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Nevertheless, It Persisted: Examining the Trump-Era CFPB and Implications for Enforcement Under the Biden Administration

By J.H. Jennifer Lee and Jake Christensen

The Consumer Financial Protection Bureau ("CFPB," "Bureau," or "agency") will commemorate the eleventh anniversary of its founding later this year. The Trump era of the last four years is regarded in the popular press as one of federal deregulation. But does that premise bear out for the CFPB? The answer depends on what one considers "deregulation."

While Bureau officials tamped down high-profile rulemaking efforts during the Trump administration, existing rules within the CFPB's jurisdiction—including 18 enumerated statutes; the Dodd–Frank Act's unfair, deceptive, or abusive acts or practices ("UDAAP") prohibition; and the military lending statute[1]— remained intact and untouched under President Trump. Many of these regulations were enshrined in federal consumer finance law for over forty years and only came under the purview of the Bureau in 2011. Thus, if one measures regulatory oversight by activity to enforce *existing* rules, it becomes apparent that the CFPB enforced those laws against regulated entities as Congress intended. Indeed, career Bureau staff effectuated some of the most vibrant regulatory activity in the Bureau's short history, during (and, at times, in spite of) the Trump administration. The cases discussed below involve matters filed during the tenures of Trump's two appointees—the Bureau's acting Director, Mick Mulvaney, and the Bureau's current Director, Kathleen Kraninger, who was installed with the advice and consent of the United States Senate.

As the country looks forward on the eve of President-elect Biden's inauguration, we gather valuable lessons relevant to oversight of the financial services industry by examining President Trump's CFPB legacy, which is three-pronged. These lessons are especially timely on the eve of President-elect Biden's inauguration and are two-fold. *First*, despite attacks on its leadership structure and efforts to weaken its enforcement capabilities, the CFPB effectively overcame those challenges to fully assert its power and carry out its regulatory mandate. *Second*, President Trump's appointees' most profound contribution to the Bureau was altering the nature of its press releases, which enabled a disconnect between public perception of a hobbled CFPB and the Bureau's productive enforcement arm. *Third*, while the CFPB opted for some more traditional (read: noncontroversial) topics (to the extent such a thing as "tradition" exists for a five-year-old agency) than those pursued during the Obama administration, the CFPB nevertheless continued to: file claims that were dependent on novel theories that pushed the envelope, collaborate frequently with sister consumer protection agencies on enforcement matters, and hew closely to the administration's policy goals, including veteran protection.

As businesses, consumers, and advocates look ahead to the Biden administration, reviewing enforcement dockets over the last four years under President Trump will help further an authentic dialogue. In this article, organize our discussion of enforcement cases around a list of myths and the facts needed to debunk them. These comparisons show how the Bureau's enforcement arm was very productive, separate from political machinations seeking to suggest otherwise. Outside the scope of this article, however, lies an exhaustive record of public statements and reporting that downplayed the Bureau's enforcement work. We trust that our readers can find such information easily enough on their own. It is remarkable that the agency's legal filings (which are less accessible than online press releases), contain facts that defy prevailing public opinions about the Bureau's work under Trump. The most prominent marker of the Trump CFPB legacy is the chasm between popular perception of the CFPB and the reality of its impactful oversight of the banking industry.

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Myth 1: Under Trump, the CFPB Would Decrease Scrutiny of the Banking Industry in a Reversal of Bank Oversight under the Obama Administration

Following President Trump's appointment of Acting Director Mick Mulvaney over the Thanksgiving weekend in 2017, the CFPB issued an order that resulted in the largest fine imposed in the agency's history. On April 20, 2018, the CFPB settled with a large national bank, for violations of Title X of the Dodd–Frank Act's UDAAP prohibition. The violations were rooted in allegations regarding the bank's (1) fees to consumers for mortgage rate-lock extensions, and (2) force-placed insurance products[2] on consumers' financing of auto purchases. As to the rate-lock extension issue, the Bureau found that the bank had inappropriately charged consumers rate-lock-extension fees that should have been absorbed by the bank, despite acknowledgement in internal communications that the bank's guidelines for its loan officers were inadequate. As to force-placed insurance, the Bureau found that the bank had charged consumers for force-placed insurance, even though it knew or should have known that these "ineffective processes . . . were likely to result in [the bank] unnecessarily placing or maintaining force-placed insurance." In addition to the order of consumer redress, the CFPB, which brought the suit in collaboration with the Office of the Comptroller of the Currency, assessed a $1 billion penalty against the bank—an amount much greater than any penalties imposed during the Obama administration.

Despite Mulvaney having excoriated officials during the Obama administration for declaring acts Unfair without first providing industry notice via official guidance or prescribed rules, this consent order represented another instance of the CFPB designating specified banking acts as Unfair in an enforcement action. The order also maintained restrictions on the bank related to the approval of severance payments to senior and executive officers that had been imposed since November 2016.

Two months later, on June 29, 2018, the CFPB issued an order against Citibank, N.A. that required the bank to pay $335 million in restitution to consumers for specified Truth in Lending Act ("TILA") violations. The Bureau found that Citibank had failed to (1) reevaluate and reduce the annual percentage rates ("APR") on consumers' credit cards as required under TILA, and (2) maintain reasonable policies and procedures governing the required APR reevaluations.

After the Bureau's founding in the early years of the Obama administration, it was relatively rare for the agency to sue banks in federal court. Traditionally, bank oversight occurred in the agency's administrative proceedings as opposed to in district court, before an Article III judge. In fact, only one such instance occurred during the tenure of Director Richard Cordray (President Obama's appointee who became the Bureau's first Director), in a case filed in federal court in Minnesota. Notably, this previously isolated practice did not stop once the Trump administration's leadership took over; instead, it continued.

On January 30, 2020, the CFPB filed suit against Citizens Bank, N.A. ("Citizens") in federal court in Rhode Island. The CFPB alleged that Citizens had committed violations of the Fair Credit Billing Act, which was enacted and incorporated into TILA in 1974. The Bureau's lawsuit alleged that when consumers asserted claims of unauthorized account usage and notified Citizens of billing errors on credit card accounts, Citizens (1) ignored the notices or denied the claims, (2) failed to refund finance charges and fees, and (3) failed to notify consumers of the status of their claims. Furthermore, the CFPB alleged that Citizens had no policies or procedures governing how the bank's employees would provide credit counseling information to consumers who called in to the bank's designated toll-free number.

Two months later, on March 9, 2020, the CFPB filed suit against Fifth Third Bank, N.A. ("Fifth Third") in federal court in Illinois, alleging that Fifth Third (1) engaged in sales practice violations in contravention of the Dodd–Frank Act's UDAAP prohibition and (2) violated TILA and the Truth in Savings Act, as well as their implementing regulations, that is, Regulations Z and DD, respectively. The Bureau alleged that Fifth Third incentivized its employees to "cross-sell" products to consumers, rewarded employees with incentive-based compensation programs, and rated employees based on ambitious sales goals. These practices, while in and of themselves not unlawful, led Fifth Third's employees to open multiple products or services on behalf of consumers without their consent or knowledge, including

deposit accounts, credit cards, online banking accounts, and new lines of credit. Notably, rather than resolving the issue with Fifth Third in a nonpublic Memorandum of Understanding, the CFPB publicly sought an injunction to force the bank to cease its conduct, seek redress for affected consumers, and obtain an order of civil money penalties from an Article III judge.

These cases thus debunk the myth that the CFPB under the Trump administration lessened its oversight of national banks.

Myth 2: Under Trump, the CFPB Would Undertake Reliable Reforms of the Agency's Approach to Abusive Acts and Practices

Under the Dodd–Frank Act, an act is abusive if it:

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
(2) takes unreasonable advantage of—

> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
> (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or
> (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

12 U.S.C. § 5531. On January 24, 2020, the Bureau issued a Statement of Policy Regarding Prohibition on Abusive Acts or Practices ("Abusiveness Policy"). The Abusiveness Policy marked the Bureau's public acknowledgement of the uncertainty as to the scope and meaning of the Dodd–Frank Act's abusiveness standard, insofar as its application to the cases brought during Director Cordray's tenure. It noted: the "current uncertainty is not beneficial." The Abusiveness Policy assured the public that, going forward, the Bureau would (1) only bring abusiveness claims in enforcement or supervision matters if there is a clear "nexus between the cited facts and the Bureau's legal analysis of the claim" and (2) ensure "more clarity as to the specific factual basis for determining that a covered person has violated the abusiveness standard." (Abusiveness Policy at 10.)

Two months later, the CFPB publicly alleged in court that Fifth Third violated the abusiveness standard by (1) enrolling consumers in online banking without their knowledge or consent, and (2) opening specific Early Access lines of credit on deposit accounts without consumers' knowledge or consent. Did the Bureau's pleading show "clarity" as to the factual basis for *abusive* acts, as distinct from facts showing *unfair* acts?

Probably not. The allegations against Fifth Third appear to not jibe with the Abusiveness Policy. For example, in Counts III and IV of the Complaint, the Bureau designated the unauthorized sales of online banking or lines of credit as *abusive*, because those acts "materially interfere[d] with consumers' ability to understand the terms and conditions of" those products, and that—as a result—the acts in question has taken "unreasonable advantage of the inability of consumers to protect their interest in selecting or using a consumer-financial product or service." Yet, in Counts I and II of the Complaint, the Bureau designated the unauthorized sales of credit cards and deposit accounts as *unfair*. So what was abusive about opening online banking/lines of credit accounts without knowledge or consent? The Bureau allegations noted that it was abusive because the unauthorized account opening was tantamount to Fifth Third interfering with express terms and conditions pertaining to those products. Notably, of course, express terms and conditions also exist for credit cards and deposit accounts.

Thus, when viewed in the context of the Fifth Third complaint, the Bureau's filing lacks the promised clarity with respect to transparency on why an act is abusive versus unfair. The rationale for the choice (to deem online banking and line-of-credit openings as *abusive* on the one hand, and credit cards and deposit account openings as *unfair* on the other hand) is unclear, especially when the supposed distinguishing factor between the violations, for example, express terms and conditions, exist for all categories of consumer banking products.

When the Abusiveness Policy was issued, the public lauded the move as relief for the banking industry, as it promised to better clarify the difference in legal standards, when abusive or unfair claims are charged based on the same predicate facts. Following the policy's issuance, the Bureau has superficially distinguished the acts by labeling some as "Counts I and II" versus "Counts III

and IV," as it did in Fifth Third. For readers focused on substance, however, it is apparent that the dividing line between unfair and abusive has become more (not less) confusing in the Trump era.

Myth 3: Under Trump, the CFPB's Leadership Crippled its Own Programs to Oversee Markets for Fair Lending Compliance

In a highly publicized announcement on February 1, 2018, the CFPB reconfigured its internal organization to move the Office of Fair Lending out of the Bureau's Division of Supervision, Enforcement, and Fair Lending, and into a new "Office of Fair Lending and Equal Opportunity" housed in the CFPB's Front Office. Advocates criticized it as weakening the CFPB's fair lending initiatives. National press outlets described the move as one that "stripped" the fair lending office of its "enforcement powers." Partisanship aside, however, the reorg did not preclude the CFPB from attaining prominence in fair lending work and placing renewed emphasis on anti-discrimination law.

First, under leadership appointed by Trump, the CFPB brought the first case in recent history to breathe new life into existing legal theories aimed at combatting redlining.[3] On July 15, 2020, the CFPB filed a complaint in federal court in Illinois against Townstone Financial, Inc. ("Townstone"), a nonbank mortgage company, alleging that it engaged in redlining. The CFPB sought an order imposing fines and granting consumer redress for alleged violations of the Equal Credit Opportunity Act ("ECOA"). ECOA and its implementing regulation, Regulation B, outlaw lender discrimination against applicants on the basis of—among other characteristics—race, color, or national origin.

Filed approximately 45 days after the killing of George Floyd and national protests against systemic racial injustices, the CFPB's public lawsuit alleged that, from 2014 to 2017, Townstone had engaged in "unlawful redlining and acts or practices directed at prospective applicants that would discourage prospective applicants, on the basis of race, from applying for credit in the [Chicago-Naperville-Elgin Metropolitan Statistical Area]." (Compl. ¶¶ 4–5.)

Specifically, the CFPB alleged that Townstone aired weekly podcasts and AM radio shows for marketing purposes, during which Townstone made statements that "would discourage African-American prospective applicants from applying to Townstone for mortgage loans." (*Id.* ¶ 13) While the radio shows and podcasts were means to advertise Townstone's mortgage lending services, the hosts of the shows also "discussed mortgage-related issues and took questions from prospective applicants." (*Id.* ¶ 29) The Complaint alleged that the following additional statements made during those discussions were grounds for an ECOA violation:

1. Townstone's CEO referred to a defunct grocery store previously located in downtown Chicago as "Jungle Jewel"—a derogatory reference to foreigners, African Americans, and Black people—and called it "a scary place." (*Id.* ¶ 32)
2. Townstone's CEO further referenced the South Side of Chicago between Fridays and Mondays as "hoodlum weekend," and asserted that the police are "the only ones between that turning into a real war zone and keeping it where it's kind of at." (*Id.* ¶ 33)
3. Townstone's vice-president and its senior loan officer made similarly inappropriate statements, comparing the "rush" from skydiving to the implied risk of harm from "walking through the South Side [of Chicago] at 3 AM" which would allow one to "get the same rush." (*Id.* ¶ 35)
4. A discussion between Townstone's president, a local realtor, and a bankruptcy attorney advised listeners that, when getting a home ready for sale, a seller should "change the light fixtures, "paint it from top to bottom," and "take down the Confederate flag." (*Id.* ¶ 37)
5. Townstone's president told a caller from a predominately Black city, which he noted was "crazy . . . on weekends" and a place that "[y]ou drive very fast through . . . and . . . don't look at anybody or lock on anybody's eyes" while there, that he should "stop spending freaking money [on his wife] and tell her to get a better job" and that because the caller's wife "probably doesn't have good credit because she's a woman." (*Id.* ¶ 39).

The CFPB alleged that the above statements would discourage both: African-American prospective applicants in general and prospective applicants living in African-American neighborhoods from applying to Townstone for mortgage loans. Interestingly, the CFPB also alleged that the above statements would discourage

prospective applicants living in other areas from applying to Townstone for mortgage loans for properties in African-American neighborhoods. In so doing, the CFPB revived the previously dormant enforcement tactic of using ECOA or other anti-discrimination laws to pursue redlining.

It is remarkable that the very first redlining case brought by the CFPB occurred under the Trump administration, in the face of vigorous available defenses, including those based on the mortgage company's First Amendment right of free speech.[4] To the extent that the public perceived the Trump-era CFPB as having a tepid appetite for enforcing laws that ban discriminatory lending, the Townstone matter proves otherwise.

Second, aside from the Townstone matter, the CFPB engaged in various other public and non-public fair lending initiatives from an enforcement and supervisory standpoint. The CFPB was able to do so because, notwithstanding the relocation of the Office of Fair Lending and Equal Opportunity, the Bureau's Divisions of Enforcement and Supervision remained separately tasked with overseeing compliance with the fair lending laws within CFPB's jurisdiction.

Third, the CFPB's enabling statute also requires that the agency refer any evidence of violations of the Fair Housing Act ("FHA") to the Department of Justice. While the CFPB retains jurisdiction over ECOA and the Home Mortgage Disclosure Act, the DOJ has (and always has had) jurisdiction over the FHA. The Office of Fair Lending and Equal Opportunity's move within the agency in reality did nothing to abrogate the CFPB's referral obligation.

Given the CFPB's power remained intact, and CFPB brought enforcement matters alleging novel fair lending theories in Townstone, it is untrue that the relocation of the CFPB's fair lending office crippled the agency from pursuing anti-discrimination policy priorities.

Myth 4: Under Trump, the CFPB Would Merely Review Markets for Traditional Nonbank Financial Services, and Not Pursue Novel Consumer Credit Products

When the Bureau was not outright dismantled after Trump's inauguration, the prevailing opinion was that the Bureau would "survive another day," but be relegated to pursuing cookie-cutter, traditional, or long-standing financial services impacting consumers, for example, debt-collection or mainstream lending products. The popular public did not believe the Bureau would continue pursuit of novel or less well-known products and legal theories.

Veterans' lending, via pension advance loans, is a less well-known, nontraditional credit product, the market for which the Bureau impacted significantly in partnership with Republican states' law-enforcement officials, in a series of cases.

i. Mark Corbett

The first of these examples involved a consent order between the Bureau and Mark Corbett. Corbett worked as a broker for several companies that claimed to offer purchases of veterans' future pension or disability benefits in exchange for immediate lump-sum payments. (Order ¶¶ 6–8) After receiving the payment, however, the affected veterans were ultimately required under the contracts to repay a much higher amount by assigning their monthly pension or disability payments to investors, creating a repayment obligation that often lasted five to ten years. (*Id.* ¶ 6) Veterans who applied for the product were also required to obtain life insurance policies that named the companies as the beneficiaries and would cover the obligation to the companies in case the veteran died and the monthly pension or disability payments stopped. (*Id.* ¶ 9)

As a result, the Bureau alleged and determined that Corbett engaged in the following Unfair and Deceptive acts or practices: (1) brokering high-interest credit contracts for veterans that included provisions unlawfully assigning the veterans' pension payments to investors; (2) misrepresenting both the actual product offering (presented as a purchase of benefit payments instead of a high-interest credit product) and when the consumers were to receive the lump-sum payments; and (3) failing to disclose the interest rate on the credit offer, in violation of sections 1031 and 1036 of the Consumer Financial Protection Act ("CFPA"). (*Id.* ¶¶ 19–39) The resulting consent order barred Corbett from brokering, offering, or arranging agreements between veterans and third parties through which the veteran purports to sell future rights to an income stream from a pension, or assisting others in doing the same. (*Id.* ¶ 40) The order

also assigned a civil monetary penalty of $1 and required that Corbett assist the Bureau in determining the identity, location, and amount of injury for each affected veteran.[5] (*Id.* ¶¶ 41, 61)

ii. Andrew Gamber

The second example involved a joint effort between the Bureau and the State of Arkansas, who filed a complaint in federal court in Arkansas against Andrew Gamber (who owned and operated companies Voyager Financial Group, LLC; BAIC, Inc.; and SoBell Corp. that were also included as defendants) that alleged Unfair and Deceptive act or practice violations, as well as violations of the Arkansas Deceptive Trade Practices Act. Similar to Corbett, Gamber's companies allegedly brokered high-interest credit to veterans, many of whom are disabled, as well as to other consumers. (Compl. ¶¶ 11, 13, 31) Gamber and his companies similarly misrepresented that they offered sale-of-payments contracts that were instead high-interest credit offers that violated federal and state laws. (*Id.* ¶¶ 12, 15–16, 18, 25, 32) Gamber and his companies also misrepresented when the veterans and other consumers would receive their payments and neglected to disclose the applicable interest rates on the offers. (*Id.* ¶¶ 18–20, 37, 43)

The resulting settlement banned Gamber and his companies from brokering, offering, or arranging agreements between pension recipients and third parties under which the consumer purports to sell a future right to an income stream from the consumer's pension; implemented a judgment requiring redress of $2.7 million, a civil money penalty of $1, and a $75,000 payment to the Arkansas Attorney General's Consumer Education and Enforcement Fund. (Settlement ¶¶ 9–10, 16, 20) The order suspended payment on the full redress among if Gamber and his companies paid $200,000 in consumer redress, as well as the civil monetary penalty and Arkansas payment, based on Gamber's and his companies' sworn financial statements indicating that they were unable to pay more.[6] (*Id.* ¶ 11)

iii. Katharine Snyder

The third example involved facts similar to Corbett and Gamber, with the Bureau, in partnership with the South Carolina Department of Consumer Affairs, filing suit against Katharine Snyder (as well as two companies, Performance Arbitrage Company, Inc. and Life Funding Options, Inc., which Snyder operated and owned). Ms. Snyder's companies similarly brokered high-interest credit to veterans, including disabled veterans, and other consumers under the guise of sale-of-payments contracts; and failed to inform consumers of the credit products' high interest rates, which the Bureau and South Carolina alleged were Unfair and Deceptive acts or practices, as well as violations of the South Carolina Consumer Protection Code. (Complaint ¶¶ 9–11, 14–16, 23–24, 29, 30, 36)

Snyder ultimately filed for bankruptcy, and upon her exit, the court approved a stipulated final judgment and order that resolved the Bureau's and South Carolina's claims. The judgment permanently bans Snyder and her companies from collecting money from affected consumers and from providing any other consumer-financial products or services. Snyder was also obligated to pay civil monetary penalties of $500 each to the Bureau and South Carolina. (Order ¶¶ 7–11, 15)

The Bureau's statutory mandate—consumer protection on financial products—is broad enough to include collaboration with states that have been traditionally Republican. This collaboration came into sharper focus during the Trump era, when the states like South Carolina and Arkansas partnered in joint law-enforcement and investigatory efforts against pension-advance providers targeting veterans or military members. While the matter sizes were small, the individual principals were charged—having a significant impact on the markets in which the businesses operate. Interestingly, in an era popularly perceived as deregulatory era, rather than seeing a weakened Bureau enforcement arm, we saw instead the career enforcement staff could cherry-pick and push strong enforcement case matters that would resonate with a populist policy agenda.

Myth 5: Under Trump, the CFPB Would Stop Pursuing Enforcement Actions that "Push the Envelope"

As mentioned above, one of the consumer financial services industry's key criticisms of the CFPB prior to the Trump era was the agency's penchant for doing "regulation by enforcement"; namely, announcing new regulatory expectations for the first time in an enforcement action as opposed to providing regulated entities with notice of those expectations through notice-and-comment rulemaking, formal guidance, and advisory letters. Myriad examples following Trump's inauguration,

including those discussed above, demonstrate that this practice continued. One extremely notable case example arose in the context of retail goods financing and debt buyers.

On October 4, 2018, the CFPB filed an enforcement action against Bluestem Brands, Inc. and related entities, which had been doing business as Fingerhut and Gettington.com.

While Title X of the Dodd–Frank Act, the CFPB's enabling statute, contains an exemption to the Bureau's jurisdiction for retailers, the Trump-era CFPB declined to extrapolate the basis for the CFPB's reach over retailers in any guidance, advisory letters, or rulemaking. Instead, the CFPB merely filed an enforcement action. Moreover, the publicly filed consent order did not even specify the legal bases for the CFPB's jurisdiction, and instead presented the Bureau's jurisdiction as a *fait accompli*.

The CFPB pursued a strikingly novel theory in the Bluestem matter, relying on logic reminiscent of the Bureau's consumer protection ethos during the Obama era. To illustrate the significance of this, it is helpful to revisit a prior debt buyer case involving JP Morgan Chase ("Chase") that the Bureau pursued during former Director Cordray's tenure. On July 8, 2015, the CFPB, in collaboration with 47 states and the District of Columbia, brought an enforcement action against Chase based on its alleged failure to confirm the amounts and/or existence of credit card debts before selling them to debt buyers or filing debt collection lawsuits.

One of the unprecedented aspects of the Chase matter was that the CFPB used an enforcement case to clarify regulatory expectations on a matter of first impression. Specifically, under the Dodd–Frank Act's UDAAP ban, what must lenders do to be deemed lawful in their business relationships with vendors such as debt buyers? Whereas longstanding bank supervisory guidance provided general information concerning the Bureau's compliance expectations for vendors based on vendors' activity that facilitated bank misconduct, the Chase matter launched shockwaves that reverberated throughout the industry because it imputed liability for the reverse scenario: a bank's liability for its involvement or omissions that ultimately facilitated misconduct by its business partners (in Chase's case, debt buyers). For the first time, the federal government was holding banks responsible for the consumer harms emanating from their debt collector-partners. The CFPB relied on an aiding-and-abetting UDAAP theory of liability to make this possible. When Chase sold accounts, it provided debt buyers with an electronic sale file containing certain basic information about the debts from Chase's internal databases, which the debt buyers used to collect on the debts. But these files contained inaccurate balances, invalid debts, and paid-off balances. This business practice was primed for rulemaking or guidance to advise and inform the industry—for the first time—that it is a violation of federal law to sell a debt accompanied by an inaccurate file. Rather than issue the guidance or prescribe the standards in new rules in advance, however, the CFPB opted instead to issue an enforcement action.

The Legal Theory of Bluestem Mimics That of Chase

The Bluestem matter is quite similar to Chase. If anything, from the perspective of "fair notice" to industry, the novelty of the claim in Bluestem is even more offensive than the claim in Chase because while no one questions the CFPB's power to oversee banks, the CFPB's authority over retailers is less established.

But how is the novelty of Bluestem similar to that present in the Chase matter? First, the CFPB did not prescribe a rule to inform retailers of the federal illegality of continuing to accept payments from consumers after retailers sell the consumers' delinquent debts (for merchandise purchased on credit) to debt buyers or debt collectors. Instead, the CFPB declared the practice to be Unfair under the UDAAP authority for the first time in an enforcement action. Similarly, the CFPB did not inform banks of the parameters within which they may sell debt to debt buyers to avoid UDAAP liability.

Second, the CFPB utilized its UDAAP authority to hold one party liable for the harmful acts of another. As with Chase, whereby the CFPB ultimately sought to hold the lender liable for the consumer impacts caused by debt buyers, in Bluestem the CFPB found that Bluestem had acted too slowly to forward information to debt buyers, prevented debt buyers from updating account balances, and helped debt buyers subject consumers to misleading debt-collection efforts.

Third, in both the Chase and Bluestem matters, which the Bureau pursued during the Obama and Trump administrations, the CFPB engaged in "regulation by enforcement."

The Bluestem matter thus illustrates the CFPB enforcement arm's continued reliance on novel legal theories to achieve the Bureau's underlying consumer-protection policy objectives during the Trump era.

Conclusion

As to consumer financial regulation, the Bureau achieved each of the above accomplishments under an "anti-regulation" Trump regime of protecting consumers. Moving forward, the Bureau will be galvanized to achieve an even more vibrant enforcement agenda than the one pursued under the radar during the Trump era. At the helm, the agency is likely to be led by a more liberal senior official and her or his managers, whose policy agenda will be more supportive of the consumer-protection mission than the "policy associate directors" installed by Trump's appointees. These new leaders at senior levels within the CFPB will align with career staff, many of whom were installed during the Obama presidency.

Industry needs, however, a steady hand. As lawyers and advisors, we feel it is important to view the political turbulence through a sober lens. While any change on policy priorities by Democrats will change the CFPB's enforcement work, the changes may be less dramatic when viewed in the context of the CFPB's vibrancy in the Trump era, as measured by facts and filings (not popular opinion). Furthermore, the comparative novelty of Title X of the Dodd–Frank Act, which is ten years old compared to other 40-year-old consumer financial regulations, is the reason—not the change to a presumptive Biden administration—that the regulatory environment feels choppy.

As the financial services industry moves forward, it is critical for market participants to closely follow new developments from the Bureau, many of which were slated to occur, regardless of who occupies the White House after January 20, 2021. Anything the Bureau does next will seem far-reaching and novel, but much of this is because the mandate embedded by Congress in its enabling statute, back in 2010, is broad and innovative.

Notes

1. The Military Lending Act, 10 U.S.C. § 987.
2. Forced-placed insurance is collateral-protection insurance, the cost for which is included in the financing charges for auto loans.
3. Redlining is defined as "[c]redit discrimination (usu[ally] unlawful discrimination) by an institution that refuses to provide loans or insurance on properties in areas that are considered to be poor financial risks or to the people who live in those areas," a form of obstructive lending practices that ultimately impede home ownership among African Americans or other people of color. Black's Law Dictionary (11th ed. 2019).
4. Townstone did ultimately make this argument in its Motion to Dismiss. (Motion to Dismiss at 9.)
5. The Bureau's Civil Penalty Fund ultimate allocated more than $9 million to consumers harmed by Corbett's actions. (*See https://www.consumerfinance.gov/about-us/newsroom/cfpb-south-carolina-arkansas-file-suit-against-brokers-of-high-interest-credit-offers/*).
6. The Bureau's Civil Penalty Fund ultimate allocated more than $2.7 million to consumers harmed by Gamber's and his companies' actions. (*See https://www.consumerfinance.gov/about-us/newsroom/cfpb-south-carolina-arkansas-file-suit-against-brokers-of-high-interest-credit-offers/*).

The Final Debt Collection Rule Is Here—Sort of

By Caren Enloe

Introduction

On October 30, 2020, the CFPB released the final version of its Debt Collection Rule (the "Rule") which is intended to interpret the federal Fair Debt Collection Practices Act (the "FDCPA") and clarify how new communication technologies can be used in compliance with the FDCPA.[1] In an unexpected twist, the CFPB has delayed publishing the provisions addressing debt validation notices and time barred debt disclosures. Sections 1006.26 (Collection of Time Barred Debt), 1006.34 (Notice of Validation of Debts) and the Safe Harbor Model Forms, are still under consideration by the CFPB and are anticipated to be published in December.[2]

The FDCPA was passed in 1977 to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."[3] Since the FDCPA was passed, interpretative questions have arisen, in part, because of new communication technologies that did not exist at the time of enactment.[4] The result of these unforeseen technological advances has been inconsistent court decisions and marketplace uncertainty. The Rule clarifies how new communication technologies can be used in compliance with the FDCPA.

An Overview of the Rule

The bulk of the Rule addresses communications between the consumer and the debt collector. The Rule expands significantly on the provisions of the FDCPA while attempting to clarify how debt collectors can use new communication technologies which were not in place when the FDCPA was enacted including email, voice mail and text messages. Focusing on those communication technologies, the Rule establishes rules for engaging in communications with consumers and identifies certain policies and procedures that, if implemented, would create safe harbors from FDCPA violations for debt collectors. Of note, the Rule contains a robust Official Interpretation ("Final Comments") which includes sample language for such things as opt out notices.[5] Additionally, the Rule contains record retention requirements which will facilitate the CFPB's supervision of debt collections.[6] The Rule takes effect November 30, 2021.[7]

Who's Covered. While the proposed rule raised some question as to whether it was intended to cover first party creditors, the final version of the Rule expressly states it applies only to "debt collectors" as that term is defined in the FDCPA.[8] First party creditors, however, should carefully note that while the CFPB declined to expand the Rule to apply to first party debt collectors, it has left open the possibility that activities performed by entities not subject to the FDCPA may violate other statutes, including the unfair, deceptive or abusive act provisions ("UDAAP") found in the Dodd–Frank Act.[9] It is therefore likely that the language of the Rule will be used to support future enforcement activities by the CFPB under its UDAAP authority as to first party creditors engaged in consumer debt collection.

Definitions

In its final form, the definitional section of the Rule largely mirrors the FDCPA except with respect to communications. The Rule distinguishes between "attempts to communicate" and actual communications. "Attempts to communicate" are any acts to initiate a communication about a debt and include leaving "limited-content messages."[10] Communications, on the other hand, require the *conveying of information regarding a debt* directly or indirectly to any person through any medium.[11]

"Limited-Content Messages"[12] are a new concept introduced by the Rule and are intended to provide

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a safe way for debt collectors to leave non-substantive messages for a consumer requesting a return call while not inadvertently disclosing the debt to third parties. The Rule and its Final Comments make clear that Limited-Content Messages are not communications regarding a debt. To qualify as a Limited Content Message, the message must be left by voice mail and only contain the specified limited content set forth explicitly in Section 1006.2(j). Those familiar with the proposed rule should note that while the proposed rule allowed for Limited-Content Messages via text message and orally, the final version of the Rule does not.[13] Similarly, while the proposed rule included the identification of the consumer as an allowed component of the Limited-Content Message, the Rule as finalized does not.[14] Instead, a Limited-Content Message is defined as being a voicemail message for a consumer that includes:

> (a) a business name for the debt collector that does not indicate that the debt collector is in the debt collection business; (b) a request that the consumer reply to the message; (c) the name or names of one or more natural persons whom the consumer can contact; and (d) a telephone number or numbers the consumer can use to reply to the debt collector.[15]

Additionally, Limited-Content Messages can contain certain very limited and specified optional content.[16]

Communications in Connection with Debt Collection

Section 1006.6 of the Rule implements and interprets section 1692c of the FDCPA, which deals with communications with consumers and third parties in connection with a debt. Section 1006.6(a) expands the definition of "consumer" for purposes of communications in connection with debt collection to include communications with confirmed successors in interest as defined in Regulation X and Regulation Z.[17]

With the advent of new technologies, preventing communications at a time and place which is known or should be known to be inconvenient has become challenging for debt collectors. The Rule attempts to address these challenges in Section 1006.6 and its Final Comments. While on its face, section 1006.6(b) includes only minor revisions to section 1692c(a)'s prohibitions from communicating with the consumer at an unusual or inconvenient time or place, the devil is in the details or, in this case, the Final Comments. Section 1006.6(b)(1) provides that an inconvenient time for communication with the consumer is before 8:00 AM and 9:00 PM local time at the consumer's location and applies equally to communications and attempts to communicate.[18] The Final Comments clarify that if the debt collector has ambiguous information as to the consumer's location, then in the absence of information to the contrary, the debt collector may assume a time that is convenient in all time zones at which the debt collector's information indicates the consumer may be located.[19] The Final Comments additionally provide debt collectors with guidance in circumstances in which the debt collector needs additional clarity or information from the consumer by allowing the debt collector to ask follow-up questions regarding a convenient time and place.[20] Additionally, the Rule makes clear that no particular words are necessary for a consumer to indicate a time and place are inconvenient.

Section 1006.6(d) implements section 1692c(b) of FDCPA regarding communications with third parties. It provides safe harbor procedures for email and text communications which, if reasonably adopted, would provide the debt collector with a bona fide error defense against any inadvertent violation of 15 U.S.C. 1692c(b).[21] Section 1006(d)(4) allows for email communications to the consumer: first, by allowing the use of an email address the consumer has either used to communicate with the debt collector (and has not subsequently opted out)[22] or the consumer has provided prior express consent to use (without withdrawing consent)[23]; and second, by allowing for the use of an email address used previously by the creditor or a prior debt collector subject to certain limitations and conditions.[24] Section 1006(d)(5) allows for text messaging subject to similar conditions.[25] The CFPB has indicated that it is finalizing provisions of the Rule (presumably to be included in the December supplement) which will require debt collectors provide consumers with a "reasonable and simple" method to opt out of electronic communications and "that will permit consumers to control the time, place and media through which debt collectors may communicate."[26]

Location Information

Section 1006.10 implements and interprets, but does not materially change, section 1692b of the FDCPA.

Section 1006.10 includes a definition of "location information," which means a consumer's "place of abode and the telephone number at such place" or place of employment.[27] The Final Comments also permit a debt collector to obtain location information for a person who is authorized to act on behalf of a deceased consumer's estate.[28]

Harassing, Oppressive, or Abusive Conduct

Section 1006.14 implements and interprets section 1692(d). While section 1006.14 generally restates the language of the statute with some minor rewording, it adds two new provisions: section 1006.14(b) provides a bright line test for call frequency while section 1006.14(h) addresses prohibited communication medium.

Section 1006.14(b) interprets section 1692d(5) of the FDCPA which prohibits a debt collector from causing a telephone to ring and from engaging a person in telephone conversations repeatedly or continuously with the intent to annoy, abuse, or harass.[29] In doing so, it establishes a bright line on call frequency by placing numeric limitations and frequency limitations on the placing of telephone calls. In doing so, the Rule creates presumptions of compliance and violation. Generally, and subject to certain very limited exceptions, a debt collector is *presumed* to have violated the provision if: (a) it places telephone calls to a particular person in connection with a particular debt more than seven times within seven consecutive days; or (b) after having had a telephone conversation with a particular person regarding a particular debt, makes a call within seven days of that conversation.[30] The converse is also true. The debt collector is presumed to have complied if it stays within the call frequency limitations. For purposes of this subsection, "particular debt" means each of a consumer's debts in collection except that student loans serviced under a single account number are considered in the aggregate to be a "particular debt."[31] It should be noted that the exceptions presented in the final version of the Rule are more limited than those that were originally proposed. In particular, the Rule clarifies that any prior consent provided by a consumer for follow up communications expires within seven days of being provided.[32]

Section 1006.14(h) of the Rule addresses prohibited communication media. In a nutshell, it prohibits a debt collector from communicating or attempting to communicate with any person through any medium of communication if the consumer has requested that the debt collector not use that medium.[33] Notably, this subsection of the Rule in its final form is more expansive than the Rule as proposed. As proposed, the prohibition was limited to communications with consumers. In its final form, the prohibition includes communications to persons.[34] In its Section by Section Analysis, the CFPB attributes the change to a recognition that 15 USC 1692(d)'s scope which includes any person versus the consumer.[35] Notwithstanding the prohibitions in section 1006.14(h)(1) and specifically addressing electronic communications, if a person opts out in writing from receiving electronic communications, the debt collector may reply once to confirm receipt of the opt-out as long as the reply contains no information other than a statement confirming the person's request.[36] Section 1006.14(h) likewise allows the debt collector to respond once to a person-initiated communication from an address or telephone number that the consumer had asked the debt collector not to use.[37]

False, Deceptive, or Misleading Representations or Means

Section 1006.18 of the Rule implements and interprets section 1692e of the FDCPA, which contains a non-exhaustive list of sixteen examples of prohibited representations and behaviors.[38] Section 1006.18 does not materially change the substance of this list, but it reorganizes it into categories of false, deceptive, or misleading representations; false, deceptive, or misleading collection means; and a catch-all provision for other prohibited representations and behaviors.

Section 1006.18 additionally requires the mini-Miranda disclosure contained in 15 USC § 1692e(11)[39] be made by the debt collector to the consumer in all of its communications.[40] In addition. the final version of the Rule adds section 1006.18(e)(4) which requires the debt collector make the disclosures in the same language or languages used for the rest of the communication and requires any translation must be complete and accurate.[41] This section also allows a debt collector's employee to use an assumed name so long as it is used consistently and the employer can readily identify the employee by the assumed name.[42] While the proposed version of the Rule included a safe harbor for meaningful attorney involvement in debt collection litigation, the final rule omits the provision.

Unfair or Unconscionable Means

Section 1006.22 interprets and implements Section 1692f of the FDCPA which contains a non-exhaustive list of unfair or unconscionable means to collect a debt.[43] Section 1006.22 adds new prohibitions on communications using certain media. Section 1006.22(f)(3) prohibits communicating or attempting to communicate with a consumer using an email address that the debt collector knows is provided to the consumer by his employer unless the consumer provided the email address to the debt collector or a prior debt collector and the consumer has not subsequently opted out.[44] Section 1006.22 also prohibits communications and attempts to communicate with a person through social media platforms if the message is viewable to third parties or the person's social media contacts.[45]

Section 1006.22(g) also creates a safe harbor to permit a debt collector to reveal its name or other information indicating that the communication relates to collection of a debt in an email or text message as long as it is done in accordance with the procedures described in section 1006.6(d)(3).[46]

Other Prohibited Practices

Section 1006.30 is a catch-all section designed to protect consumers from certain harmful debt collection practices, including the transfer of certain debts. Section 1006.30 additionally restates certain provisions of the FDCPA concerning allocation of payments[47], venue[48] and the furnishing of certain deceptive forms.[49]

Notably, Section 1006.30(b) prohibits the sale, transfer for consideration, or placement for collection of a debt that the debt collector knows or should know has been paid, settled, or discharged in bankruptcy. The provision carves out exceptions for transferring debts to their owner or the original creditor under an agreement providing for the same, and transferring debts in the course of a merger or acquisition.[50] Additionally, the provision adds a carve out for secured claims in bankruptcy. Section 1006.30(b)(2)(ii) allows for the transfer, sale, or placement for collection of secured claims in bankruptcy so long as the debt has not been discharged in bankruptcy, the debt is secured by an enforceable lien and the debt collector notifies the transferee that the consumer's personal liability was discharged in bankruptcy.[51]

Disputes and Requests for Original Creditor Information

Section 1006.38 of the Rule implements and interprets sections 1692g(b) and 1692g(c) of the FDCPA. While largely mirroring the language of the FDCPA, the section notably addresses a debt collector's obligations with regard to duplicative disputes.[52] A "duplicative dispute" is defined as a dispute that was submitted within the validation period that is "substantially the same as a dispute previously submitted by the consumer in writing within the validation period for which the debt collector already has satisfied" the debt validation requirements, but that "does not include new and material information to support the dispute."[53] In the case of a duplicative dispute, the debt collector may either (i) notify the consumer in writing or electronically in a manner permitted by section 1006.42 of the Rule that the dispute is duplicative, provide a brief statement as to the basis for the determination, and refer the consumer to the prior response, or (ii) provide a second copy of the verification of the debt or of the judgment.[54] Debt collectors should be aware that Section 1006.38 is a work in progress and is likely to contain some additions in the December supplement, including safe harbor provisions for debt collectors.

Sending Required Disclosures

As finalized, Section 1006.42 has been significantly simplified when compared to its proposed counterpart. Section 1006.42 sets forth requirements for sending the disclosures required by the FDCPA and the Rule. Section 1006.42(a) establishes the general expectation that disclosures must be sent in a manner reasonably expected to give the consumer actual notice in a form that the consumer may keep and access at a later time.[55] To the extent the debt collector sends any notice or disclosures required by Section 1692g of the FDCPA electronically, the debt collector must comply with section 101(c) of the E-Sign Act.

Other Provisions

The Rule contains document retention requirements. Section 1006.100 requires debt collectors to retain records evidencing their compliance or noncompliance with the FDCPA and the Rule beginning on the date that the debt collector begins collection activity and ending three years after the debt collector's last collection activity.[56] The Rule contains a special provision for telephone recordings which makes it clear that

if a debt collector records telephone calls made in connection with the collection of debt, recordings must be kept for three years from the date of the call.[57] The Final Comments address examples of what records should be retained and suggest that records can be retained by any method that reproduces the records accurately and allows for ready access.[58]

Section 1006.104 of the Rule implements section 1692n of the FDCPA in relation to state laws and, while adding information about its application to the Rule, closely mirrors the statutory language.[59]

Section 1006.108 of the Rule provides the procedure by which states may apply for an exemption for state regulation of debt collection.[60]

What's Next?

Depending upon the final outcome of the 2020 congressional elections and the continued effects of the pandemic, Congress may consider legislative proposals to walk back certain provisions of the Rule dependent upon the outcome of the remaining congressional races.

Additionally, there is more to come from the CFPB. In December, the CFPB plans to release the remainder of the Rule, this time focusing on disclosures. Additionally, the CFPB is looking at additional interventions, including the debt collector's obligations to substantiate debts.

And while first party creditors have avoided direct implications from the Rule thus far, there remain indirect implications. Third party vendor management requirements will need to be revisited and updated to reflect the Rule and to ensure compliance by third party vendors. Additionally, first party creditors should review their policies and procedures concerning consent for electronic communications to ensure their third party vendors can take advantage. With the Rule in place, first party creditors can anticipate debt collectors will embrace their ability to use technology in their debt collection communications. As a result, first party creditors should review and update their policies and procedures as to securing consent for email and text communications and providing opt out procedures for the same.

Moreover, it can be anticipated that the Bureau will use the Rule as guidance for potential enforcement actions against first parties collecting on their own behalf. In 2013, the Bureau tied debt collection to its unfair, deceptive or abusive acts authority provided under section 1031 of the Dodd–Frank Act.[61] At that time, the CFPB made clear that original creditors and other covered persons under the Dodd–Frank Act involved in debt collection related to any consumer financial product were subject to the prohibition against UDAAPs in the Dodd–Frank Act.[62] Specifically, the Bureau delineated a number of examples of debt collection activity (all of which are addressed in the FDCPA) which would constitute UDAAPs. Moreover, while first party creditors may not be directly subject to the Rule, it is important to note that the Bureau declined to clarify whether any particular actions taken by first-party debt collectors would constitute a UDAAP under Dodd–Frank. First party creditors engaged in internal collections, therefore, should carefully review the Rule to align their policies and practices to conform with the Rule. By the same token, compliance departments for third party debt collectors should begin carefully reviewing the Rule and its Final Comments and align their policies, procedures, media content and scripts to conform with the Rule and take advantage of the safe harbors contained within the Rule.

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Notes

1. Debt Collection Practices (Regulation F) 85 Fed. Reg. 76734 (Nov. 30, 2020) (to be codified at 12 C.F.R. pt. 1006) [hereinafter Rule].
2. *Id*.
3. 15 U.S.C. § 1692(e) (2020).
4. *See, e.g., Foti v. NCO Fin. Sys. Inc.,* 424 F. Supp. 2d 643, 659 (S.D.N.Y. 2006) ("[T]he fact that NCO may not be able to leave

a pre-recorded message that complies with both § 1692e(11) and § 1692c(b) of the Act in no way warrants a conclusion that 'communication' should be narrowly interpreted. Rather, it merely suggests that a debt collector is not permitted to leave a pre-recorded message in violation of the FDCPA. Debt collectors, however, could continue to use other means to collect, including calling and directly speaking with the consumer or sending appropriate letters. Thus, the alleged 'Hobson's Choice' in this case is self-imposed by NCO. It is only because of the method of debt collection selected—calling and leaving the type of pre-recorded messages—that NCO is faced with this potential dilemma.").

5. Rule, *supra* n.1, at 76898–99 (to be codified at 12 C.F.R. pt. 1006, Supp. I, ¶ 6(D)(4)(ii)(c)-2).
6. Rule, *supra* n.1, at 76888 (to be codified at 12 C.F.R. § 1006.1(b)).
7. *Id*. at 76734.
8. *Id*. at 76742.
9. *Id*.
10. *Id*. at 76888 (to be codified at 12 C.F.R. § 1006.2(b)).
11. *Id*. at 76888 (to be codified at 12 C.F.R. § 1006.2(d)) (emphasis supplied).
12. *Id*. (to be codified at 12 C.F.R. § 1006.2(j)).
13. *Id*.
14. *Id*.
15. *Id*. (to be codified at 12 C.F.R. § 1006.2(j)(1)).
16. *Id*. (to be codified at 12 C.F.R. § 1006.2(j)(2)).
17. *Id*. at 76889 (to be codified at 12 C.F.R. § 1006.6(a)(5)).
18. *Id*. (to be codified at 12 C.F.R. § 1006.6(b)(1)).
19. *Id*. at 76896 (to be codified at 12 C.F.R. pt. 1006, Supp. I, ¶ 6(B)(1)(i)-2).
20. *Id*. (to be codified at 12 C.F.R. pt. 1006, Supp. I, ¶6(B)(1)-1).
21. *Id*. at 76890 (to be codified at 12 C.F.R. § 1006.6(d)(3)).
22. *Id*. (to be codified at 12 C.F.R. § 1006.6(d)(4)(i)(A)).
23. *Id*. (to be codified at 12 C.F.R. §1006.6(d)(4)(i)(B)).
24. *Id*. (to be codified at 12 C.F.R. § 1006.6(d)(4)(ii)).
25. *Id*. (to be codified at 12 C.F.R. § 1006.6(d)(5)).
26. *Id*. *at* 76755; *see also id*. at 76890 (to be codified at 12 C.F.R. § 1006.6(e)).
27. *Id*. at 76890 (to be codified at 12 C.F.R. § 1006.10(a)).
28. *Id*. at 76900 (to be codified at 12 C.F.R. pt. 1006, Supp. I, ¶ 10(b)(2)-1).
29. 15 U.S.C. § 1692d(5) (2020).
30. Rule, *supra* n.1, at 76890 (to be codified at 12 C.F.R. § 1006.14(b)(2)).
31. *Id*. at 76891 (to be codified at 12 C.F.R. § 1006.14(b)(4)).
32. *Id*. (to be codified at 12 C.F.R. § 1006.14(b)(3)(i)).
33. *Id*. (to be codified at 12 C.F.R. § 1006.14(h)(1)).
34. The Rule defines "person" more broadly than consumer. A person includes natural persons, corporations, companies, associations, firms, partnerships, societies, and joint stock companies. *Id*. at 76888 (to be codified at 12 C.F.R. § 1006.2(k)).
35. *Id*. at 76825; *see also* 15 U.S.C. § 1692d (2020).
36. *Id*. at 76891 (to be codified at 12 C.F.R. § 1006.14(h)(2)(i)).
37. *Id*. (to be codified at 12 C.F.R. § 1006.14(h)(2)(ii)).
38. *See* 15 U.S.C. § 1692e(1)–(16) (2020).
39. Section 1692e(11) requires the debt collector disclose that the debt collector is attempting to collect a debt and that any information obtained will be used for the purpose. 15 U.S.C. § 1692e(11) (2020).
40. Rule, *supra* n.1, at 76891–92 (to be codified at 12 C.F.R. § 1006.18(e)).
41. *Id*. at 76892 (to be codified at 12 C.F.R. § 1006.18(e)(4)).
42. *Id*. (to be codified at 12 C.F.R. § 1006.18(f)).
43. 15 U.S.C. § 1692f(1)-(8) (2020).
44. Rule, *supra* n.1, at 76892 (to be codified at 12 C.F.R. § 1006.22(f)(3)).
45. *Id*. (to be codified at 12 C.F.R. § 1006.22(f)(4)).
46. *Id*. (to be codified at 12 C.F.R. § 1006.22(g)).
47. 15 U.S.C. § 1692(h) (2020).
48. 15 U.S.C. § 1692i (2020).
49. 15 U.S.C. § 1692j (2020).
50. Rule, *supra* n.1, at 76892 (to be codified at 12 C.F.R. § 1006.30(b)(2)).
51. *Id*. (to be codified at 12 C.F.R. § 1006.30(b)(2)(ii)).
52. *Id*. at 76893 (to be codified at 12 C.F.R. § 1006.38(d)((2)(ii)).
53. *Id*. (to be codified at 12 C.F.R. § 1006.38(a)(1)).
54. *Id*. (to be codified at 12 C.F.R. § 1006.38(d)(2)(ii)).
55. *Id*. (to be codified at 12 C.F.R. § 1006.42(a)).
56. *Id*. (to be codified at 12 C.F.R. § 1006.100(a)).
57. *Id*. (to be codified at 12 C.F.R. § 1006.100(b)). The Interpretation makes clear that there is no requirement that a debt collector record telephone calls. However, if a debt collector does records calls, the recordings are evidence of compliance or noncompliance and must be maintained for the requisite three-year period. *Id*. at 76907 (to be codified at 12 C.F.R. pt. 1006, Supp. I, ¶100(B)-1).
58. *Id*. (to be codified at 12 C.F.R. pt. 1006, Supp. I, ¶¶ 100(A)-1, 100(A)-3).
59. Rule, *supra* n.1, at 76893 (to be codified at 12 C.F.R. § 1006.104).
60. *Id*. (to be codified at 12 C.F.R. § 1006.108).
61. *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts,* CFPB Bulletin 2013-07 (July 10, 2013).
62. *Id*.

THE MONITOR

The Monitor is an agenda of matters of interest to the financial services industry. The Monitor includes: (1) regulatory and related matters on which comment periods are open; (2) important regulatory initiatives that are still pending and under active consideration; (3) recent regulatory matters of continued urgency to the financial services community; and (4) cases pending before the US Supreme Court and other federal and state courts. All cases are listed by subject. Unless otherwise noted, this issue of The Monitor covers developments during the period October 20, 2020 through November 20, 2020.

BANK REGULATION

OCC Bulletin Summarizes, Clarifies CRA Rule Requirements

The Office of the Comptroller of the Currency has published a bulletin containing answers to frequently asked questions regarding its Community Reinvestment Act final rule that took effect Oct. 1, 2020. The bulletin summarizes the key provisions and provides responses to questions from bankers and examiners about how the OCC will administer and implement the rule (OCC Bulletin 2020-99).

Highlights of the final rule. Published in the Federal Register on June 5, 2020, the final rule: clarifies and expands the bank lending, investment, and services that qualify for positive CRA consideration; updates how banks delineate the assessment areas in which they are evaluated; provides additional methods for evaluating CRA performance in a consistent and objective manner; and requires reporting that is timely and transparent. The OCC also issued a list of qualifying CRA activities.

The final rule establishes three compliance dates. Banks must comply with certain provisions of the June 2020 rule as of the effective date of Oct. 1, 2020, while other provisions have compliance dates of either Jan. 1, 2023, or Jan. 1, 2024, depending on the bank type. The rule also includes a transition provision to provide flexibility for the OCC to establish an orderly transition for CRA examinations that assess performance based on activities conducted on or after Oct. 1, 2020, but before the applicable compliance date.

The OCC said it is conducting outreach activities to provide banks with more information regarding how the agency will administer the transition to the June 2020 rule, beginning with those provisions in the rule that have an Oct. 1, 2020, compliance date. In the meantime, the OCC has addressed frequently asked questions related to the transition period, qualifying activities, bank types, examinations, and the rule's notice requirements.

Bank type. The OCC said it will apply the asset size thresholds in the small bank and intermediate bank definitions of the June 2020 rule to determine bank type in December 2020. Bank type based on the December assessment will then be communicated to banks.

- A bank with assets of $600 million or less is a small bank.
- A bank with assets greater than $600 million and equal to or less than $2.5 billion is an intermediate bank.
- A bank with assets greater than $2.5 billion will become a GPS (global performance standards) bank.
- Wholesale and limited purpose bank type designations and examination procedures do not change.

Examinations. Addressing question related to examinations, the OCC said it plans to issue new examination procedures for all bank types and will publish "a reasonable schedule for implementing the updated procedures during the transition period."

For CRA examinations that evaluate bank activities conducted during the transition period and before the effective date of new guidance or examination procedures, the OCC said the examination procedures under the former, 1995 rule will be used, based on bank type.

Specifically:

- A small bank is subject to the 1995 rule's small bank examination procedures.
- An intermediate bank is subject is to the 1995 rule's intermediate small bank examination procedures.
- To administer a seamless transition to the June 2020 rule, a GPS bank is subject to the 1995 rule's large bank examination procedures.

- Wholesale and limited purpose bank type designations and examination procedures do not change.

Notice requirements. The OCC also clarified that banks may comply with the final rule's notice requirements on Oct. 1, 2020, or, at their option, continue to display the notice required under the former rule until March 1, 2021. All banks must comply with the June 2020 rule notice requirements by March 1, 2021.Banks must display the public notice in their main office and branch offices "in a form and location visible and prominent to the public," which includes either paper or an electronic format, such as a digital display. In addition to a display of the public notice in one of these formats, banks may also post the notice on their websites.

Bureau Issues No-Action Letter to BoA for New Small Dollar Loan Product

The Consumer Financial Protection Bureau has a issued a no-action letter to Bank of America, N.A. (BoA) regarding a small-dollar credit product—referred to as "Balance Assist"—that BoA intends to offer and provide to consumers. Based on the information provided in BoA's application for the NAL, the Bureau said that it will not make supervisory findings or bring a supervisory or enforcement action against BoA predicated on the offering, its features and practices, or the information BoA intends to provide to consumers, unless or until the NAL is terminated by the Bureau under its NAL Policy. In its announcement, the Bureau said that it also intends to collect information on payday loan disclosures.

Small dollar loan. In its application, BoA described Balance Assist as a fixed term, amortizing small-dollar installment loan which the customer will pay back in fixed minimum payments over the term of the loan, which will be three months.The product will be offered to existing BoA checking account customers in increments of $100 up to $500. Customers will be charged a $5 flat fee regardless of amount borrowed. BoA stated that the fee will be clearly disclosed to the customer and will be included when calculating the product's annual percentage rate, not to exceed 36 percent.

There will be no late payment fees or prepayment penalties. In addition, BoA said that it will waive the overdraft item fee or returned item fee if the customer does not have sufficient funds in their checking or savings account to make the payment, Bank of America will waive the overdraft fee or returned item fee incurred for the payment or attempted payment.

BoA said that the product was designed for its checking account customers with the goals of: (1) providing an affordable banking solution for short term liquidity needs; (2) providing a streamlined digital only small-dollar credit product; and (3) expanding consumer access to credit.

Rollovers and re-borrowing risk mitigation. The application includes risk mitigation features. Specifically, rollovers will be prohibited, and BoA will mitigate re-borrowing risk by requiring the Balance Assist loan to be fully repaid before another Balance Assist loan can be obtained. BoA will also impose a cooling off period from the date of closure of one Balance Assist loan to the approval for another Balance Assist loan.NAL Policy. The Bureau's letter was issued under the updated NAL Policy from last year. BoA's application is based on the NAL Template issued by the Bureau on May 22, 2020, in response to an application from the Bank Policy Institute. The Bureau said that it approved the NAL Template to further competition in the small-dollar lending space, which fosters access to credit while including important protections for consumers who seek small-dollar loan products.

Payday loan information collection. In a related announcement, the Bureau issued a Paperwork Reduction Act notice requesting approval of an information collection related to payday loan disclosures. According to the notice, the Bureau has hired a contractor to conduct one-on-one consumer interviews with participants to evaluate and refine potential options for a Bureau-designed payday loan disclosure. During the interviews, respondents will review disclosure forms and be asked questions about their impressions of the form, comprehension of information presented, usability, and decision making. The results of its testing—estimated to conclude September 2021—will inform the decision-making process around whether to move forward with a rulemaking related to payday loan disclosures.

CFPB Final Rule Implements FDCPA "in the Modern World"

The Consumer Financial Protection Bureau has adopted a final rule amending Regulation F (12 CFR

Part 1006), which implements the Fair Debt Collection Practices Act. The final rule focuses on debt collection communications and aims at giving consumers more control over how often and through what means debt collectors can communicate with them regarding their debts. The rule also clarifies how the protections of the FDCPA, which was enacted in 1977, apply to modern communication technologies, such as email and text messaging. The final rule takes effect one year after its publication in the Federal Register.

According to the Bureau, "[t]he rule is the result of a deliberative, thoughtful process spanning more than seven years and reflects engagement with consumer advocates, debt collectors, and other stakeholders." The Bureau, which issued a notice of proposed rulemaking in May 2019, said it received and considered over 14,000 comments during the public comment and rulemaking process.

Time and place of communications. In general, the final rule clarifies restrictions on the times and places at which a debt collector may communicate with a consumer. A consumer is not required to use specific words to assert that a time or place is inconvenient for debt collection communications. Absent an exception in the FDCPA or rule, a debt collector is required to abide by a consumer's designation of inconvenient times, even if those times are presumptively convenient according to the statute.

Communication methods. Modern communication technologies, such as emails and text messages, may be used in debt collection, with certain limitations to protect consumer privacy and to protect consumers from harassment or abuse, false or misleading representations, or unfair practices. These protections include requiring a debt collector's emails and text messages to include instructions for a reasonable and simple method allowing a consumer to opt out of receiving further emails or text messages. In addition, a consumer may restrict the media through which a debt collector communicates by designating a particular medium, such as email, as one that cannot be used for debt collection communications. The final rule also provides that a debt collector may have a bona fide error defense to civil liability under FDCPA for an unintentional third-party disclosure if the debt collector follows the procedures identified in the rule when communicating with a consumer by email or text message.

Telephone calls. A debt collector is presumed to violate the FDCPA's prohibition on repeated or continuous telephone calls if the debt collector places a telephone call to a person more than seven times within a seven-day period or within seven days after engaging in a telephone conversation with the person. However, a debt collector is presumed to comply with the prohibition if the debt collector places a telephone call not in excess of either of those telephone call frequencies. The rule includes a non-exhaustive list of factors that may be used to rebut the presumption of compliance or of a violation.

Limited-content message. The final rule also defines a new term related to debt collection communications—limited-content message. The term identifies what information a debt collector must and may include in a voicemail message left with a consumer (with the inclusion of no other information permitted) so that the message is not deemed a communication under the FDCPA. Accordingly, a debt collector may leave a voicemail for a consumer that is not a communication under the FDCPA or the final rule and therefore not subject to certain requirements or restrictions if the voicemail is consistent with the definition of a limited-content message.

Estates, personal representatives. The final rule also clarifies that the personal representative of a deceased consumer's estate is a consumer for purposes of communications in connection with the collection of debt. As a result, a debt collector is generally permitted to discuss a debt with the personal representative of a deceased consumer's estate. The final rule also clarifies how a debt collector may locate the personal representative of a deceased consumer's estate.

Disclosures. The FDCPA requires that a debt collector provide certain disclosures to the consumer. The final rule clarifies the standards a debt collector must meet when sending the required disclosures in writing or electronically. However, the Bureau has reserved certain sections of Regulation F for a disclosure-focused final rule that it intends to publish in December 2020 to clarify the information that a debt collector must provide to a consumer at the outset of debt collection and

to provide a model notice containing the information required by FDCPA section 809(a). The Bureau said it also plans to address in the disclosure-focused final rule consumer protection concerns related to requirements prior to furnishing consumer reporting information and the collection of time-barred debt for which the statute of limitations has expired.

Additional provisions. The final rule addresses certain other consumer protection concerns in the debt collection market, including provisions:

- clarifying debt collectors' obligation to retain records evidencing compliance or noncompliance with the FDCPA and Regulation F;
- prohibiting the sale, transfer for consideration, or placement for collection of certain debts; and
- clarifying debt collectors' obligations when responding to duplicative disputes.

Safe harbor not included. The Bureau did not finalize a proposed safe harbor for debt collectors against claims that an attorney falsely represented the attorney's involvement in the preparation of a litigation submission. According to the Bureau, the proposed provision was aimed at providing greater clarity to the issue but, after receiving extensive feedback from numerous stakeholders, the Bureau decided not to finalize the provision.

Bureau blog posts. CFPB Director Kathleen L. Kraninger said in a blog post that in adopting the final rule the Bureau is "developing a debt collection system that works for consumers and industry in the modern world." A separate blog post highlights consumers' debt collection rights and provides sample letters to assist consumers in responding to common debt collection scenarios.

Congressional reaction. In a statement, Sen. Sherrod Brown (D-Ohio), Ranking Member of the Senate Banking Committee, said that "[t]he CFPB's new debt collection rule fails to provide hardworking consumers with the protections they need to guard against abusive debt collection practices." Although "pleased that the CFPB did not include some of the most harmful provisions of the proposed rule," Brown emphasized that "the final rule still allows collectors to make excessive phone calls to consumers—up to seven times a week for each debt—and unfairly puts the burden on consumers to 'opt out' of harassing text, email, and social media messages." House Financial Services Committee Ranking Member Patrick McHenry (R-NC), meanwhile, lauded the CFPB, stating that the final rule modernizes methods of communication while also preserving consumer protections against harassment. This will "provide clear rules of the road for small businesses and consumers," McHenry said.

Bank Regulatory Agencies Release Operational Resilience Guidance

The Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation issued an interagency paper outlining practices designed to help large banks increase operational resilience. The paper, entitled "Sound Practices to Strengthen Operational Resilience," brings together existing regulations and guidance as well as common industry standards to provide a comprehensive approach that banks may use to strengthen and maintain their operational resilience. The paper does not revise the agencies' existing rules or guidance.

"Operational resilience is the ability to deliver operations, including critical operations and core business lines, through a disruption from any hazard. It is the outcome of effective operational risk management combined with sufficient financial and operational resources to prepare, adapt, withstand, and recover from disruptions." The paper outlines practices to increase operational resilience that are drawn from existing regulations, guidance, statements, and common industry standards with the goal of bringing them all into a centralized location. The practices are grounded in effective governance and risk management techniques. Risks to operational resilience include cyberattacks, natural disasters, and pandemics. Combined with a growing reliance on third-party service providers, those events expose banks to a range of operational risks, which underscore the importance for firms to strengthen their operational resilience.

Although the agencies acknowledged that operational resilience is important to all banking institutions, the practices outlined are directed at domestic banks with more than $250 billion in total consolidated assets or banks with more than $100 billion in total assets and other risk characteristics.

The agencies' sound practices are guided by comprehensive scenario assessments and third-party risks. The sound practices outlined in the paper revolve around governance, operational risk management, business continuity management, third-party risk management, scenario analysis, secure and resilient information system management, and surveillance and reporting.

The agencies are also preparing to convene consultations with the public in the coming months. They will be particularly interested in discussing ways in which the largest and most complex firms can improve the operational resilience of critical operations. They also seek to minimize the potential for market fragmentation and to align best practices. Depending on the outcome from those discussions, the agencies could update their sound practices.

Additional sound practices for managing cyber risk are also included in an appendix.

SECURITIES/SECTION 20/ BROKER-DEALER

SEC Adopts Amendments to Modernize and Enhance Management's Discussion and Analysis and Other Financial Disclosures

On November 29, 2020, The Securities and Exchange Commission today announced that it has voted to adopt amendments that will modernize, simplify and enhance certain financial disclosure requirements in Regulation S-K. The amendments are intended to enhance the focus of financial disclosures on material information for the benefit of investors, while simplifying compliance efforts for registrants.

"These rules will improve the quality and accessibility of the disclosure that companies provide their investors, including, importantly giving investors greater insight into the information management uses to monitor and manage the business," said SEC Chairman Jay Clayton. "The improved approach to these disclosures reflects the broad diversity of issuers in our public markets and will allow investors to make better capital allocation decisions, while reducing compliance burdens and costs and maintaining strong investor protection."

"I want to thank the staff in the Division of Corporation Finance and our other divisions and offices for their work on today's rules and, more generally, for their work to modernize and improve our disclosure system as our markets and economy have evolved," continued Chairman Clayton. "The dedication of our staff to ensure that our disclosure-based regulatory system remains effective, efficient and mission-oriented is critical to the growth and continued leadership of our public capital markets.

The amendments reflect the Commission's long-standing commitment to a principles-based, registrant-specific approach to disclosure. This approach, as applied to Management's Discussion and Analysis, should yield material information relevant to an assessment of the financial condition and results of operations of the registrant, and allow investors to view the registrant from management's perspective. The amendments are also intended to improve disclosure by enhancing its readability, discouraging repetition and eliminating information that is not material.

Summary

The Commission voted to adopt amendments to modernize, simplify and enhance certain financial disclosures called for by Regulation S-K, and related rules and forms, in a manner that reduces the costs and burdens on registrants while continuing to provide material information to investors. The amendments are also designed to improve the readability and navigability of disclosure documents, and discourage repetition and disclosure of immaterial information

Background

The Commission proposed the amendments on Jan. 30, 2020 as part of its ongoing, comprehensive evaluation of disclosure requirements intended to improve the existing disclosure regime for both investors and companies. The amendments reflect the Commission's consideration of comment letters received in response to the proposal, as well as the staff's experience with Regulation S-K arising from the Division of Corporation Finance's disclosure review program and changes in the regulatory and business landscape since the adoption of Regulation S-K.

Highlights

The changes to Items 301, 302, and 303 of Regulation S-K sharpen the focus on material information by:

- Eliminating Item 301 (Selected Financial Data); and
- Modernizing, simplifying and streamlining Item 302(a) (Supplementary Financial Information) and Item 303 (MD&A). Specifically, these amendments:
  - Revise Item 302(a) to replace the current requirement for quarterly tabular disclosure with a principles-based requirement for material retrospective changes;
  - Add a new Item 303(a), Objective, to state the principal objectives of MD&A;
  - Amend current Item 303(a)(1) and (2) (amended Item 303(b)(1)) to modernize, enhance and clarify disclosure requirements for liquidity and capital resources;
  - Amend current Item 303(a)(3) (amended Item 303(b)(2)) to clarify, modernize and streamline disclosure requirements for results of operations;
  - Add a new Item 303(b)(3), Critical accounting estimates, to clarify and codify Commission guidance on critical accounting estimates;
  - Replace current Item 303(a)(4), Off-balance sheet arrangements, with an instruction to discuss such obligations in the broader context of MD&A;
  - Eliminate current Item 303(a)(5), Tabular disclosure of contractual obligations, in light of the amended disclosure requirements for liquidity and capital resources and certain overlap with information required in the financial statements; and
  - Amend current Item 303(b), Interim periods (amended Item 303(c)) to modernize, clarify and streamline the item and allow for flexibility in the comparison of interim periods to help registrants provide a more tailored and meaningful analysis relevant to their business cycles.

In addition, the Commission adopted certain parallel amendments to the financial disclosure requirements applicable to foreign private issuers, including to Forms 20-F and 40-F, as well as other conforming amendments to the Commission's rules and forms, as appropriate.

What's Next?

The amendments will become effective 30 days after they are published in the Federal Register. Registrants are required to comply with the rule beginning with the first fiscal year ending on or after the date that is 210 days after publication in the Federal Register (the "mandatory compliance date"). Registrants will be required to apply the amended rules in a registration statement and prospectus that on its initial filing date is required to contain financial statements for a period on or after the mandatory compliance date. Although registrants will not be required to apply the amended rules until their mandatory compliance date, they may comply with the final amendments any time after the effective date, so long as they provide disclosure responsive to an amended item in its entirety.

FUTURES/DERIVATIVES/SWAPS/ COMMODITIES

CFTC Unanimously Approves Final Rule Amending Swap Execution Facility Requirements

On November 18, 2020, Commodity Futures Trading Commission unanimously approved a final rule amending certain parts of its regulations relating to the execution of "package transactions" on swap execution facilities (SEFs) and the resolution of error trades on SEFs. Both matters are currently the subject of relief in Commission staff no-action letters.

The final rule amends part 37 of CFTC regulations to allow the swap components of certain categories of package transactions to be executed on-SEF but through flexible means of execution rather than through the required methods of execution for "required transactions." In addition, the final rule amends part 36 of CFTC regulations to include an exemption from the trade execution requirement for swap transactions that are executed as a component of a package transaction that also includes a component that is a new issuance bond. The final rule codifies the majority of relief currently provided in CFTC No-Action Letter No. 20-31.

Furthermore, the final rule enables SEFs to permit market participants to execute swaps transactions to correct operational or clerical errors using execution methods other than those required by CFTC regulations for required transactions. The final rule codifies the intent of CFTC No-Action Letter Nos. 17-27 and 20-01 to allow SEFs and market participants to correct operational or clerical errors.

The final rule is the 32nd approved by the Commission under Chairman Heath P. Tarbert. It becomes effective 60 days after publication in the Federal Register.

COURT DEVELOPMENTS

Debt Collector Could Not Avoid FDCPA Liability by Obligating Creditor to Provide Accurate Information

The Ninth Circuit Court of Appeals held that the bona fide error defense in the Fair Debt Collection Practices Act (FDCPA) does not allow debt collectors to avoid liability by contractually obligating creditor-clients to provide accurate information. A debt collector claimed that it qualified for the bona fide error defense because it contractually required creditor to provide it with accurate information. Therefore, it was not liable under the FDCPA when it tried to collect more than a consumer owed because it calculated interest using an incorrect date of last payment. The court rejected the debt collector's argument and held that a debt collector must maintain procedures designed to avoid discoverable errors, such as errors in calculation and itemization. The bona fide error defense does not shield debt collectors who unreasonably rely on creditors' representations. The court also rejected the debt collector's argument that it separately qualified for the defense because it sends its creditor-clients follow-up requests seeking verification of the accuracy of their information. The debt collector did not qualify for the defense on that basis because it did not wait for a response before instituting collection efforts (*Urbina v. National Business Factors Inc.*, Nov. 5, 2020, Christen, M.).

A consumer had an unpaid balance on a medical bill from Tahoe Fracture Clinic (TFC). TFC advised the consumer that she had an outstanding balance of $614 and when she did not respond, forwarded the bill to National Business Factors (NBF) for collection. NBF sent a letter to TFC requesting that TFC verify the amount due. The following day, without receiving a response from TFC, NBF sent the consumer a collection notice seeking payment of $614 plus interest. The consumer sued NBF, alleging violations of the FDCPA. NBF admitted it received an incorrect payment history from TFC and mistakenly calculated interest beginning Feb. 26, 2016 rather than Aug. 12, 2016. Because NBF had charged too much interest and attempted to collect more than the consumer owed, it was undisputed that NBF violated the FDCPA. NBF argued that because it contractually required TFC to provide it with accurate information, it qualified for the FDCPA's bona fide error defense. The district court concluded that NBF was entitled to the defense because it employed a procedure reasonably adapted to avoid errors of the type that occurred in the consumer's case.

The Ninth Circuit reversed after finding that NBF failed to demonstrate that it was entitled to the bona fide error defense because it did not show that it maintained procedures reasonably adapted to avoid the violation. The Ninth Circuit found persuasive the holding in an Eleventh Circuit case in which the court denied a debt collector's claim, nearly identical to NBF's, that an contract obligating a creditor-client to present only accurate information on debts qualified as a procedure reasonably adapted to avoid erroneous interest calculations. As the Eleventh Circuit stated, employing a one-time form contract with a creditor-client, then blindly relying on the creditor to send only valid debts, is not a procedure designed to avoid erroneous interest charges resulting from an inaccurate payment history. Procedures designed to avoid such erroneous charges might include: a requirement that the creditor verify under oath that each charge was accurate, the publication of an in-house fair debt compliance manual, updated regularly and supplied to each firm employee, training seminars for firm employees collecting consumer debts, and a multi-step, highly detailed pre-litigation review process to ensure accuracy and to review the work of firm employees to avoid violating the Act. NBF's reliance on TFC to provide accurate information did not in any way compare to the types of procedures and systems found to qualify for the bona fide error defense.

NBF also argued that even if its collection service contract was insufficient to qualify for the bona fide error defense, it separately qualifies because it sends its creditor-clients follow up requests seeking verification of the accuracy of their information. This argument also fell short because NBF did not wait for a response from TFC before it attempted to collect from the consumer. Because NBF did not argue that it routinely waits for creditor-clients to respond before sending collection notices to debtors, it failed to show that its practice of requesting account verification from its clients is genuinely calculated to catch errors of the sort that occurred here. [*Urbina v. National Business Factors Inc.* (9th Cir)]

Payday-Loan Business Operator's Convictions under TILA, RICO Upheld

The U.S. Court of Appeals for the Second Circuit upheld the convictions of the owner of a payday loan business, who was found guilty of violating the Truth in Lending Act and Racketeer Influenced and Corrupt Organizations Act (RICO). The district court did not err in disregarding the choice-of-law provisions in the loan agreements; New York's public policy interest in prohibiting excessive interest rates overcomes the stated choice-of-law provisions. The government's reliance on RICO's "unlawful debt" provision did not violate the fair warning guarantee of the Due Process Clause, because the "unlawful debt" provisions are straightforward and the unenforceability in New York of the contractual choice-of-law provisions was foreseeable, because such a provision clearly violates New York public policy. Moreover, there was ample evidence in the record providing a rational basis for a jury to find that the business owner was aware of the unlawful nature of his loans. The TILA conviction was upheld based on evidence that, on the typical loan document, the "total of payments" disclosure included just one finance charge in addition to the loan principal amount. Because TILA disclosures must reveal the total payments set at the time of the loan, a jury could rationally have found that the defendant's "total of payments" disclosure of just the loan principal plus one finance charge—despite the fact that no such payment was actually scheduled—was inaccurate and misleading (*U.S. v. Moseley*, Nov. 3, 2020, Carney, S.).

Background. Defendant Richard Moseley, Sr., was convicted when a jury found that he violated the RICO Act and the TILA. Moseley's payday-loan business lent money to borrowers in New York and other states at interest rates exceeding—by many multiples—the maximum legal interest rates allowed in those states in its loan documents. The business failed to meet TILA disclosure requirements, and it issued loans to borrowers without their consent. The district court sentenced Moseley to 120 months in prison and ordered Moseley to forfeit $49 million. Moseley appealed.

Convictions upheld. With regard to the RICO conviction, Moseley contended that the district court erred in disregarding the contractual choice-of-law provision; the prosecution violated his due process right to fair warning by charging him under RICO; and the evidence was insufficient to establish that he had the requisite guilty mental state. The court rejected all three contentions. The loan agreements specified that the agreements were to be governed by the laws of the jurisdictions of Nevada, Nevis, and New Zealand, none of which has usury laws, but New York's public policy interest in prohibiting excessive interest rates overcomes the stated choice of law provisions. New York's felony usury offense is particularly persuasive in demonstrating that the New York legislature considers usury to be a matter of serious public concern. The court rejected Moseley's argument that the usury laws of Missouri (where the business was headquartered) should apply. The contacts with Missouri were thin as compared to the loans and payments that affected borrowers in New York, and borrowers had no way of knowing that the business was based in Missouri.

The government's reliance on RICO's "unlawful debt" provision did not violate the fair warning guarantee of the Due Process Clause. The "unlawful debt" provisions of RICO are straightforward and the unenforceability in New York of the Nevada, Nevis, and New Zealand contractual choice-of-law provisions was foreseeable, because such a provision clearly violates New York public policy. Accordingly, there was no basis to conclude that Moseley was somehow lulled into a false sense of security or had no reason even to suspect that his conduct might be within RICO's scope.

There was ample record evidence that provided a rational basis for a jury to find that Moseley was aware of the unlawful nature of his loans. He admitted that he knew he was lending at rates more than twice the rate allowed in New York. He received numerous complaints from state attorneys general informing him that he was lending in violation of state laws, after which he stopped making loans through those of his lending entities that had come under scrutiny by state attorneys general, while continuing to lend through those that were not under scrutiny.

With regard to his TILA conviction, Moseley argued that his loan agreements disclosed the "total of payments" borrowers would make, as TILA requires, and that the evidence was insufficient to show that these disclosures were inaccurate. But the record

contained evidence that on the typical Moseley loan document, the "total of payments" disclosure included just one finance charge in addition to the loan principal amount. Because TILA disclosures must reveal the total of payments set at the time of the loan, a jury could rationally have found that Moseley's "total of payments" disclosure of just the loan principal plus one finance charge—despite the fact that no such payment was actually scheduled—was inaccurate and misleading.

The court also rejected Moseley's challenges to the admissibility of evidence of borrower complaints and to the district court's calculation for purposes of sentencing that overall Moseley caused borrowers nationwide a loss of $49 million. [*U.S. v. Moseley* (2nd Cir)]

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