

CFPB Update

COHEAO Annual Conference

January 29, 2018
Arlington, VA

John L. Culhane, Jr., Partner
Consumer Financial Services Group
Higher Education Group
215.864.8535
culhane@ballardspahr.com

Heather S. Klein, Associate
Consumer Financial Services Group
Higher Education Group
215.864.8732
kleinh@ballardspahr.com

CFPB Update – CFPB Version 2.0



Version 1.0



Version 2.0?

Overview

- CFPB Leadership Change and Legal Challenges to Mulvaney
- Rulemaking
 - Debt Collection
 - Student Loan Servicing
 - Arbitration
- Supervision
- Enforcement
- Who Will Fill the Gap?
 - FTC (possibly)
 - State Attorneys General and Banking Agencies (absolutely)

CFPB Leadership Change

Dueling Directors

- Cordray resigned as Director effective midnight on November 24, 2017
- Before resigning, Cordray appointed Leandra English as Deputy Director
 - Announced that English will be the Acting Director under § 1011(b)(5)(B) (Deputy Director to “serve as acting Director in the absence or unavailability of the Director”) until Trump appoints and Senate confirms a new Director
- Trump then appointed Mick Mulvaney, the Director of OMB, to be the Acting Director
 - Appointment made under the Federal Vacancies Reform Act, 5 U.S.C. § 3345 et seq., authorizing the President to temporarily fill an executive agency position vacant because the person holding it “dies, resigns, or is otherwise unable to perform the functions and duties of the office.”
- Which statute controls?

Legal Challenges to Mulvaney's Appointment

- English v. Trump and Mulvaney
 - District Court denied request by English for TRO (not appealable)
 - District Court denied request by English for preliminary injunction (appealable)
 - English appealed to DC Circuit and requested expedited review
- Lower East Side People's Federal Credit Union v. Trump and Mulvaney
 - Threshold issue is whether the credit union's status as a regulated entity establishes standing to bring the case
 - Oral arguments on the government's motion to dismiss were heard on January 12
 - Briefings will close on January 24, 2018, and a ruling is expected thereafter

But if the CFPB is Unconstitutional ...

- *En banc* panel of D.C. Circuit may soon decide the PHH case
- Recall that three judge panel of DC Circuit held that the CFPB was unconstitutional because it was “too independent”
- CFPB, with DOJ’s support, sought *en banc* review of D.C. Circuit’s Oct. 2016 decision in late 2016
- D.C. Circuit granted CFPB petition in Feb. 2017, vacating the decision of the three-judge panel
- DOJ reversed course in Mar. 2017 and urged the court to find the CFPB’s structure unconstitutional
- Oral argument held in May 2017

Mulvaney's Initiatives

- Started with a regulatory moratorium (since expired)
- Imposed a data collection freeze due to concerns about cybersecurity
- Imported senior staff from OMB and House Financial Services Committee
- Requested zero funding from Federal Reserve Board for Q2 2018
 - Says that CFPB's balance at FRBNY of \$177.1 million exceeds projected expenses of \$145 million
 - Sees no authority or practical reason to maintain a large reserve fund
- Announced “call for evidence regarding CFPB functions” and plans to issue series of Requests for Information
 - First RFI seeks comment on Civil Investigative Demands

CFPB Rulemaking

Debt Collection Rulemaking: History

- **11/2013** - ANPR issued
- **7/2016** – CFPB issued outline of proposals for SBREFA consideration
 - Originally, anticipated a separate SBREFA process for first-party and third-party; Cordray reversed course in June 2017
- **9/2017** – Publication of Part I of the rulemaking considered “imminent” and would cover third-party disclosure and treatment issues
- **12/2017** – CFPB withdrew request to survey 8,000 consumers regarding collection disclosures
- **1/2018** – CFPB submitted Fall 2017 rulemaking agenda to OMB
 - Said to be current as of “September 28, 2017” and listed the matters that would be under consideration from 11/1/17 – 10/31/18, including an NPR in 2/18

Debt Collection Rulemaking: What's Next?

- But rulemaking is clearly stalled (and likely dead in its current form)
- Opportunity for industry to put forth sensible proposals re:
 - Use of newer technologies
 - Limited content voice messages
 - Contact frequency
 - Inconvenient contacts
 - Documentation
 - Extent applicable to first-party creditors
- States remain active!
 - E.g., Oregon H.B. 2356, effective 1/1/18

Student Loan Servicing (SLS) Rulemaking: History

- **5/2015** – CFPB published request for information (RFI) on SLS
- **9/2015** – CFPB issued a critical report based on the RFI comments
- **10/2015** – CFPB, Treasury and ED released Joint Statement of Principles on SLS
- **11/2015** – SLS debuted on CFPB Fall 2015 semiannual rulemaking agenda as long-term action item
- **5/2016** – CFPB published RFI about communications to borrowers about alternative repayment options

Student Loan Servicing (SLS) Rulemaking: History (cont.)

- **7/2016** – ED issued Mitchell Memo (after consultation with CFPB) identifying “best practices” for federal SLS
- **2/2017** – CFPB issued RFI on its SLS market monitoring initiative
- **4/2017** – ED changed course; withdrew Mitchell Memo and Joint Principles in statement issued by Betsy DeVos
- **1/2018** – SLS retained as a potential long-term action item on Fall 2017 rulemaking agenda
 - Next steps undetermined
 - No date set for further action

Student Loan Servicing Rulemaking: What's Next?

- Clearly dead for now but, unless curtailed, prior reports could serve as the bases for future activity with a change in administrations
- Watch for opportunities to respond to Mulvaney's call for evidence regarding CFPB functions and an appropriate request for information

Congressional Override of Arbitration Rule

- Short History of Rule
 - Background of Arbitration Rule
 - Congressional Review Act – House and Senate votes
 - H.J. Res. 111 overrides the rule and is signed by President Trump
 - CFPB acknowledges defeat on website
 - CFPB removes rule from CFR
- Impact of Override
 - CRA restrictions on issuance of new rule
 - What kind of arbitration rule could CFPB issue?
 - Potential congressional legislation
- Potential trouble spots in several hostile states (Maryland, California)

CFPB Supervision

CFPB Supervision

- Impact of the PII data freeze
 - No uniform approach
- Likely movement away from certain aggressive positions
 - UDAAP
 - Federal student loan servicing
- Likely movement towards more traditional areas of emphasis
 - Advertising compliance under TILA and ECOA
 - Application processing under ECOA and FCRA
 - Disclosure requirements under TILA
 - Preauthorized electronic fund transfers under EFTA
 - Credit reporting under the FCRA

CFPB Enforcement

CFPB Enforcement

- Initial freeze on matters “not already in the pipeline” has expired
 - But at present there are no new investigations, CIDs, or requests
- What about pending investigations and lawsuits?
 - No uniform approach so lots of jockeying and case by case resolution
 - Direct communication with Mulvaney has apparently worked
- If and when enforcement resumes, expect movement away from aggressive/novel legal theories and regulation by consent order
 - Focus on well-established UDAAPs
- Unclear if information sharing with states will continue or will go on hiatus

Who Will Fill the Gap?

Who Will Fill the Gap: FTC (?)

- Could end up being something of a wild card
 - FTC currently has two Obama appointees and three vacancies
 - Trump announced intent to nominate Rohit Chopra on October 19
- Consumer Sentinel – Last Report Covered Complaints in CY 2016
 - Debt Collection was the top complaint category (28% of complaints)
 - Education was no. 20 overall (<1%) but no. 10 for military complaints (1%)
 - Complaints about colleges and universities increasing
- Emphasis in 2017 seems likely to continue in 2018
 - Student Loan Debt Collection – Particularly collection calls
 - Student Loan Debt Relief Scams – The Game of Loans
 - Military Borrower Scams – Victory Media case

Who Will Fill the Gap: States

- State attorneys general
 - 20 AGs sent letter to ED responding to termination of Memoranda of Understanding with CFPB (Sept. 26, 2017)
 - Several AGs (e.g., IL, PA, MA, and WA) have litigation pending against servicers
 - Areas of interest are those traditionally emphasized by the CFPB, including servicing quality, loss mitigation, and loan forgiveness
- State banking regulators
 - Application of new student loan servicer licensing regimes (CT, DC, CA and IL, with more to come)
 - Application of existing first party debt collection or other state licensing regimes (MA, WI)
 - Substantive regulation of servicer conduct, likewise focusing on servicing quality, loss mitigation, and loan forgiveness

Questions / Resources – Ballard Spahr

If you have any questions about anything we covered today, please contact:

John L. Culhane, Jr., Partner
Consumer Financial Services Group
Higher Education Group
215.864.8535
culhane@ballardspahr.com

Heather S. Klein, Associate
Consumer Financial Services Group
Higher Education Group
215.864.8732
kleinh@ballardspahr.com

Visit our blog, the *CFPB Monitor*, at www.cfpbmonitor.com.

Subscribe to our e-alerts at www.ballardspahr.com (click “subscribe”).

Panelist – John L. Culhane, Jr.

- Partner at Ballard Spahr and a member of the firm’s Consumer Financial Services, Mortgage Banking, Bank Regulation and Supervision, Higher Education, and Privacy and Data Security Groups as well as its Marketplace Lending Task Force, Fair Lending Task Force, T CPA Task Force, and Military Lending Act Task Force
- Compliance practice emphasizes counseling clients on the development and implementation of innovative loan, leasing, and payment programs, and includes counseling on fair lending, servicing and collection issues
- Regulatory practice includes preparing clients for banking agency and CFPB targeted fair lending and full spectrum compliance examinations as well as assisting in the defense of consumer class actions, attorney general investigations, and agency enforcement actions
- Named a top consumer financial services lawyer by Chambers USA, 2015, 2016 & 2017
- Charter member of the American College of Consumer Financial Services Lawyers
- Former Chair of the Subcommittee on Fair Lending of the ABA Committee on Consumer Financial Services

Panelist – Heather S. Klein

- Associate at Ballard Spahr and a member of the firm’s Consumer Financial Services, Mortgage Banking, and Higher Education Groups as well as its Marketplace Lending Task Force and Fair Lending Task Force
- Counsels educational institutions, student loan servicers, collection agencies, and other regulated entities on federal and state consumer finance laws and the Department of Education.
- Assists colleges with setting up school programs to replace Perkins loans and with launching income share programs.
- Prepares clients for audits and examinations and advises on state licensing matters.
- Conducts regulatory due diligence in connection with mergers, acquisitions and corporate finance transactions.
- Previously a Fellow with the Financial Frauds and Consumer Protection Division of the New York State Department of Financial Services