DREHER TOMKIES LLP

ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

July 10, 2020

CFPB ISSUES FINAL PAYDAY RULE REVOKING ABILITY TO PAY PROVISIONS BUT LEAVING PAYMENT PROVISIONS

The Consumer Financial Protection Bureau ("CFPB") issued its final rule regarding Payday, Vehicle Title and Certain High-Cost Loans ("Rule"). The final Rule will be effective 90 days after its publication in the Federal Register. As anticipated, the Rule as revised revokes the ability to pay and underwriting provisions, but leaves in place the payment provisions that apply to "covered loans." Although the ability to pay and underwriting provisions received the most attention when the Rule was first released and throughout the process, the payment provisions apply broadly and will create operational challenges for lenders.

The Rule was originally released in October of 2017 and became effective on January 16, 2018. The Rule's compliance date for the payment provisions was August 19, 2019. The compliance date is currently stayed pursuant to a court order issued in *Community Financial Services Association v. CFPB*, No. 1:18-cv-00295 (W.D. Tex. Nov. 6, 2018).

The payment provisions of the Rule apply to "covered loans." Covered loans can be closed-end or open-end and are defined to include three categories of credit products as described below.

The first category is "Short Term Loans," defined as:

(1) for closed-end credit that does not provide for multiple advances, the consumer is required to repay substantially the entire amount of the loan within 45 days of consummation, or

(2) for all other loans, the consumer is required to repay substantially the entire amount of any advance within 45 days of the advance.

The second category is "Longer Term Balloon Payment Loans," defined as:

(1) for closed-end credit that does not provide for multiple advances to consumers, the consumer is required to repay substantially the entire balance of the loan in a single payment more than 45 days after consummation or to repay such loan through at least one payment that is more than twice as large as any other payment(s), or

(2) for all other loans, either:

(a) the consumer is required to repay substantially the entire amount of an advance in a single payment more than 45 days after the advance is made or is required to make at least one payment on the advance that is more than twice as large as any other payment(s), or

(b) a loan with multiple advances is structured such that paying the required minimum payments may not fully amortize the outstanding balance by a specified date or time, and the amount of the final payment to repay the outstanding balance at such time could be more than twice the amount of other minimum payments under the plan.

The third category is "Longer Term Loans," defined as credit products with terms of more than 45 days that have (i) a "cost of credit" that exceeds 36% per annum, and (ii) a form of "leveraged payment mechanism" that gives the lender a right to withdraw payments from the consumer's account.

A lender 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 an obligation on a loan, except that the lender does not obtain a leveraged payment mechanism by initiating a single immediate payment transfer at the consumer's request. "Account" means a demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household purposes.

The Official Interpretations provide in regard to timing for coverage determination that a loan may become a covered longer-term loan at any such time as both of the requirements are met. For example a lender originates a closed-end loan that is not a longer-term balloon-payment loan to be repaid within six months of consummation with a cost of credit equal to 60 percent. At the time of consummation, the loan is not a covered longer-term loan because it does not have a leveraged payment mechanism. After two weeks, the lender obtains a leveraged payment mechanism. The loan is now a covered longer-term loan because it meets both of the requirements. Thus, a loan can become a covered loan subject to the rule after origination.

The payment provisions contain the following two requirements:

1. <u>Disclosure of Payment Transfer Attempts</u>: Prior to initiating the

Darrell L. Dreher
ddreher@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Emily C. Cellier
ecellier@dltlaw.com

Susan L. Ostrander
sostrander@dltlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DLTLAW.COM

Michael C. Tomkies
mtomkies@dltlaw.com

Susan M. Seaman
sseaman@dltlaw.com

Lindsay P. Valentine
lvalentine@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

Robin R. De Leo
robin@deher-la.com

first payment withdrawal or an unusual withdrawal from a consumer's account, a lender must provide to the consumer a payment notice in accordance with the Rule. The notice must contain an identifying statement, transfer terms, payment breakdown and lender name and contact information. If the lender provides the first payment withdrawal notice through electronic delivery, the lender must send the notice no earlier than when the lender obtains payment authorization and no later than three business days prior to initiating the transfer. .

2. Prohibited Payment Transfers: A lender must not initiate a payment transfer from a consumer's account in connection with any covered loan that the consumer has with the lender after the lender has attempted to initiate two consecutive failed payment transfers from that account in connection with any covered loan that the consumer has with the lender. Thus, after two failed attempts, the lender would have to obtain a new ACH authorization.

Under the Rule payment transfer means any lender-initiated debit or withdrawal of funds from a consumer's account for the purpose of collecting any amount due or purported to be due in connection with a covered loan. A debit or withdrawal meeting the description above is a payment transfer regardless of the means through which the lender initiates it, including, but not limited to, a debit or withdrawal initiated through any of the following means:

(1) Electronic fund transfer, including a preauthorized electronic fund transfer;

(2) Signature check, regardless of whether the transaction is processed through the check network or another network, such as the automated clearing house (ACH) network;

(3) Remotely created check; or

(4) Remotely created payment order.

In light of the U.S. Supreme Court's *Selia Law* decision, the CFPB also specifically ratified the payment provisions by a separate issuance. The CFPB indicated that it will continue to assess the effect of the payment provisions and determine if further action is warranted.

For more detail on the Rule's applicability or the requirements of the payment provisions, please feel free to contact us. We will continue to review the Rule and any guidance provided to determine the Rule's full impact on lenders. ❑

✧ *Elizabeth Anstaett and Mike Tomkies*