

2016 TCFA Annual Convention

Legal Update

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Today's Topics

- Reminders
 - Military Lending – 10/3/16
 - Plain Language Contract (and Privacy Notice) – 12/31/16
 - Debt Collection Rules not yet released
- CFPB Proposed Rules:
 - Annual Privacy Notice Exemption
 - Payday/Small Dollar Lending
 - Arbitration Agreements

Reminders

- Military Lending
 - Compliance by 10/3/16
 - For every transaction you must confirm borrower is not active duty or dependent
 - Safe harbor – DOD Database or product from national CRAs
 - Can rely on other proof, but this is the only safe harbor
 - It is your burden to prove person is not a covered borrower
 - Keep record of proof in file for every transaction (including renewals)
 - OCC has proposed a rule that requires licensees to maintain these records

Reminders

- OCCC's Plain Language Contract Rule
 - Compliance by 12/31/16
 - New model contract has:
 - Updated OCCC contact notice
 - More stringent readability requirement (affects arbitration clauses)
 - If you do not use the *exact* model contract, must submit the non-standard contract for approval
 - ALSO, update your Privacy Notice with the new OCCC contact notice from model form

CFPB Privacy Notice Amendment

- Implements 2015 amendments to GLBA
- General Privacy Notice Requirements
 - Provide initial notice when establish customer relationship
 - Provide annual notice every year that customer relationship continues
 - Provide revised notice if you change your practices
- New exemption: Don't have to deliver annual privacy notice IF:
 - limit sharing of customer info so customer does not have right to opt out; and
 - have not changed privacy notice from one previously delivered
- Must resume annual notice if change practices or cease to qualify for exemption
- Will remove ability to provide annual notice online, as superfluous

CFPB Payday Rule

- Highlights

- Outline published March 2015; rule proposed June 2016
- What is covered is largely unchanged
- Will cover certain traditional installment loans IF:
 - Right to make transfers from customer's account; OR
 - Secured by vehicle title
- Chapter 342F signature loan longer than 45 days not covered
- Notable change: can obtain access to account after 72 hours
- CFPB has requested information about other small-dollar loans

CFPB Payday Rule

- “Covered Loan”
 - Short-term credit products with terms ≤ 45 days
 - Longer-term credit product with an “all-in APR” greater than 36% where lender obtains:
 - A non-purchase money security interest in the consumer’s vehicle; OR
 - A “leveraged payment mechanism,” such as access to repayment through a consumer’s account or paycheck.
- TCFA members **MUST** pay attention
 - Every title loan is covered

CFPB Payday Rule

- IF loan is covered, THEN two options:
 - Full payment test; OR
 - Make one of two alternative loan products
 - Loan similar to NCUA “payday alternative” loan, or
 - Loan of 24 months or less, with 36% APR or less, reasonable origination fee, and portfolio default rate of less than 5%

CFPB Payday Rule

- Full Payment Test – “ability to repay”
 - Conclude consumer’s *residual income* will be sufficient to make all loan payments AND meet *basic living expenses* during term
 - Residual income = net income - amounts payable for major financial obligations
 - Basic living expenses = expenses for goods and services necessary to maintain health, welfare, and ability to produce income of household
 - Reasonably project amount and timing of consumer’s net income and payments for major financial obligations
 - Major financial obligations = housing + minimum payments on debt obligations + court-ordered child support

CFPB Payday Rule

- Full Payment Test – “ability to repay”

To make reasonable projection, lender must:

- Obtain written statement of borrower as to:
 - Amount and timing of net income receipts; and
 - Amount and timing of payments for major financial obligations
- Obtain evidence verifying the written statement:
 - For income: reliable record of an income payment covering sufficient history (e.g., employment records, government benefits, other sources)
 - For debt obligations: credit report from national CRA, records of lender and affiliates, and consumer report from a “registered information system
 - For child support: credit report from national CRA
 - For housing expenses: lease, reliable record of recent expenses, or estimate based on local housing expenses
- May only rely on written statement to extent it is consistent with the verification evidence

CFPB Payday Rule

- Alternative loan options

- NCUA-type option

- No more than 6 month term
- \$200 to \$1,000 principal
- 28% max APR, plus origination fee of \$20
- Repayable in two or more equal payments, no less than monthly intervals
- No more than 3 outstanding loans made by lender in last 180 days
- Proof of recurring income
- No prepayment penalty or other creditor enhanced remedies
- Furnish information about loan to registered information system or national CRA

CFPB Payday Rule

- Alternative loan options
 - 36% APR, portfolio default option
 - Not more than 24 month term
 - 36% APR or less, plus reasonable origination (reasonable estimate of actual costs; \$50 or less is safe harbor)
 - Repayable in two or more equal payments, no less than monthly intervals
 - No more than 2 outstanding loans by lender in last 180 days
 - Portfolio default rate must be $\leq 5\%$ per year (for these loans)
 - Policies and procedures to address this determination
 - If exceeds 5%, lender required to refund all collected origination fees
 - No prepayment penalty or other creditor enhanced remedies
 - Furnish information about loan to registered information system or national CRA

CFPB Payday Rule

- Limitations on renewals

- Presumption of unaffordability: Consumer presumed NOT to have ability to repay covered loan, and therefore cannot renew/reborrow, IF:
 - Delinquent more than 7 days in past 30 days on scheduled payment
 - Has expressed in last 30 days an inability to make one or more payments
 - Time between renewal and first due date would be longer than time between renewal and next scheduled due date on existing loan; or
 - Renewal would result in consumer receiving no disbursement of loan proceeds or an amount that does not substantially exceed the next payment on the existing loan within 30 days of renewal

CFPB Payday Rule

- Limitations on renewals
 - Exception to presumption of unaffordability
 - If renewal would result in substantially smaller payments or substantially lower total cost of credit
 - Overcoming presumption of unaffordability
 - Sufficient improvement in financial capacity such that consumer will have ability to repay the renewal despite unaffordability of existing loan

CFPB Payday Rule

- Other requirements
 - Limitation on debits – after failed attempt to debit account, must give written notice before next attempt; after 2 fails, must cease attempts to debit account absent a new and specific authorization
 - New “registration information system” – must obtain report from one
 - Compliance program – if making covered loan, must have written policies and procedures to ensure compliance
 - Record retention – retain evidence of compliance for 36 months after date on which covered loan ceases to be outstanding
 - Electronic records – must retain electronic records in tabular format for: origination calculation; determinations for ability to repay; consumers who qualify for exceptions or overcome presumption of unaffordability; loan type and terms; payment history and loan performance

CFPB Payday Rule

- Request for Information
 - CFPB asking for information about non-covered loans, such as traditional installment loans, including:
 - Pricing, underwriting practices, loan structures that include little to no principal reduction for an extraordinary period of time
 - Recovery methods
 - Marketing practices for credit insurance, debt cancellation agreements, GAP waivers, debt suspension and other add on products
 - Default interest rates, teaser rates, repayment and late-payment penalties

CFPB Arbitration 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 (211 days after final rule is published)
 - 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