



CFPB, Virginia Attorney General Target Payday and Auto Title Lenders

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Section 1031 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (?Dodd Frank?) authorizes the Consumer Financial Protection Bureau (?CFPB?) to issue rules to prevent unfair, deceptive, or abusive acts or practices in consumer financial markets. Under this broad authority, on March 26, 2015, the CFPB took direct aim at short term, high interest rate lenders by publishing an outline of proposals that it is considering preliminary to issuing new rules governing payday loans, motor vehicle title loans, and certain other ?high cost? installment and open-end loans. Because of the potential impact such rules will have on small businesses, the CFPB is required by the Small Business Regulatory Enforcement Fairness Act to gather input from a panel of small business representatives selected by the CFPB in consultation with the Small Business Administration. An outline of the CFPB?s proposals, together with a list of questions, will be sent to the panel, which will then issue a report providing its feedback and findings on the proposals? potential economic impact on small businesses.

As outlined by the CFPB, the proposals would cover short-term credit products (with a term of 45 days or less), and longer-term credit products with an ?all-in APR? greater than 36 percent where the lender obtains either: (a) access to repayment through a consumer?s deposit account or paycheck, or (b) a non-purchase money security interest in the consumer?s vehicle. Covered short-term credit products would include both closed-end single payment and multiple payment loans due within 45 days, as well as open-end lines of credit repayable in full within 45 days.

The published proposals would give lenders alternative requirements to follow when making covered loans, which the CFPB refers to as ?debt trap prevention requirements? and ?debt trap protection requirements.? The ?prevention? option would require a reasonable, good faith determination by the lender that the consumer has the ability to repay the debt, would create limits on repeated transactions and, for short-term credit, would require a 60-day cooling off period after three sequential loans. The ?protection? option would not require the same ability to repay analysis, but would require the lender to satisfy certain underwriting requirements, would place certain structural limitations on covered loans designed to taper the balance on sequential loans, and would limit fees, interest rates and payment

amounts based on the borrower's income.

Given the time required for the small business panel review and for the CFPB to digest the panel's findings, creditors should expect the CFPB to publish a formal proposed rule sometime this summer or early this fall. After the required notice and comment period, any final rule governing these types of loan products would most likely become effective sometime in 2016.

Section 1042(a) of Dodd Frank also empowers state Attorneys Generals (AGs) and regulators to bring civil actions to enforce federal consumer law prohibitions of unfair, deceptive, or abusive acts or practices (UDAAP) against any company offering consumer financial products or services, defined as covered persons under 12 U.S.C. § 5481(6). Exactly what lending practices are considered UDAAP has been the subject of considerable angst and criticism as both the CFPB and various state AGs appear content to define UDAAP through enforcement as opposed to regulatory guidance.

According to the statute - the Consumer Financial Protection Act - an act or practice is unfair if: (1) it causes or is likely to cause substantial injury to consumers; (2) the injury is not reasonably avoidable by consumers; and (3) the injury is not outweighed by countervailing benefits to consumers or competition. 12 U.S.C. § 5531(c). An act or practice is abusive if it: (1) materially interferes with a consumer's ability to understand a term or condition; or (2) takes unreasonable advantage of a consumer's lack of understanding, his inability to protect his own interests, or his reasonable reliance on the lender to act in the consumer's interest. 12 U.S.C. § 5531(d)

At the Richmond, Virginia field hearing where the CFPB announced its proposals, the Virginia AG, Mark Herring, announced that he is undertaking efforts to reorganize and revitalize the Attorney General's Consumer Protection Section to include a focus on predatory lending. Details of these efforts have not yet been released, but potential strategies mentioned in the announcement include enforcement actions brought by the AG's office, or in partnership with the CFPB and other states. Such enforcement actions could be premised on alleged violations of Virginia law, or could be based on state AG authority to enforce the prohibition of UDAAP under Dodd Frank.

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