



October 30, 2012

CFPB ISSUES ABILITY TO PAY PROPOSAL

The Consumer Financial Protection Bureau ("CFPB") has proposed to amend Regulation Z and its official interpretation to remove the "independent" ability-to-pay requirement for credit cards on consumers who are over the age of 21 and to permit card issuers to consider income to which such consumers have "a reasonable expectation of access." See Docket No. CFPB-2012-39 (Oct. 17, 2012).

This proposal comes on the heels of criticism that the independent ability-to-pay requirement has prevented spouses and partners who do not work outside the home from obtaining credit. The CFPB proposes to amend Section 1026.51(a) of Regulation Z in two respects: (i) to remove all references to an "independent" ability to repay from the regulation and its commentary and (ii) to permit card issuers to consider income or assets to which an applicant, who is 21 or older, has reasonable access. Young consumers (under age 21) without a cosigner must still have an independent ability to pay. The proposal includes examples in the commentary of those circumstances in which the expectation of access is deemed to be reasonable or unreasonable.

The CFPB is proposing certain technical amendments to the young consumers (under age 21) provisions in Section 1026.51(b) for conformity with the amendments to 1026.51(a). The CFPB is also proposing several new comments to explain how the independent ability-to-pay standard under Section 1026.51(b) differs from the more general ability-to-pay standard under Section 1026.51(a).

Credit card issuers should be prepared to re-evaluate their application practices and their procedures for determining ability-to-pay, including reliance on applicant-provided salary, income and asset information, in the event that the proposed rule becomes final. Revisions to application forms may be appropriate. The CFPB recognizes that card issuers may need to ask a series of questions to obtain adequate underwriting information in applications used for both young and older consumers.

Comments are due 60 days following publication in the Federal Register. □

✧ *Mike Tomkies and Kathleen Caress*

CFPB ISSUES LARGER PARTICIPANTS RULE AND EXAM GUIDE FOR COLLECTION

The CFPB recently issued a final rule governing what constitutes a "larger participant" for consumer debt collection. The final rule defines larger participants to include collection agencies, debt buyers and law firms with \$10 million in annual receipts resulting from consumer debt collection agencies. The CFPB noted that this threshold would likely bring approximately 175 out of the estimated 4,500 entities currently engaging in debt collection – or approximately 4% of all debt collection firms, representing 63% of receipts in the consumer debt collection market – under CFPB supervision. The CFPB already has jurisdiction over the debt collection activities of many banks and nonbanks, and their respective third party vendors and servicers, under other authority.

The final rule defines "receipts" as "total income" (or in the case of a sole proprietorship, "gross income") plus the "cost of goods sold" as these terms are defined and reported on IRS tax return forms. The term does not include net capital gains or losses or medical debt collections. Annual receipts are measured as the average of a person's most recently completed three fiscal years, or the average receipts for the entire period the person has been in business if it has less than three completed fiscal years. The calculation of annual receipts also implements the aggregation requirement by providing that the annual receipts of a person will be added to the annual receipts of each of its affiliated companies. Such aggregation includes the receipts of both the acquired and acquiring companies in the case of an acquisition occurring during any relevant measurement period.

The rule defines "consumer debt collection" differently from the proposed rule, as a debt collector's collection of debt incurred by a consumer primarily for personal, family or household purposes and related to any consumer financial product or service. The CFPB made several clarifying changes and declined to make others. Business debts and business-purpose debts, for example, are excluded. Traditional loan servicing also is more clearly excluded by specifically excluding debts not in default when obtained. The CFPB declined to exclude certain student loans and attorneys generally.

The effective date for the rule is January 2, 2013.

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The CFPB also released its examination procedures. The examination modules include:

- Communications in connection with debt collection;
- Information sharing, privacy, and interactions with consumer reporting agencies;
- Consumer complaints, dispute resolution, and debt validation;
- Payment processing and account maintenance;
- The Equal Credit Opportunity Act; and
- Litigation practices, repossession, and time-barred debt.

In various prepared remarks, the CFPB has stressed that its supervision program will allow the CFPB to examine larger participants on-site and evaluate the various problems that pose risks to consumers. Among the risks highlighted are: (i) the accuracy and integrity of information over time (from initial creditor through subsequent owners), (ii) the adequacy of disclosures, such as debtors' ability to dispute, (iii) prompt responses to consumer inquiries, complaints and disputes and (iv) the integrity of communications. The CFPB intends to continue and broaden efforts to coordinate enforcement with other state and federal authorities, including state attorneys general, the Federal Trade Commission, and state and federal prudential regulators.

Both larger participants covered by the rule and other persons engaged in collection activities should review their internal processes and third party relationships carefully in light of the CFPB guidance and efforts as both supervisor and enforcer, considering all aspects of the collection process (from credit origination through operations to final charge-off and abandonment). □

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