

Consumer Financial Services Update

Payday Lending Rule Compliance Date Stayed Yet Again by Texas Court

June 6, 2019

On May 30, 2019, a federal district court in Texas issued an Order that appears to temporarily grant a reprieve for lenders subject to the CFPB's 2017 Payday Lending Rule (Rule). Uncertainty has surrounded the implementation of the Rule over the past several months, as the CFPB had issued [two notices of proposed rulemaking](#) (NPRMs) in February to amend the Rule. While the NPRMs proposed to rescind and delay the compliance date for the mandatory underwriting provisions, the CFPB did not propose to delay the August 19, 2019 compliance date for other sections of the Rule, including the payments provisions.

Although the CFPB has yet to delay the compliance date for the payments provisions, litigation filed by an industry trade group has resulted in a stay of the August compliance date. However, there were indications that the court would lift the stay prior to the August compliance date, which caused lenders and service providers subject to the Rule to implement new compliance programs based on payment prohibitions and other payment disclosure requirements.

Nevertheless, the industry received some good news last week as the court issued an [Order](#) that confirmed that the stay of the August 19, 2019 compliance date is continued in full force and effect. *Community Financial Services Association v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. May 30, 2019). Lenders have no obligation to comply with the Rule until the court-ordered stay is lifted. We note that the court ordered both parties to file a Joint Status Report by August 2, 2019, so it is unlikely that the stay will be lifted prior to that date. In addition, the industry consensus is that the court will not lift the stay in August because lenders would not have sufficient time to comply with the Rule. However, this is purely speculative. We will continue to monitor court filings and industry chatter to stay abreast of any changes to the compliance date for the payment provisions.

The Summary below provides a high-level overview of the scope of the Rule, including a discussion of covered loans and excluded credit products, and an overview of the payments provisions.

Scope of Rule

The Rule applies to "lenders" who make "covered loans." A "lender" is defined in the Rule as a person who regularly extends credit to consumers primarily for personal, family, or household purposes. A "covered loan" includes:

1. Any short-term loan with a term of 45 days or less;
2. Longer-term loans (regardless of rate) that have certain types of balloon-payment structures. For closed-end credit that provides for a single advance, a balloon payment is defined as either:
 - A loan where the consumer is required to repay the entire balance of the loan in a single payment more than 45 days after consummation; or
 - A loan where the consumer is required to repay the loan through at least one payment that is more than twice as large as any other payment(s);

3. Any longer-term loan with a term of more than 45 days where the cost of credit (APR) for the loan exceeds 36%, as measured, and the lender obtains a “leveraged payment mechanism” at any time during the term of the loan.

In some business arrangements, service providers or other parties conduct certain functions on behalf of lenders. The Rule treats covered loans made pursuant to such business arrangements the same as covered loans made by a single entity.

Leveraged Payment Mechanism

A lender or service provider obtains a leveraged payment mechanism if it has the right to initiate a transfer of money, through any means, from a consumer’s account to satisfy a loan obligation. However, a lender or service provider does not obtain a leveraged payment mechanism by initiating a single immediate payment transfer at the consumer’s request. A single immediate payment transfer is a payment transfer initiated by a one-time electronic fund transfer within one business day after the lender obtains the consumer’s authorization for the one-time electronic fund transfer, or a one-time transfer initiated within one business day after the consumer proffers a check to the lender.

Which Credit Products are Excluded?

- Purchase money loans (except refinances of a purchase money loan). A purchase money loan means credit extended for the sole and express purpose of financing a consumer’s initial purchase of a good when the credit is secured by the property being purchased, whether or not the security interest is perfected or recorded. The exclusion would not apply to refinances of credit extended for the purchase of a good.
- Real estate secured credit, including home mortgages and credit secured by personal property used as a dwelling;
- Credit cards;
- Student loans, both federal and private;
- Non-recourse pawn loans;
- Overdraft services and lines of credit;
- Certain wage advance programs;
- No cost advances;
- Conditional exemption for alternative loans that generally conform to the National Credit Union Administration (NCUA)’s requirements for the Payday Alternative Loan (PAL) program; and
- Conditional exemption for accommodation loans, provided the lender together with its affiliates do not originate more than 2,500 covered loans in a calendar year, and did not derive more than 10% of their receipts from covered loans during the previous tax year.

Requirements of the Rule

Payment Prohibition

Generally, a lender is prohibited from attempting to initiate a payment transfer in connection with a covered loan if the lender previously has made two consecutive failed payment transfers in connection with a covered loan, unless the lender obtains a “new and specific authorization” from the consumer. The Rule considers more than two attempts to withdraw payment from a consumer’s account in connection with a covered loan to be an abusive and unfair practice. This prohibition on further withdrawal attempts applies whether the two failed attempts are initiated through a single payment channel or different channels, such as the automated clearinghouse system and the check network. After a second failed attempt, through any channel or channels, a lender would be required to follow various requirements for obtaining a new and specific payment

authorization from the consumer. Alternatively, the consumer may elect to request a single immediate payment transfer. The lender would also be required to provide a consumer rights notice, as discussed below.

Disclosures

First Payment Withdrawal Notice

A lender is required to provide a consumer with notice before its first attempt to withdraw payment for a covered loan from the consumer's account.

Unusual Payment Withdrawal Notice

A lender also must provide a consumer with notice prior to initiating an "unusual withdrawal," which is a payment transfer that will deviate from previously scheduled amounts or dates, or that involves a different payment channel than the prior attempt. Note that the Rule provides an exception to the unusual payment withdrawal notice requirements and does not require the notice when the lender initiates a "single immediate payment transfer" at the consumer's request.

Consumer Rights Notice

The Rule also requires a lender to provide a consumer rights notice if two consecutive attempts to withdraw payment have failed due to insufficient funds in a consumer's account.

Delivery of Notices

A lender may electronically deliver notices required by the Rule as long as the consumer consents to electronic communications, and the lender complies with the electronic delivery consent requirements under the Rule. When obtaining consent to provide electronic disclosures, the lender must provide consumers with an option to receive notice by email. However, lenders may not provide disclosures electronically if the consumer revokes consent or if the lender is notified that the consumer is unable to receive notices at the address or number provided.

Procedures, Evidence, and Evasion

A lender making a covered loan must develop and follow written policies and procedures designed to ensure compliance with the Rule. Lenders must also retain evidence of compliance for 36 months after the date on which a covered loan ceases to be an outstanding loan. Finally, the Rule includes a prohibition on evasion and provides several illustrative examples in the Commentary.

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For further information, please reach out to one of the authors of this alert or another member of the firm's [Consumer Financial Services Group](#).



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