

# 2017 TCFA Annual Convention

## Legal Update

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# Today's Topics

- Payday/Small Dollar Lending Rules—Not Yet Released
- Arbitration Rule—Released July 10, 2017
- Debt Collection Rules—Rewrite Underway
- Operation Choke Point
- CHOICE Act
- *Hiawatha Henry v. Cash Biz, LP*

# Payday/Small Dollar Lending Rules

- Not yet released
- Rulemaking proposed June 2016
- Comment period closed November 7, 2016

# CFPB Arbitration Rule—Released

- **Released July 10, 2017: Final rule nearly identical to the proposed rule**
- **Covers TCFA members**: applies to creditors that extend consumer credit (and much more, like debt collection activities)
- **Prohibition**: prohibits reliance on a class-action waiver in arbitration agreement
- **Disclosure**: requires a disclosure that says you cannot stop the consumer from being part of a class action in court
  - If you buy an account with non-compliant arbitration clause, have 60 days to amend the contract with the disclosure or send written notice to same effect

# CFPB Arbitration Rule

- Reporting: must submit onerous records about claims filed in arbitration to CFPB
- Compliance deadline: will apply to agreements entered into after the compliance date (March 7, 2018)
  - BUT, if you purchase or become party to contract after date, it becomes subject to the rule
- OCCC: if use arbitration clause, must revise and resubmit non-standard contract to OCCC

# *Hiawatha Henry v. Cash Biz, LP*

- Case involves mandatory arbitration provisions in loan agreements
- Payday companies were misclassifying civil debts as bad checks and criminally charging borrowers
- Borrowers filed class action and Cash Biz filed a motion to compel arbitration and enforce the waiver-of-class-action provision in its loan agreements
- Trial court denied motion, court of appeals reversed and ordered case to arbitration
- Texas Supreme Court granted oral argument on June 23, 2017
  - Unclear what impact CFPB's new Arbitration Rule will have

# CFPB Debt Collection Rule

- Highlights:
  - Notice of rulemaking published in November 2013
  - Comment period closed in February 2014
  - CFPB still hasn't published a proposed rule
  - CFPB recently announced it's decided to rewrite the rule for market-wide coverage
    - New rule would apply to first- and third-party debt collectors
    - Unclear whether CFPB has authority to regulate first-party creditors in light of *Henson v. Santander*

# Operation Choke Point

- Department of Justice program led by the Consumer Protection Branch
- Focused on preventing “fraudsters” from accessing the banking system indirectly through middlemen
- Some argue DOJ using program to target “high risk” businesses like payday lenders and gun dealers
  - Banks freezing or closing accounts of these legitimate but “high risk” businesses
- Group of payday lenders filed suit, but making little progress

# CHOICE Act

- Financial Creating Hope and Opportunity for Investors, Consumers, and Entrepreneurs Act
  - Would effectively gut Dodd-Frank
  - Eliminates the CFPB's ability to regulate small-dollar credit
- Passed by the U.S. House on June 8, 2017
- Not expected to receive Senate approval