/news/news/financial/2017/fil17045.html.

The proposal is sparking interest and some positive response, however, FDIC Vice-Chairman Thomas Hoenig, is not a fan. In his view the proposal is "neither simpler nor less burdensome than the current rule." According to Hoenig, "It is just different. It falls well short of achieving the kind of simplification that would provide truly meaningful benefit to the industry, investors, and the public. Hoenig contends the proposal "will only perpetuate the disparate capital benefits across banks of different sizes and provide only minimal regulatory reporting relief. ABA has formed a working group to formulate comments on the proposal. If you are interested in participating, please contact Marilyn Foss about how to do so.

How to Write an Effective Comment Letter

One of the speakers at the Security Professional's conference that was held in Bismarck last week urged attendees to be active in bank regulatory agencies' rulemaking processes by submitting comment letters. The speaker commented how letters by trade associations are helpful, but noted agencies are very much interested in hearing from the banks which are directly affected by rules and changes to rules. NDBA agrees: banker comments are at least as effective as those by trade associations and often carry more impact.

ABA has prepared materials to help bankers write effective comment letters. The points apply whether a letter is responsive to a federal or state agency proposal. Here's the link: *https://www.aba.com/Compliance/Pages/Comply_EffectiveCL.aspx?utm_campaign=COMPLIANCE-20171002&utm_medium=email&utm_source=Eloqua*.

Marilyn Foss
NDBA General Counsel

Role of the General Counsel

North Dakota Bankers Association is extremely fortunate to have the expertise of Marilyn Foss on staff. Marilyn has been with the association for over 19 years as general counsel and has served our members and staff with great professionalism.

NDBA's general counsel serves as the attorney for the association. Although she is pleased to be able to serve as a resource for NDBA members in responding to their questions, she is providing general information, not legal advice. Banks must obtain legal advice from counsel who has been retained by the bank to represent the bank's interests in a specific matter.

To contact Marilyn Foss, NDBA General Counsel, call 701.223.5303 or email at marilyn@ndba.com.