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Insights: Perspectives

5 Takeaways: The State of the CFPB's Small Dollar Rule

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5 KEY TAKEAWAYS

The State of the CFPB's Small Dollar Rule

Kilpatrick Townsend's Sam Arora recently presented at the Texas Organization of Financial Service Centers' (TOFSC) Annual Conference on "CFPB: Updates on Litigation re: Small Dollar Loans". The TOFSC was attended by many of Kilpatrick's clients and potential clients in the financial industry.

Key takeaways from the presentation include:

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Timeline for CFPB Rules

On October 5, 2017, the Consumer Financial Protection Bureau ("CFPB") released its final rules regulating short-term loans and some longer term loans including payday and vehicle title Loans (the "Rule"). The final rule was published in the Federal Register on November 17, 2017 and can be found in Section 1041 of the Code of Federal Regulations. The compliance date for the Rule is August 2019. In January 2018, however, the CFPB announced that it intended to engage in rulemaking process to reconsider the Rule pursuant to the Administrative Procedure Act (APA). The CFPB, however, cannot engage in a rulemaking process without following the time-consuming notice and comment procedures of the APA similar to the way the current rule was promulgated. So if the CFPB intends on revising the Rule, it should effectively halt or stay the Rule's compliance date of August 2019.

Who Does This Rule Affect?

The rule applies to banks, nonbank entities, credit unions and lenders and their service providers including credit access businesses doing business in the United States.

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What is Covered Under the Rules?

- Short-term loans which are loans with terms of 45 days or less;
- Longer-Term balloon payment loans (more than 45 days) in which the repayment of entire amount more in a single payment or if at least one payment is more than twice as large as any other payment
- Third Type of Loan is a covered longer-term loan in which the cost of credit exceeds 36% APR.

Major "ABILITY TO REPAY" Requirement for Covered Loans.

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For short-term loans (45 days or less) and longer-term balloon payment loans (more than 45 days), the lender must make an ability to repay determination on behalf of the borrower before a lender can issue a loan. The Rule generally requires that, before making such a loan or advance, a lender must reasonably determine that the consumer will be able to make the payments on the loan while also meeting major financial obligations and basic living expenses without the need to borrow over the next 30 days.

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Current Litigation Surrounding the Rule.

In the Spring 2018, the CFPB announced in its rulemaking agenda that it would issue proposed rulemaking to amend the Rule, which had a compliance date of August 2019. In light of this announcement by the CFPB and because the CFPB was argued to be unconstitutionally structured, in April 2018, two industry trade groups, the Community Financial Services Association of America (CFSA) and the Consumer Service Alliance of Texas (CSAT) filed a lawsuit against the CFPB in the Western District of Texas alleging that the CFPB's Rule was unconstitutional. The two trade groups argued that the ability to repay test was unfair and abusive, and that the Rule was adopted by an unconstitutionally-structured agency. In June 2018, Mick Mulvaney, head of the CFPB, sided with the two industry groups in April and sought to halt the August 2019 compliance date. Judge Yeakel rejected Mulvaney's effort to halt the compliance date without reason. The trade groups filed a preliminary injunction on September 14, 2018 and on November 6, 2018, Judge Yeakel effectively reversed his prior order and ordered that the Rule be stayed pending further order of the Court. Since the August 2019 compliance date is now stayed, the CFPB has announced that it will issue its proposed rulemaking to revise the rule in January 2019.

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