CFPB AND TEXAS TRADE GROUPS SET STAGE FOR TEXAS COURT TO OPINE ON THE CFPB'S PAYDAY LOAN RULE

Two Texas trade groups are challenging the Consumer Financial Protection Bureau's ("CFPB") authority to enact the Payday, Vehicle Title and Certain High-Cost Installment Loan rule ("Rule") in a Texas federal court. *See Com. Fin. Servs. Assoc. of Am., Ltd and Cons. Servs. Alliance of Texas v. Cons. Fin. Prot. Bureau*, No. 18-cv-0295-lv (W.D. Tex., Nov. 20, 2020).

In March 2019, the court continued a court ordered stay on the effective date of the Rule. *See* our prior ALERT dated April 2, 2019. On August 20 2020, the court lifted the stay of litigation it had also granted. After this order was granted, the case received a number of filings from both parties, including an amended complaint from the trade groups, motions for summary judgment from both parties and reply briefs from both sides.

The trade groups' amended complaint, motion for summary judgment and opposition and reply to the CFPB's motion for summary judgment emphasize that the Supreme Court invalidated the CFPB's prior Director's actions as constitutionally defective. See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). Thus, the Rule was void from the start and to enforce it would require a new and valid rulemaking process. The trade groups further argue that the CFPB cannot cure the constitutionally tainted Rule by ratification because there was no proper ratification process. Relying on prior case law, the trade groups argue that the new CFPB Director did not make a detached and considered judgment of the Rule and instead "rubber-stamped" the results of an invalid notice-and-comment process.

In their filings, the trade groups also make multiple arguments for the invalidity of the payments provisions of the Rule. *See* our prior ALERTS dated Feb. 12, 2019 and Oct. 24, 2017 for details of the Rule. First, the trade groups argue that the purported ratification of the payments provisions of the Rule exceeded the CFPB's statutory authority and violated the Administrative Procedures Act ("APA"). The trade groups argue that the purported ratification was arbitrary and capricious within the meaning of the APA because the payments provisions were based on premises that the CFPB either rendered false or rejected in revoking the Rule's underwriting provisions.

Second, the trade groups allege that apart from the defective ratification, the payment provisions of the Rules are invalid and violate the APA because in adopting the payments provisions, the CFPB (i) overstepped its statutory authorizations to ban unfair and abusive practices, (ii) ignored important aspects of the problem it attempted to solve, rendering its analysis arbitrary and capricious, (iii) mangled a statutorily required cost-benefit analysis and (iv) flouted statutory provisions that forbid the CFPB from establishing a usury limit. To support these arguments, the trade groups allege that (i) the payments provisions effectively establish a usury limit in violation of the Dodd-Frank Act because they target installment loans above a specified interest rate, (ii) the CFPB failed to take into account important differences among the various payment transfers covered by the restriction on payment transfer attempts and (iii) the CFPB refused to amend the payment provisions to exclude debit card transactions.

The trade groups also argue that if the court upholds the payments provisions and lifts its stay of the Rule's effective date, the court should allow companies 445 days, or alternatively 286 days, to come into compliance with the payments provisions, rather than allow the CFPB to require immediate compliance.

The CFPB has until December 18th to file its reply in support of its cross-motion for summary judgment. We will continue to monitor further developments and provide updates. ❑

✧ *Mike Tomkies and Lindsay Valentine*

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

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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