AMERICAN BAR ASSOCIATION
Business Law Section

# CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER

July 2016

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## Important Dates

[Business Law Section Annual Meeting](#)
September 8-10, 2016
Boston, MA

[Seventh Annual National Institute on Consumer Financial Services Basics](#)
October 17-19, 2016
Arlington, VA

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## Membership Minute

**CFSC by the Numbers**: As of May 2016, total members = 1,488. This represents a 1.99% increase since May 2015. Keep up the good work in spreading the word about joining the ABA's CFSC - encourage your clients and colleagues to check it out!

**Get Back to Basics!** The Seventh Annual National Institute on Consumer Financial Services Basics will take place from October 17-19 2016 in Arlington, VA. Whether you are an experienced practitioner or new to the world of consumer financial services law, this excellent program will give you what you need in the key areas of this dynamic and ever-changing area of law. Stay tuned for more details and save the date!

**CFSC Website**: Did you know you can find links to helpful information on the website, including past newsletters, meeting materials and non-CLE Webinars? To learn more, visit the CFSC website.

**Get Involved in the CFSC**: Want to get more involved in

## Leadership Message

Andrew Smith, Chair
Consumer Financial Services Committee

Dear CFSC Members:

In this issue of the CFSC Newsletter, we again showcase our membership with substantive articles on diversity and inclusion, behavioral economics, arbitration, faster payments, and the Supreme Court's recent *Spokeo* decision. We also have "spotlights" on the Young Lawyer Subcommittee as well as our very own former Chair, Alan Kaplinsky, recently the recipient of the Senator William Proxmire Lifetime Achievement Award.

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## Upcoming Meetings


Join us for the 2016 Business Law Section Annual Meeting September 8-10, 2016 in Boston, MA! [Register and reserve your hotel room now](#).

## Subcommittee Spotlight

**Dollars & Cents: The Business Value of Diversity & Inclusion**
**By Juan M. Sempertegui**

During the American Bar Association, Business Law Section's 2016 Spring Meeting in Montreal, Canada, the Diversity & Inclusion Committee presented a Continuing Legal Education (CLE) program titled: *Diversity & Inclusion: Your Clients Care And This Is Why You Should Too!* The panel, moderated by Anne Gwal from Pepco Holdings, Inc., included: Joan Durocher from the National Council on Disability; Kenneth Fredeen from Deloitte LLP (Canada), Business Law Section Advisor Michele Coleman Mayes from the New York Public Library; Samuel M. Reeves from Wal-Mart Stores, Inc.; and Joseph "Joe" K. West from Duane Morris LLP. The program materials for the CLE included written responses to diversity-related inquiries from more than 15 general counsel and legal officers at some of the largest companies in the world. The panelists, and those legal officers that provided written responses, discussed extensively the business value of diversity and its impact on the legal marketplace.

This article incorporates some of the CLE information presented at during the Spring Meeting and provides

## Legal Features

**Deceptive for Whom? The Implications of Behavioral Economics Driven Consumer Financial Services Policy**
**By Xiaoling (Ling Ling) Ang and Stephen Bronars**

Behavioral economics interventions, which include policies such as mandated disclosure that target how consumers receive and process information, have received a fair bit of attention in consumer financial services. The Consumer Financial Protection Bureau (CFPB) has a history of engaging prominent scholars in behavioral economics.

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**Making the Most of the Comment Period on the CFPB's Proposed Arbitration Rule**
**By Joseph L. Robbins**

On May 24, 2016, the Consumer Financial Protection Bureau (the "Bureau") published its proposed arbitration rule in the *Federal Register*, triggering a 90-day period, through August 22, 2016, during which the public can comment on the Bureau's proposal.

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the CFSC? Feel free to contact Carolyn Hann or Grace Powers, CFSC Membership Subcommittee Chair and Vice-Chair, for information.

additional support that diversity and inclusion have become business imperatives for corporations and law firms. First, we analyze the changing demographics and then we consider the tangible benefits that arise from a diverse workforce.

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**Young Lawyers Subcommittee Spotlight**
**By J Robert Savoie and Marci Kawski**

The Young Lawyers Subcommittee focuses on supporting young lawyers with an interest in consumer financial services compliance and litigation. The YL Subcommittee performs several different functions within the Consumer Financial Services Committee.

First, the YL Subcommittee provides opportunities for young lawyers to learn about the consumer financial services industry and meet other young lawyers practicing in the industry. For purposes of the Young Lawyers Subcommittee, a "young lawyer" is an attorney who is either fewer than forty years old or has less than ten years' experience.

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**Faster Payments: A Consumer Protection Perspective**
**By Monami Chakrabarti**

As innovation in the payments industry continues to flourish, there has been significant focus on speed and efficiency, and on creating an environment where consumers, merchants and financial institutions can ultimately exchange payments in real-time. However, consumer protection principles in this area have garnered much less attention.

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**First Nail in the Coffin for No-injury Suits? Supreme Court Makes Clear the Days of Hyper-technical Lawsuit Claims May Be Over.**
**By Richard Gottlieb**

No actual harm, no lawsuit? That might be the end result from the Supreme Court's ruling in *Spokeo, Inc. v. Robins* that a plaintiff must show an injury in fact before pursuing a claim for violation of the federal Fair Credit Reporting Act (FCRA), a holding that could have major repercussions for consumer plaintiffs pursuing claims under a wide variety of consumer protection statutes.

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## Member Spotlight

**American College of Consumer Financial Services Lawyers Senator William Proxmire Lifetime Achievement Award Presented on April 9, 2016 to Alan S. Kaplinsky**

The American College of Consumer Financial Services Lawyers (College) is pleased to present its Senator William Proxmire Lifetime Achievement Award to Alan S. Kaplinsky.

The Proxmire Award is given each year to "a person who has made significant contributions in the field of consumer financial services over that person's career." Alan is a highly deserving recipient of the Award both because of his notable achievements in the area of consumer financial services law and because of the legacy he will ultimately leave behind.

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## Task Force on Auto Finance Dictionary

The Consumer Financial Services Committee has formed a Task Force to draft an Auto Finance Dictionary as an e-book that will be published by the Business Law Section next year. The Dictionary will provide readily accessible and hyperlinked definitions for terms that are used in the auto finance industry, some of which are often misunderstood and misused. The Dictionary will be patterned after a Dictionary of Securitization Terms that the Section published last year. CFSC members Kevin McDonald and John Ropiequet will chair the Task Force. If you are knowledgeable about auto finance and would like to participate in this project, please contact John Ropiequet, (312) 876-7814 or jlropiequet@arnstein.com.

# Leadership Message

In this issue of the CFSC Newsletter, we again showcase our membership with substantive articles on diversity and inclusion, behavioral economics, arbitration, faster payments, and the Supreme Court's recent *Spokeo* decision. We also have "spotlights" on the Young Lawyer Subcommittee as well as our very own former Chair, Alan Kaplinsky, recently the recipient of the Senator William Proxmire Lifetime Achievement Award.

In this Chairman's Message, we will urge you to get more involved in the Committee as a Young Lawyer Liaison, remind you of our recent successes at the spring meeting in Montréal, and encourage you to attend the Business Law Section Annual Meeting in Boston in September, where we will have a *full* slate of CLE programming running from Wednesday through Saturday, including an entire day of programs devoted to Fintech.

**Getting More Involved: Young Lawyers Subcommittee**

We are now in the process of selecting individuals to serve as Young Lawyer Liaisons to our various Subcommittees. This is an exceptional opportunity to become more involved in the planning and coordination – as well as the execution – of programs and articles. In addition, the Young Lawyers Subcommittee organizes Beer & Basics, which is an excellent opportunity to speak in a setting that is less formal than the full Committee meeting. We rely on the leadership of our Committee to provide the quality content and programming which our members have come to expect, and the Young Lawyer Liaisons play a key role in that endeavor.

The leadership of the Young Lawyers Subcommittee already has reached out to all of the Committee members soliciting interest in becoming a Young Lawyer Liaison. Being a Young Lawyer Liaison is the easiest and most effective way to become involved in Committee leadership. Being a Committee leader also can be very effective in reminding your employer of the importance of supporting your attendance at Committee meetings.

We encourage you to respond to the questionnaire and to contact incoming Young Lawyers Subcommittee chair Marci Kawski with any questions.

**Business Law Section Spring Meeting**

The Business Law Section held its Spring Meeting in Montréal in April. Our meetings were well attended, despite travel delays caused by surprisingly tenacious springtime snows. But, on the bright side, it's not every year that we get to have ***two*** "snow" meetings, and, honestly, we would have been a little disappointed if it had been 80° and sunny, given that it is Canada, after all.

Our committee had four of the top five meetings from an attendance perspective. The top attendance-getter was the Fisher Program, with 111 attendees recorded. Other top CFSC programs covered TCPA, collecting and foreclosing mortgage loans, and sanctions. (This final program was presented by members of the Banking Law Committee.)

As always, thank you to our generous sponsors: Davis Wright Tremaine sponsored Beer & Basics; Goodwin Procter hosted our joint reception with Banking Law; and Morrison Foerster treated us to a festive Committee Dinner at L'Atelier Argentine.

Program materials from the Spring Meeting can be found on the CFSC website.

**Business Law Section Annual Meeting**

We will begin the festivities on the afternoon of Wednesday, April 6, at 4:00 PM with Beer & Basics, followed by a joint reception with the Banking Law Committee. The Committee Dinner will be held Thursday, September 8, at Goodwin Procter's palatial new offices overlooking Boston Harbor, and tickets are $110 per person.

All of our meetings will be held at the Westin Copley Place, except for Beer & Basics, which will be held at the Boston Marriott Copley Place.

- You can register for the Annual Meeting and the Committee Dinner here.
- If you already have registered for the Annual Meeting, but have not have registered for the Committee Dinner, you can register for the Committee Dinner here.

Thursday programming includes CLE presentations on the *Spokeo* decision; the evolution of standing in debt collection actions; diversity and Dodd Frank § 342; and the CFPB's proposed arbitration rule. In addition, our own Prof. Chris Peterson will present his soon-to-be-published article empirically analyzing the results of the CFPB's enforcement program.

On Friday, we will devote a full day of programming to Fintech issues, with panels covering:

- defenses against cyber-attacks;
- paperless auto finance transactions;
- a comparison of US and foreign Fintech regulation;
- alternative lending platforms for credit cards, student loans and mortgages;
- the future of regulatory risk management in marketplace lending (presented by members of the Banking Law Committee);
- machine-learning and the compliance challenges that it presents;
- the blockchain and consumer protection; and
- Fintech and housing finance.

On Saturday, we have another full day of programming, beginning with an in-depth look at the CFPB's HMDA rule, a program focused on CFPB and industry efforts to improve financial literacy, and ***two hours of ethics CLE***, geared towards financial services lawyers practicing at or before state and federal agencies.

*Andrew Smith, Chair*
*Consumer Financial Services Committee*

# Dollars & Cents: The Business Value of Diversity & Inclusion

By Juan M. Sempertegui[1]

Diversity and inclusion discussions have traditionally focused on creating equal opportunities for everyone, especially those in the minority based on gender, race, sexual orientation, and/or disability. In recent years, it has become quite clear that diversity also matters in business. The historic changing demographics of the United States should be forcing corporations and their law firms to consider diversity and inclusion of individuals from different backgrounds as imperative to growth and relevance.

During the American Bar Association, Business Law Section's 2016 Spring Meeting in Montreal, Canada, the Diversity & Inclusion Committee presented a Continuing Legal Education (CLE) program titled: *Diversity & Inclusion: Your Clients Care And This Is Why You Should Too!* [2] The panel, moderated by Anne Gwal from Pepco Holdings, Inc., included: Joan Durocher from the National Council on Disability; Kenneth Fredeen from Deloitte LLP (Canada), Business Law Section Advisor Michele Coleman Mayes from the New York Public Library; Samuel M. Reeves from Wal-Mart Stores, Inc.; and Joseph "Joe" K. West from Duane Morris LLP. The program materials for the CLE included written responses to diversity-related inquiries from more than 15 general counsel and legal officers at some of the largest companies in the world. The panelists, and those legal officers that provided written responses, discussed extensively the business value of diversity and its impact on the legal marketplace.

This article incorporates some of the CLE information presented at during the Spring Meeting and provides additional support that diversity and inclusion have become business imperatives for corporations and law firms. First, we analyze the changing demographics and then we consider the tangible benefits that arise from a diverse workforce.

*Diverse Consumer*

As of July 1, 2014, the U.S. Census determined that the U.S. population is comprised of 13.2% African-Americans, 5.4% Asians, 17.4% Latinos and 62.1% Whites, not including Latinos.[3] As a result, more than 35% of the population is considered multicultural and it is projected to substantially increase in the coming years. Specifically, by around 2020, "'more than half of the nation's children are expected to be part of a minority race or ethnic group' … [and] 'by 2044, the Census Bureau predicts no one racial or ethnic group will dominate the U.S. in terms of size.'"[4] So why do these numbers matter for law firms and in-house counsel? The answer is quite simple - buying power.

From 2000 to 2013, the buying power for African-American households increased by 78%, for Asian American households it increased by 160%, and for Latino households the increase was 142%.[5] Of note, Asian households, which have a higher median household income, spent 21% more than the average U.S. household.[6]

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[1] Juan M. Sempertegui works for a state financial regulatory agency and serves as the Vice-Chair for the Lawyers of Color Subcommittee in the American Bar Association, Business Law Section's (ABA-BLS) Diversity & Inclusion Committee. Special thanks to Kenneth Fredeen, Jason Goitia, Michelle Mayes, Dalila Sempertegui and Chris Young for their assistance.

[2] ABA-BLS Diversity & Inclusion Committee is led by Chair by Sylvia Chin from White & Case LLP and Vice-Chair Chris Young from Young Law Firm, PLLC. The CLE Program Chairs were Juan Sempertegui and Wilson Chu from McDermott Will & Emery LLP and the Program Materials Coordinator was Grace E. Robson from Markowitz, Ringel, Trusty & Hartog, P.A.

[3] Quick Facts, U.S. Census Bureau (July 1, 2015) https://www.census.gov/quickfacts/table/RHI125214/00.

[4] Bill Chappell, *For U.S. Children, Minorities Will Be The Majority By 2020, Census Says*, National Public Radio (Mar. 4, 2015) http://www.npr.org/sections/thetwo-way/2015/03/04/390672196/for-u-s-children-minorities-will-be-the-majority-by-2020-census-says.

[5] Catalyst, *Buying Power: People of Color in the U.S.*. (May 20, 2015)http://www.catalyst.org/knowledge/buying-power-people-color-us.

[6] *Id.*

Companies such as BB&T Bank have recognized these demographic changes and acted by creating a multicultural markets division.[7] The bank recognized that the "major source of population growth is now represented by persons of African, Asian and Latino heritage" and focused on hiring "native-speaking associates to address communication and cultural differences" to serve them better.[8] The company's efforts resulted in increasing BB&T's "multicultural financial centers by 35%, to 350."[9]

In terms of individuals with disabilities, the American Community Survey estimates that the "overall rate of disability in the U.S. population in 2014 was 12.6%."[10] But this underestimates the size of the market. In the *2016 Annual Report: The Global Economics of Disability*, it is noted that the estimated population of 1.3 billion people with disabilities are an emerging market the size of China, and when you add family and friends, the number of potential customers grows by another 2.4 billion.[11] This could represent 53% of the consumer market, and that number will grow as boomers, with their significant spending power, age. In terms of attorney employment, a 2012 study from the Washington State Bar Association found that 21% of its members have a disability, but yet employers nationwide frequently report less than 1% of their employees as having a disability.[12] It is also worth noting that people with disabilities are represented in all other diverse groups.

"Efforts to quantify the LGBT [lesbian, gay, bisexual, and transgender] population, both by the government and outside polling sources, are relatively new, with much still unknown about this subsection of America."[13] As a result, it is currently difficult to provide reasonable US estimates of the LGBT makeup in the population. Nonetheless, there is little doubt that the LGBT population is a prevalent part of the U.S. population and the marketplace.

It is undisputed that the substantial demographic change to a more diverse consumer base will impact the approaches that corporations take to market their products and services. To effectively serve their clients, law firms must be sensitive to these approaches and the changing marketplace. As noted below, many legal officers are mindful of these shifts and are already acting accordingly:

*We live our values every day and everywhere, collaborating for the benefit of our customers, investors, employees, communities and partners. As the demographics of each of these key stakeholder groups grow more diverse, as the world in which we live and operate becomes increasingly global, and as the competition for customers and top talent becomes increasingly fierce, Alcoa will continue to succeed only if we foster an environment where people can bring unparalleled creativity, energy and new ways of thinking to the table.* **Audrey Strauss, Executive Vice President, Chief Legal Officer, Alcoa Inc.**

*Collaborating with a diverse group of coworkers, who reflect the customers and communities we serve, has led to better problem solving, thereby positively impacting our customer satisfaction ratings and service reliability efforts.* **Kevin Fitzgerald, Executive Vice President and General Counsel, Pepco Holdings, Inc.**

*Hundreds of millions of diverse customers and members shop in our stores and clubs each week. The more we reflect our customers and their perspectives, the better positioned we will be to meet their needs.* **Samuel M. Reeves, Senior Vice President, General Counsel, Wal-Mart Stores, Inc.**

[7] Walt Abro, *Marketing to Multicultural Customers* ABA Bank Marketing (Mar. 2, 2015) http://ababankmarketing.com/insights/marketing-to-multicultural-customers/.
[8] *Id.*
[9] BB&T Bank, *Multicultural Outreach*, https://www.bbt.com/about/cra/multicultural-outreach.page (last visited June 12, 2016).
[10] 2015 Disability Statistics Annual Report, Institute on Disability/UCED (Jan. 2016) http://www.disabilitycompendium.org/docs/default-source/2015-compendium/annualreport_2015_final.pdf.
[11] Rich Donovan, *2016 Annual Report: The Global Economics of Disability*, Return on Disability (May 2016) http://www.rod-group.com/sites/default/files/2016%20Annual%20Report%20-%20The%20Global%20Economics%20of%20Disability.pdf.
[12] Terry Carter, *The biggest hurdle for lawyers with disabilities: preconceptions*, ABA Journal, (June 1, 2015) http://www.abajournal.com/mobile/mag_article/the_biggest_hurdle_for_lawyers_with_disabilities_preconceptions.
[13] Lindsey Cook, *Where Does Gay America Live?*, U.S. News & World Report (Mar. 20, 2015) http://www.usnews.com/news/blogs/data-mine/2015/03/20/new-data-offer-picture-of-gay-america.

*Diversity [s]trengthens our culture and increases our agility and ability to compete in a complex, fast-paced, global environment, [e]nables us to deepen our understanding of customers in each of our markets and businesses, [u]nleashes creativity, innovation and business value by welcoming different perspectives, experiences and beliefs, [r]educes and eliminates barriers to full participation in the workplace to help all employees reach their greatest potential.* **Melissa Kennedy, Executive Vice-President and Chief Legal Officer, Sun Life Financial**

*We believe that an inclusive and diverse workforce, where we learn from our differences, leads to higher employee engagement, which is integral to creating great customer experiences and enhanced loyalty.* **Bindu Cudjoe, Deputy General Counsel & Chief Administrative Officer Bank of Montreal**

*Tangible Benefits*

The value of diversity extends beyond appealing to consumers. Employees from diverse backgrounds also provide tangible benefits to corporations and law firms in many distinct ways.

Acritas Research Ltd. published a Diversity Report on May 12, 2016, addressing the impact of a diverse legal team.[14] The report is based on 1,771 interviews with senior-in-house counsel around the world, with respondents defining diversity primarily in terms of gender, but also according to race and ethnicity, nationality, LGBT identification, age and years of experience. The survey determined that "compared to 'not at all diverse' external legal support teams, 'very diverse' teams provide a superior performance to their clients across all key performance areas."[15]

The evidence gathered in the study established that diverse teams deliver enhanced performance across various attributes "including responsiveness, business understanding, client focus, commerciality and efficiency."[16] Specifically, law firms were "more than one and a half times as likely to achieve a perfect ten performance score from their clients when the team was considered diverse." In addition, law firms with diverse teams received over 3 times higher Net Promoter Score.[17] As a result, the clients were much "more likely to promote the law firm they are working with to others," the "ultimate signal of a strong client relationship."[18] The proof manifests itself in share of wallet,[19] with very diverse teams earning 25% more in revenue than not at all diverse teams. The study found similar substantial benefits to in-house teams.[20] Legal departments with diverse teams were found to have improved overall performance, better value, better relationships, and improved efficiency compared to non-diverse teams.

The survey results clearly establish that a diverse team has a positive impact on both sides of the legal relationship. As stated below, in-house counsel from various corporations also recognize the value of diversity:

*At 3M, we view diversity as the appreciation of differences, and we use inclusion of those differences as a competitive advantage to power our curiosity and creativity. By enabling broader perspectives, insights, and ideas, diversity and inclusion gives us a greater edge in all we do. And diversity and inclusion allows everyone in the workplace to bring his or her "full self" to work and be respected and v*alued. **Ivan Fong, SVP, Legal Affairs & General Counsel, 3M Company**

*We believe diverse teams create greater innovation with different approaches, questions and ideas.* **Horacio Gutierrez, General Counsel and VP of Legal Affairs, Microsoft Corporation**

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[14] Acritas Sharper Insight, *Acritas Global Legal Diversity Survey Finds Diversity Delivers 25% Higher Share of Wallet*, (May 12, 2016) http://www.acritas.com/news/diversity-delivers-25-higher-share-wallet.
[15] *Id.*
[16] *Id.*
[17] "Net Promoter Score" is a customer loyalty metric developed by (and a registered trademark of) Fred Reichheld, Bain & Company, and Satmetrix. See Frederick F. Reichheld, *The One Number You Need to Grow*, Harvard Business Review (Dec. 2003) https://hbr.org/2003/12/the-one-number-you-need-to-grow/ar/1.
[18] Acritas Sharper Insight, *supra* n.14.
[19] "Share of wallet" is a marketing term referring to the amount of the customer's total spending that a business captures in the products and services that it offers. Increasing the share of a customer's wallet that a company receives is often a cheaper way of boosting revenue than increasing market share..
[20] Acritas Sharper Insight, *supra* n.14.

*The differing perspectives brought to the workplace by employees who reflect the culture in which we operate helps ensure that the organization's products and services meet the needs of the different communities in our society, and helps ensure that our organization stays away from "groupthink" and other cultural biases.* **John Mountain, SVP, Legal, CCO & Corporate Secretary, NEI Investments**

*We may believe that we are considering all aspects of an issue, but if everyone involved in the debate approaches the issue from the same perspective, we run the risk of thinking we have considered all options when in reality we are just operating in an echo chamber. It therefore is vital that our legal department, and our outside counsel, include individuals with diverse backgrounds, life experiences, and perspectives. Without that diversity, we can't produce the best and most complete legal guidance to our clients.* **Craig Silliman, Executive VP – Public Policy and General Counsel, Verizon Communications.**

*Conclusion*

Inclusion of diverse lawyers will play a major role in helping law firms and corporations deal with the demographic shifts that are taking place. The changes are real and they are having a substantial impact on the marketing of products and services. The associated challenges will require addressing many issues with new approaches. Hence, as Business Law Section Advisor Michelle Mayes stated in Montreal, quoting Carla Harris, a Managing Director at Morgan Stanley:

"To have the innovation everyone seeks, you need new ideas;
To generate new ideas, you need different perspectives;
To have different perspectives, you need different experiences,
And to achieve this, you need diversity."

# Young Lawyers Subcommittee Spotlight

By J Robert Savoie, McGlinchey Stafford PLLC (Vice-Chair) and
Marci Kawski, Whyte Hirschboeck Dudek S.C. (Vice-Chair and incoming Chair)

The Young Lawyers Subcommittee focuses on supporting young lawyers with an interest in consumer financial services compliance and litigation. The YL Subcommittee performs several different functions within the Consumer Financial Services Committee.

First, the YL Subcommittee provides opportunities for young lawyers to learn about the consumer financial services industry and meet other young lawyers practicing in the industry. For purposes of the Young Lawyers Subcommittee, a "young lawyer" is an attorney who is either fewer than forty years old or has less than ten years' experience.

Second, the YL Subcommittee provides opportunities for young lawyers to speak at American Bar Association meetings. In these capacities, the YL Subcommittee hosts the first presentation of each meeting, referred to as the Beer & Basics series. The Beer & Basics series focuses on introducing young lawyers to various consumer financial services topics. These issues have included primers on a wide variety of topics. Traditionally three young lawyers speak at these presentations.

Third, the YL Subcommittee provides opportunities for young lawyers to network with a huge number of attorneys practicing in the consumer financial services industry. These opportunities range from the speaking opportunities noted above to various informal introductions, lunches, and dinners.

Finally, the YL Subcommittee provides the initial opportunity for young lawyers to get involved in the leadership of the Consumer Financial Services Committee. The YL Subcommittee administers the Young Lawyer Liaison program, which pairs one or more young lawyers with each of the various other subcommittees of the Consumer Financial Services Committee. These positions allow young lawyers to demonstrate their commitment to the Consumer Financial Services Committee and gain visibility in the consumer financial services industry more generally. Young Lawyer Liaisons also have the opportunity to draft a 101 Series article, which is a short written piece highlighting some of the fundamentals of their committee's substantive focus. These pieces are published on the YL CFS website.

The term of the vast majority of the Young Lawyer Liaisons are ending in September of this year and the YL Subcommittee will be circulating an invitation for all young lawyers to apply for a position. Please keep a look out for the application materials in the next couple months! In the meantime, if you are interested in conducting a Beer & Basics presentation or otherwise getting involved, please reach out to the YL Subcommittee leadership.

CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER

AMERICAN BAR ASSOCIATION Business Law Section

JULY 2016

# Deceptive for Whom? The Implications of Behavioral Economics Driven Consumer Financial Services Policy

By Xiaoling (Ling Ling) Ang and Stephen Bronars, Edgeworth Economics, LLC

## I. Introduction

Behavioral economics interventions, which include policies such as mandated disclosure that target how consumers receive and process information, have received a fair bit of attention in consumer financial services. The Consumer Financial Protection Bureau (CFPB) has a history of engaging prominent scholars in behavioral economics: Sendhil Mullainathan, the Robert C. Waggoner Professor of Economics at Harvard, was appointed the first Assistant Director of Research in the spring of 2011;[1] Eric J. Johnson, the Norman Eig Professor of Business at Columbia Business School, has been a visiting scholar since 2014;[2] and Professor Richard H. Thaler, the Charles R. Walgreen Distinguished Service Professor of Behavioral Science and Economics at the University of Chicago Booth School of Business, David Laibson, the Robert I. Goldman Professor of Economics at Harvard, and Justine S. Hastings at Brown[3] have served on the CFPB's Academic Research Council. Cass R. Sunstein, the Robert Walmsley Professor and the founder and director of the Program on Behavioral Economics and Public Policy at Harvard Law School was formerly the Administrator of the White House Office of Information and Regulatory Affairs, which reviews the Paperwork Reduction Act and regulatory impact analyses conducted by the CFPB, from 2009 to 2012.[4]

Insights from behavioral research conducted by these scholars as well as the CFPB staff's understanding of and contributions to the behavioral economics literature are likely to interact with the design, implementation, and enforcement of consumer financial services law. These concepts are likely to be applied in analyses of potentially unfair, deceptive, or abusive acts or practices (UDAAP).[5] Behavioral economics considers how consumer and firm behavior may be affected by how information is presented and interpreted by consumers. Consequently behavioral economics may be especially useful in analyses of alleged deceptive practices where consumers' interpretations of these practices are salient. These interpretations are unlikely to be uniform across consumers, which, in the language of class action litigation, may be at odds with the commonality of the alleged deceptive practices. As we discuss in more detail later in the article, variation in the way in which policy affects different consumers may have greater repercussions in consumer financial services markets than in markets for other goods and services. In fact, in its standards for CFPB rulemaking, §1022(b)(2) of the Dodd-Frank Consumer Financial Protection and Wall Street Reform Act (Dodd-Frank Act) explicitly requires that the CFPB consider "the potential benefits and costs to consumers and covered persons, including the potential reduction

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[1] Press Release, CONSUMER FINANCIAL PROTECTION BUREAU, *Treasury Bureau Announce Senior Leadership Hires for the Consumer Financial Protection Bureau* (May 11, 2011) *available at* http://www.consumerfinance.gov/about-us/newsroom/treasury-department-announces-senior-leadership-hires-for-the-consumer-financial-protection-bureau/.

[2] COLUMBIA BUSINESS SCHOOL. Eric. J. Johnson CV (Jan. 2016) *available at* http://www8.gsb.columbia.edu/cbs-directory/sites/cbs-directory/files/faculty_cvs/Johnson%20Eric%20-%20%28MKT%29%20-%20CV%202015.pdf (last visited May 11, 2016).

[3] CONSUMER FINANCIAL PROTECTION BUREAU, *Academic Research Council Members* (April 2014) http://files.consumerfinance.gov/f/201404_cfpb_bios_academic-research-council.pdf.

[4] Cass R. Sunstein, HARVARD LAW SCHOOL. http://hls.harvard.edu/faculty/directory/10871/Sunstein (last visited May 11, 2016).

[5] *See* CONSUMER FINANCIAL PROTECTION BUREAU, *CFPB Supervision and Examination Manual, Version 2* at 110 (Oct. 2012) http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf.

of access by consumers to consumer financial products or services resulting from such rule." [6] In addition, the Dodd-Frank Act requires that regulators consider the effects a policy may have on different groups of consumers.[7]

The potential effects of a behavioral intervention,[8] in contrast with price ceilings or product bans, are not explicitly part of the regulation text or administrative or court decisions, but instead flow from adjustments made by affected parties. Economists refer to these responses and adjustments as general equilibrium effects.[9] While there are various types of behavioral interventions, for the purposes of this article we'll focus on the general equilibrium effects of informational disclosure, given the prominence of mandated disclosure as the focus of §1032 of the Dodd-Frank Act.[10] A disclosure intervention may be particularly appealing to policy advisors because the letter of the intervention does not explicitly limit consumer choice, product offerings, or pricing. The absence of these direct limits on choice may make it easier for constituencies with differing points of view to support the intervention.[11] There's an active research literature on whether and in what circumstances mandated disclosure impacts real life,[12] and, in full disclosure, we've contributed to this research.[13] While we cannot do justice to the body of behavioral economics literature or even the literature on disclosure in the span of this article, by relying on a few simple examples, we hope to shed light on some issues that should be considered when analyzing proposed behavioral policies or evaluating potential deceptive acts or practices related to disclosures, correspondence with consumers, or advertising.

In Section II we discuss the centrality of consumer composition in consumer financial services relative to other industries, then in Section III we present an example-driven introduction to the behavioral insights related to disclosure. Section IV consists of qualitative behavioral analyses of the general equilibrium effects of two potential consumer financial mandated disclosures in student loans and deposit account overdrafts that apply the concepts introduced in Section II and III. Section V concludes.

## II. The Importance of Consumer Composition in Consumer Financial Services

Financial service providers, should, by design, be more concerned with the composition and behavior of borrowers after a product is selected than providers of many other consumer goods and services. To illustrate the contrast, let's first consider a physical consumer product, like a snack cake. The snack cake manufacturer does not particularly care which customers purchase the product or what happens with the snack cakes after they're sold. To the seller, whether Steve and Ling Ling each buy one snack cake or Steve buys two snack cakes, total revenue, costs and profits are the same. In addition, the seller does not care whether the snack cakes are eaten or thrown away.

Now consider the case of a consumer financial product, the residential mortgage. The loan owner[14] (initially the lender) is interested in the mortgage being used to purchase real property because the property is collateral for the loan. If the terms of the mortgage are not fulfilled and the loan is in default, the property can be sold to make the lender whole. Furthermore, over the life of the loan, the borrower has repeated interactions with the lender, perhaps through a contracted servicer. Unlike snack cakes where payment is received at point-of-sale, the loan owner's revenues are received incrementally through monthly mortgage payments. A disruption in this cash flow—a delinquency or default—affects the value of the loan. This repeated interaction means that the lender has a vested interest in how much is borrowed, who is borrowing, and whether the borrower can repay the loan—this is the motivation for underwriting.

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[6] 12 U.S.C. § 5512(b)(2) (2010).
[7] *See* 12 U.S.C. § 5521(b)(2)(A)(ii) for a reference to rural consumers.
[8] A behavioral intervention is a policy designed to counteract consumers' behavioral biases, such as a tendency towards instant gratification. These interventions typically take the form of targeted information provision.
[9] General equilibrium effects are the net effects of a policy once all adjustments are made. To the extent that there are multiple consequences of a policy, general equilibrium analysis takes into account the interactions between all of these effects.
[10] 12 U.S.C. § 5532.
[[11] *See* Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155–1229 (2013) at 1158.
[12] *See* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Discourse*, 159 U. PA. L. REV. 647 (2010); Eric J. Johnson & Daniel G. Goldstein, *Do defaults save lives?*, 302 SCI. 1338-1339 (Nov. 21, 2003).
[13] Xiaoling Ang & Alexei Alexandrov, *Choice Architecture versus Price: Comparing the Effects of Changes in the U.S. Student Loan Market* (June 29, 2016), http://papers.ssrn.com/abstract=2504660.
[14] By loan owner we mean any owner over the life of the loan—if a loan is sold, the seller has an interest in observable loan quality at time of sale.

The lender also cares how much of a product a particular consumer uses. Consider a customer with an excellent credit history and an income of $60,000 who takes out a thirty-year fixed rate mortgage for $300,000 at 4% for a house valued at $375,000. The fundamentals look solid: the loan-to-value ratio (LTV) is 80% and, assuming this is her only debt, the debt-to-income ratio (DTI) is 28.6%, so this is a qualified mortgage[15] that does not require private mortgage insurance. Now if the borrower wants to take out another identical mortgage the LTV would be 160% and his DTI would be 57.3%. Unlike the case of one consumer buying two snack cakes, a second mortgage would probably raise red flags. The lender would probably refuse to make the loan, reduce the loan amount, or charge an interest rate much higher than 4%. This example illustrates how borrowing levels might affect the products offered to one borrower, but does not show how the actions and decisions of one borrower might affect other borrowers.

One way that one borrower can affect another borrower in a loan market is through the risk pool. While it's difficult to determine whether any individual borrower will default on a loan, through data analytics a lender can draw inferences about how a group of borrowers may perform on average. These analyses inform which loan applicants will receive loans and how much they will be charged. Suppose that a lender makes 100 loans for $100 with a single payment at the end of one year. Assume that lenders, if repayment were guaranteed, would be willing to make the loan at an annual interest rate of 10% for total interest income of $1000. If it is expected that 95% of borrowers will repay the loan and 5% of borrowers will default, then expected interest income declines to $950, and $500 in principal is lost, which lowers net revenue to $450. To receive $1000 in net revenue from this loan product, or $10 per loan, the interest rate would have to increase to 15.79%.[16]

What happens when the mix of borrowers changes? Suppose that borrowers who repay the loan are 100% reliable, and the remaining borrowers are simply not going to repay the loan, and the lender cannot tell whether a borrower is reliable or unreliable with available information. A change in market conditions that causes some reliable borrowers to no longer apply for a loan will make the pool of borrowers riskier. If 10% of borrowers are expected to default, lenders can only earn $10 per loan on average, if an interest rate of 22.22% is charged.[17] The riskier the pool gets, the higher interest rates will need to be for lenders to be willing to make loans. But keep in mind that the "reliable" borrowers who remain in the pool, as other "reliable" borrowers exit, now pay a substantially higher interest rate even though they have not changed their own behavior or their reliability as borrowers.

## III. What is Behavioral Economics?

The "behavioral" part comes from repeated empirical observations of people acting in ways that don't appear to make sense when we consider (what we believe is) the full range of options available to the person, including the cost of each option. Economic reasoning applies to any situation where resources are scarce, whether budgets are measured in dollars, calories, or time. Behavioral economics is the marriage of these two concepts.

To make this more concrete, suppose that you are trying to eat a healthy, calorie-restricted diet. You have plans to eat fresh produce, whole grains, healthy proteins and fats, and generally be mindful of what you eat. But...there's cake in the kitchen at work. It's run-of-the-mill supermarket birthday cake. You wouldn't buy it instead of bananas if you were at the supermarket. But it's there, next to the coffee, and you have a meeting that's probably going to run over lunch. Cake it is!

The cake can seem to be the best alternative at the time if you aren't thinking of a broad range of food alternatives, but rather about what is directly in front of you. There may be several brick-and-mortar restaurants serving lunch near your office and even a few food trucks in the neighborhood, but evaluating all available food alternatives takes time and effort; each restaurant has a menu and research is required to learn which food trucks are within walking distance (even if you follow your favorites on Twitter). Filtering through all of this information can pile on pretty quickly,[18] so it may make

[15] CONSUMER FINANCIAL PROTECTION BUREAU, *Basic Guide for Lenders: What is a Qualified Mortgage?*, http://files.consumerfinance.gov/f/201310_cfpb_qm-guide-for-lenders.pdf (last accessed May 11, 2016).

[16] This comes from $95 \times \$100 \times 15.79\% = \$1500$ in interest payments and $5 \times \$100 = \$500$ in lost principal.

[17] This comes from $45 \times \$100 \times 22.22\% = \$1000$ in interest payments and $5 \times \$100 = \$500$ in lost principal, for $\frac{\$500}{50} = \$10$ revenue per loan.

[18] As the people writing this article, and probably the people reading this article, are paid to filter information, this is not necessarily a bad thing from our point of view.

sense to focus on the limited information at hand. And cake is pretty hard to resist—we can have a completely separate discussion about the self-control[19] behavioral economics literature.

Behavioral economics incorporates insights from psychology to build on a substantial body of economic research. It studies how people use scarce resources, and what happens when constraints change. The difference between behavioral economics and the version of economics you may have encountered in an introductory economics class in college is that behavioral economics incorporates potential psychological or cognitive factors that may influence how people weigh tradeoffs. What does this have to do with cake? Suppose the menu for the salad restaurant next door were posted next to the cake. Posting the salad menu might cause some people to resist the temptation of the cake because they are now thinking about a salad. For others, the craving for cake will outweigh the effect of the salad menu. If we compared total birthday cake consumption on days when salad menus were posted to cake consumed on days when the menu was not visible, we might be able to calculate the average effect of the salad menu intervention on all office personnel. But we might also care about the effects on specific individuals of this intervention. Suppose the menu dissuades Steve from eating cake, but Ling Ling is not swayed by the intervention. Because Steve has resisted eating cake, more of it is available and Ling Ling may now choose to eat a second piece of cake. If an unexpected phone call causes Steve to be too busy to buy a salad for lunch, is he better off for having resisted the temptation of the cake?

The only intervention in this example is the prominent placement of a piece of paper, which is essentially a disclosure. As we've illustrated, there can be consequences of introducing a disclosure even for people who appear to ignore the information in the disclosure. This is especially true when the availability or price of the regulated product depends on the composition of people who purchase the product.

## IV. Applications of Behavioral Economics to Consumer Financial Service Disclosures

Behavioral interventions can affect different people in different ways and impact the mix of consumers who want a particular consumer financial product. This can affect the price of the products available as well as cause changes in which products are offered. This implies that behavioral interventions, by potentially changing risk pools, may have real effects on access to and the price of credit, despite not setting limits on pricing or product offerings. To get a handle on how this might work, we think about two hypothetical mandated disclosures: one in the student loan market and one for deposit account overdrafts.[20]

### A. Overborrowing in the Student Loan Market?

There are various factors that should enter into the decision to take out a student loan, including how much a student expects to earn after completing his education and how certain he is that he will complete his schooling. These decisions are tied to decisions about what to study, where to go to school, and how much to work while in school. While students who may have borrowed too much (overborrowers) may receive a lot of press,[21] there is also the potential to borrow too little (underborrow).[22] Underborrowing can manifest in different ways: a consumer may forgo college or training in order to work because he does not appreciate how much his lifetime income could increase with training, or because he's not confident in his ability to succeed in school. Students may also be overly zealous about avoiding student loans and work more hours for pay while in school, for which they may suffer academically.[23] On the flip side, overborrowers may

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[19] Self-control is the ability to forgo something enjoyable today in order to receive future benefits. Procrastination is an example of a failure of self-control. For a discussion of the impact of self-control biases on credit markets, *see* Paul Heidhues & Botond Kőszegi, *Exploiting Naïvete about Self-Control in the Credit Market*, 100 AM. ECON. REV. 2279–2303 (2010), http://www.wiwi.uni-bonn.de/kraehmer/Lehre/TopicsSS14/HeidhuesKoszegi-ExploitingNaivete.pdf

[20] There are currently mandated disclosures in both of these markets: see 34 CFR 601.11 for the Self-Certification Form for private educational loans and 12 CFR 1005.17 for the A-9(A) model consent form for deposit account overdraft services.

[21] *See* Andrew Martin & Andrew Lehren, *A Generation Hobbled by the Soaring Cost of College*, N.Y. TIMES, May 12, 2012, A1, http://www.nytimes.com/2012/05/13/business/student-loans-weighing-down-a-generation-with-heavy-debt.html?pagewanted=all&_r=0; *Break the death grip of student loans* ROCHESTER DEMOCRAT & CHRON., May 16, 2016 http://www.democratandchronicle.com/story/opinion/editorials/2016/05/16/break-death-grip-student-loans/84422212/.

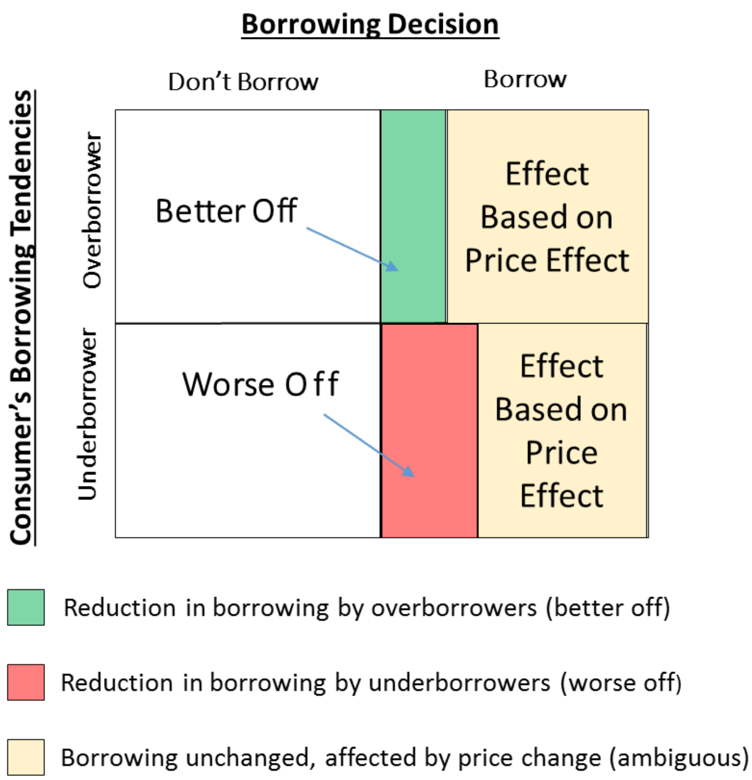
[22] Christopher Avery & Sarah Turner, *Student Loans: Do College Students Borrow Too Much—Or Not Enough?*, 26 J. ECON. PERSP. 165–192 (2012).

[23] Sarah Grant, *You Can't Work Your Way Through College Anymore*, BLOOMBERG (Oct 28, 2015) http://www.bloomberg.com/news/articles/2015-10-28/you-can-t-work-your-way-through-college-anymore.

overestimate their future earnings or academic success, or choose to spend more on non-academic related expenses because they assume they can pay for those expenses in the future. Both overborrowers and underborrowers would be better off if they changed their borrowing behavior, but these adjustments should be in opposite directions.

Consider a campaign to inform consumers about the potential dangers of borrowing too much in student loans. In addition to potentially reducing borrowing by overborrowers, the intervention might dissuade borrowing by some consumers with a tendency to underborrow, as shown in Figure 1. In this case the intervention could exacerbate the tendency to underborrow. If prices (interest rates) don't change, the affected overborrowers are better off and the affected underborrowers are worse off. Prices could change, however, if the mix of credit risks changes. Underborrowers may be better credit risks because they're borrowing less relative to their expected earnings while overborrowers may not be increasing their future earnings by borrowing more. So the effect of the exit of overborrowers on expected future cash flow per borrower may be offset by the exit of underborrowers. If the effect of underborrowers exiting is stronger than the effect of overborrowers then prices (interest rates) should increase, making all borrowers that remain in the market worse off (and vice-versa).

*Figure 1: Student Loan – Intervention to Discourage Overborrowing, Effect on Amount Borrowed*




B. Deposit Account Overdraft

Consider an informational disclosure that makes deposit account overdraft more salient.[24] This could potentially be implemented through highlighting present bias (a tendency towards impatience) or providing specific information about the costs of overdraft. In the following example we assume the current industry-standard per-transaction fee structure of overdraft fees and a fee of $34.[25] Suppose that consumers can be divided into groups based on how much attention they pay to the possibility of overdrafting (attentive vs. inattentive) and whether they have another source of liquidity to draw

[24] *See* 80 Fed. Reg. 53503 (2015). The CFPB issued a 60 day Paperwork Reduction Act Notice on September 4, 2015 for an information request titled "Web-Based Quantitative Testing of Point of Sale/ATM (POS/ATM) Overdraft Disclosure Forms."
[25] This is consistent with the $34 median fee in 2012 at the 33 largest institutions in the market monitoring data used by the CFPB in its 2013 *Study of Overdraft Programs*.CONSUMER FIN. PROT. BUREAU, *CFPB Study of Overdraft Programs* at 52 (June 2013) http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_
overdraft-practices.pdf.

on such as a credit card or another bank account (unconstrained vs. constrained). This is illustrated in Figure 2(A). The consumers in the upper left quadrant pay attention, have enough funds, and never overdraft. The consumers in the upper right quadrant have enough funds but overdraft because they're not paying attention—by inadvertently selecting their debit card instead of a credit card or forgetting about an online payment. Consumers in the lower right quadrant overdraft because they are out of funds, but they are not paying attention to their balance and are unaware of the first transaction that triggers an overdraft. The last group in the lower left is interesting—they are also out of funds but they are strategic in their use of overdrafts. Suppose that a consumer in this category has to make $100 of purchases—$50 at the grocery store, $20 at the pharmacy, and $30 at a big box store—but only has $10 in her checking account. She could trigger an overdraft fee on each purchase for a total of $102 in fees or could anticipate these fees and instead withdraw $100 from an ATM and incur a total of $34 in fees. Granted, consumers would be better off if fees were lower, but conditional on the fee structure and financial constraints, she has minimized overdraft fees.

Figure 2(B) represents an intervention that causes more consumers to be attentive to overdraft fees. Formerly inattentive, unconstrained consumers who became attentive are made better off because they no longer pay overdraft fees, and are represented in green. Formerly inattentive, constrained consumers, in yellow, now consolidate their potential overdraft transactions into a single ATM withdrawal. If the overdraft fees stay the same, then no consumers have been harmed and some have benefited from this intervention. A key insight is that the number of overdraft transactions declines and both the composition of who overdrafts and the average magnitude of an overdraft also change. To the extent that some smaller overdrafts were cross-subsidizing other larger overdrafts, fees may adjust to reflect the new smaller pool of consumers with larger average overdraft amounts. Financially constrained consumers in the lower left quadrant and in the yellow area will struggle to reduce the number and magnitude of overdrafts, and will likely be harmed if the financial institution raises overdraft fees. Inattentive consumers on the right side of the figure do not adjust their overdrafts in response to fees. Consequently, the bank could raise the fee making all the consumers in the red areas strictly worse off. Furthermore, while some consumers in the yellow area may gain from the intervention, the gain from a reduction in overdrafts could be offset by a higher fee so that some consumers may be harmed overall.

## V. Conclusion

Behavioral economics is a vibrant area of economic research and has the potential to provide valuable insight to policy makers. However, it is important to keep in mind that it is embedded in a broader economic framework; the general equilibrium consequences of behavioral interventions should be taken into account. These consequences are especially important in consumer financial services markets, because the composition of consumers who use a product can affect risk pools, pricing, and product offerings.

We hope that in this article we have demonstrated that it can be foolhardy to treat consumers as a homogeneous group in considering the effect of either behavioral interventions or alleged deceptive practices. Behavioral economics does not assume that all consumers are identical, so some consumers may not be harmed at all by, or may even benefit from,[26] an alleged deceptive act. Behavioral economics in the context of disclosures raises many practical considerations for industry participants and regulators, including whether information may be omitted in the interest of brevity and clarity, whether consumers can be expected to interpret the disclosure reasonably under the circumstances, and whether or not it comes across as misleading to certain consumers. When analyzing the impacts of behavioral consumer financial services interventions through regulation, litigation, supervisory guidance, or enforcement, policy makers should take into account not only the average direct effects of the interventions, but also how different consumers may be impacted indirectly by the intervention through the general equilibrium effects on prices and product offerings.

These impacts can often be evaluated empirically using real world data and applying tools from economics—much of the work in behavioral economics has been quantitative. To study the effects of a practice that might be considered deceptive, we would apply econometric techniques to a financial institution's data on customer characteristics (*e.g.,* credit scores, collateral, Census tract) and product usage (*e.g.,* repayment history, draws on lines of credit), and then evaluate how the mix of consumers using the product and their use of the product may be affected by the practice or act in question. We can

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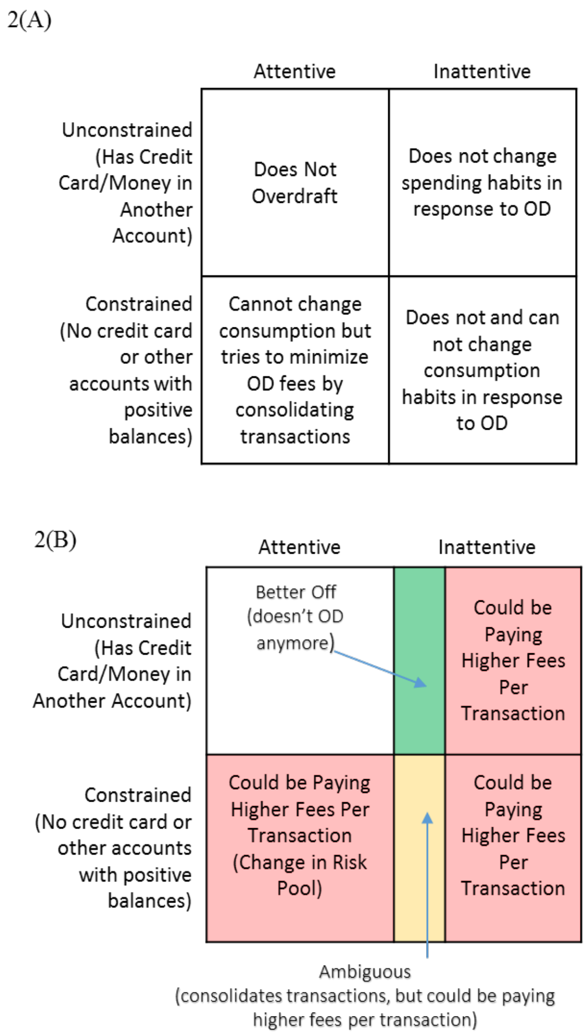
[26] For example, the student borrowers who benefit from lower prices because there are lower risk borrowers in the pool without the disclosure in yellow in Figure 1 or the strategic overdrafters face lower fees in the lower left quadrant in Figure 2.

happily spend (and have spent) hours discussing these approaches in different applications, but will practice self-control and save these topics for a later discussion.

*Figure 2: Overdraft Salience Intervention*



# Making the Most of the Comment Period on the CFPB's Proposed Arbitration Rule

By Joseph L. Robbins,[1] Goodwin Procter LLP

On May 24, 2016, the Consumer Financial Protection Bureau (the "Bureau") published its proposed arbitration rule in the *Federal Register*, triggering a 90-day period, through August 22, 2016, during which the public can comment on the Bureau's proposal.[2]

As has been widely reported, the rule would place significant restrictions on the use of pre-dispute arbitration agreements ("PDAA") in contracts for consumer financial products and services. Specifically, the rule would: (1) prohibit PDAAs that bar consumers from filing or participating in a class action; and (2) require financial services companies that engage in arbitration to submit certain records from arbitration proceedings to the Bureau, including claims and awards, so the Bureau can monitor for "consumer protection concerns that may warrant further Bureau action."[3]

The rule would apply broadly to most consumer financial products and services and companies which provide them ("providers"), and require compliance by the 211th day following the final rule's publication.[4] Industry advocates worry the rule would benefit class action lawyers but hurt consumers and industry alike, while consumer advocates believe the rule would help provide consumers their day in court.

The published Report spans over 100 pages in the *Federal Register*, including detail on consumer protections laws, class actions, and arbitration generally; the Bureau's Arbitration Study; the Small Business Review Panel and other stakeholder research; the legal authority for the Bureau's proposed rule; the preliminary findings underlying the proposed rule; and a section-by-section analysis of the proposed rule and commentary thereto.

Although there is much to comment on, the Report suggests it is unlikely the Bureau will make drastic changes in the final rule. That said, the Report does request comment on certain discrete issues, and these could be where the Bureau is most likely to amend its proposal. Accordingly, stakeholders may want to focus on these particular issues when submitting comments. A discussion of three main areas where the Bureau has specifically requested comment follows.

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[2] *See* Bureau of Consumer Fin. Prot., *Arbitration Agreements*, 81 Fed. Reg. 32830 (May 24, 2016) https://www.gpo.gov/fdsys/pkg/FR-2016-05-24/pdf/2016-10961.pdf (to be codified at 12 C.F.R. pt. 1040) (the "Report").

[3] *Id.* at 32830.

[4] *Id.* at 32924-25, 32896-97.

### *Scope of the Proposed Rule*

The Bureau seeks comment on whether any products or services that the Bureau has proposed to cover should not be covered, and whether any types of consumer financial products or services that it has not proposed to cover should be covered."[5] For example, the proposed rule would provide a limited exception for "general-purpose-reloadable prepaid card[s]" packaged prior to the compliance date, recognizing the burden such providers would have in searching each retail location, removing non-compliant cards from the shelves, and printing new packages with compliant arbitration agreements. Although the Bureau believes "this represents a unique situation not present with other products and services," it seeks comment on whether this "proposed exception should be available to providers of other products." At the same time, however, the Bureau also asks whether this prepaid card exception should be eliminated.[6]

The Bureau also signaled a potential willingness to exempt additional entities from the rule, especially "small entities."[7] Although the Bureau was not swayed by earlier comments from the Small Business Review Panel that the proposal could put certain small entities (like debt collectors) out of business, the Bureau was unable to certify that "the proposed rule will not have a significant economic impact on a substantial number of small entities" within the meaning of the Regulatory Flexibility Act.[8] Accordingly, the Bureau invites comment on whether the proposed rule covers the appropriate entities.[9]

### *Collection and Publication of Arbitral Records*

As noted above, the proposed rule would require providers that engage in arbitration to submit certain arbitral records, including claims and awards, to the Bureau for monitoring purposes. The Bureau seeks comment on whether providers would encounter "obstacles in complying with the proposed submission requirement and, if so, what those obstacles are."[10] For example, providers are invited to comment on whether the 60-day deadline is enough time to make the required submissions.[11]

The Bureau also "seeks comment on whether it should collect the response by the opposing party, if any, in addition to the claim."[12] On the one hand, submitting responses could help providers convey a more balanced view of disputes and avoid or mitigate the potential "consumer protection concerns" that the Bureau intends to monitor. On the other hand, providers may not want an additional reporting burden, especially given the proposed rule's redaction requirements.

Under those redaction requirements, providers (or their agents) would have to redact nine specific types of personally identifiable financial information (PIFI) from submissions, but not all PIFI as defined under federal law.[13] The Bureau seeks comment on whether this proposal strikes an "appropriate balance between protecting consumer privacy and

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[5] *Id.* at 32873.
[6] *Id.* at 32897-98; *see also id.* at 32876 (asking whether the coverage of consumer reports under the Fair Credit Reporting Act should be narrowed, or expanded to include for example "a broader suite of identity theft prevention services").
[7] *Id.* at 32880, 32886.
[8] *Id.* at 32914, 32886.
[9] *See also id.* at 32874 (proposed rule applies to "creditors" as defined under Regulation B, which is broader than if defined under Regulation Z).
[10] *Id.* at 32893-94.
[11] *Id.* at 32895.
[12] *Id.* at 32893.
[13] *See id.* at 32895-96; 12 CFR § 1016.3(q). In contrast to the nine limited categories of PIFI identified in the Bureau's proposal, Regulation P defines PIFI broadly as "*any* information: (i) A consumer provides to you to obtain a financial product or service from you; (ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or (iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer." 12 CFR § 1016.3(q)(1) (emphasis added). As an example, the Bureau's proposal requires redaction of individuals' addresses, "excluding city, State, and zip code." The Bureau seeks comment on whether it should also require redaction of city, State, and zip code. Report at 32896. Such PIFI redaction questions affect not just consumer privacy and provides' redaction burden, but also the extent to which the Bureau's arbitral records may be used as a source of ideas for further litigation and enforcement (for example, on fair lending and redlining issues where geography plays an important role).

imposing a reasonable redaction burden on providers."[14] Additionally, the Bureau intends to publish the arbitral records it collects, and requests comment on whether publication should be limited based on consumer privacy or other confidentiality concerns.[15] Lastly, the Bureau invites comment on "whether it should publish arbitral records individually or in the form of aggregated data."[16]

***Cost-Benefit Analysis and Alternative Options***

Although the Report suggests that the Bureau is reluctant to depart from its proposal in any major way, the Bureau does request additional cost-benefit analysis related to its proposal and additional information regarding alternatives to its proposal.

For example, the Bureau acknowledges that it is currently "unable to quantify and monetize" providers' potential compliance costs under the proposed rule, and requests "comment and data, if available." Similarly, the Bureau is currently "unable to quantify and monetize the extent of the consumer benefit that would result from" the proposed rule, and the Bureau requests comment and data related thereto.[17]

The Report further seeks comment on what the Bureau views as potential alternatives to its proposed rule. These are: 1) effective disclosures and consumer education about arbitration and PDAAs; 2) allowing consumers to opt-in or opt-out of PDAAs; and 3) banning PDAAs altogether.[18]

Regarding alternative 1), the Report argues that even if consumers understood how arbitration and PDAAs work, consumers would be unlikely to change their shopping behavior to avoid PDAAs. In addition, the Bureau asserts that consumers often are unaware of their legal claims, and any claims they do identify are often too small to pursue individually, either in arbitration or in court. The Report raises similar concerns with the opt-in / opt-out regimes outlined in alternative 2), and notes that providers would have little additional incentive to comply with consumer protection laws where consumers opt-into PDAAs to get a lower price while erroneously thinking others will opt-out and sue the bad actors for them (free rider problem). Finally, the Bureau does not adopt the total PDAA ban outlined in alternative 3) because it "could be more costly if individual arbitration proceedings are less expensive than individual litigation."[19]

Nevertheless, the "Bureau requests comment on these and any other alternative policy options that may accomplish the goals of the proposed rulemaking with substantially less regulatory burden, including a detailed description of the option and any evidence" supporting it.[20]

***Conclusion***

The above discussion captures just some of the discrete requests for comment presented by the Report, and stakeholders are encouraged to familiarize themselves with the entire Report in order to make the most of the comment period. Similarly, stakeholders should familiarize themselves with the Bureau's prior research, such as the March 2015 Arbitration Study[21] and the December 2015 Small Business Review Panel Report,[22] to better understand the Bureau's viewpoint. The first page of the Bureau's proposal includes instructions on how to submit comments during the comment

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[14] Report at 328956.
[15] *Id.* at 32893.
[16] *Id.*
[17] *Id.* at 32904, 32912. The Report also contains various data, including a chart estimating future class action litigation (*id.* at 32909), on which interested parties may wish to submit comments.
[18] *Id.* at 32920-21.
[19] *Id.*
[20] *Id.* at 32922.
[21] Bureau of Consumer Fin. Prot., *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (Mar. 2015) http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.
[22] Bureau of Consumer Fin. Prot., U.S. Small Bus. Admin. & Office of Mgmt. & Budget, *Final Report of the Small Business Review Panel on CFPB's Potential Rulemaking on Pre-Dispute Arbitration Agreements* (Dec. 11, 2015) http://files.consumerfinance.gov/f/documents/CFPB_SBREFA_Panel_Report_on_Pre-Dispute_Arbitration_Agreements_FINAL.pdf. http://.

period, which is open through August 22, 2016.[23] Note that all comments will become part of the public record and will be subject to public disclosure.

[23] Report at 32830.

CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER
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# Faster Payments: A Consumer Protection Perspective

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As innovation in the payments industry continues to flourish, there has been significant focus on speed and efficiency, and on creating an environment where consumers, merchants and financial institutions can ultimately exchange payments in real-time. However, consumer protection principles in this area have garnered much less attention. This article presents an overview of recent regulatory and industry initiatives to incorporate consumer protection principles into faster payment systems and highlights ways in which faster payments strengthen consumer protection.

*The NACHA Same-Day ACH Rule: Faster Payments, Benefitting Consumers*

NACHA's recent amendment to its operating rules to permit same-day ACH payments (Same-Day Rule) illustrates how faster payments can provide significant value for consumers and strengthen consumer protections. The Same-Day ACH rule, which will take effect in September 2016, expedites payments by enabling the same-day processing and settlement of most types of ACH transactions. Under the rule, two new settlement windows will be added to the ACH network, increasing the flow of funds between financial institutions from once each day to three times each day.[1] The rule requires Originating Depository Financial Institutions[2] to submit files of same-day ACH payments and also requires Receiving Depository Financial Institutions (RDFIs)[3]to receive same-day ACH payments , thereby allowing consumers to access funds more quickly.[4] The rule will be implemented in three phases, the first of which will apply to credits, allowing faster payroll deposits. The next phase of the rule will apply to debits, allowing expedited bill payments.[5] The last phase will require RDFIs to provide funds availability at 5:00 pm local time for same day credit entries.

By improving consumers' access to funds, the Same-Day Rule increases transparency and visibility in connection with the status of transactions and also strengthens consumer protection. For instance, faster payments can enable consumers to exercise more control over financial decision-making by providing greater certainty over when funds will be deposited or debited from accounts.[6] In addition, the shift towards real-time payments could also reduce the risk of potential complications such as late fees, overdrawn balances and insufficient balances for future transactions.[7]

*Federal Reserve's Faster Payments Task Force & Consumer Protection Criteria*

In terms of regulatory efforts, the Federal Reserve System has been very active in shaping faster payment systems and developed a Task Force of Faster Payments (Task Force) in 2015 to identify and assess new approaches to implementing payment systems. In January 2016, the Task Force issued guidance entitled "Faster Payments Effectiveness Criteria," which outlined a comprehensive rubric for assessing the effectiveness of payment systems. The criteria draw upon

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[1] NACHA Membership Approves Same Day ACH, dated May 19, 2015, available at: https://www.nacha.org/news/nacha-membership-approves-same-day-ach; *see also* Same Day ACH: Moving Payments Faster, *available at*: https://www.nacha.org/rules/same-day-ach-moving-payments-faster
[2] The depository financial institution of an organization or person that initiates an ACH transaction (the Originator) that forwards the ACH transaction into the national ACH network through an ACH Operator. *See* Federal Financial Institutions Examination Council's (FFIEC) Bank Secrecy Act Anti-Money Laundering Examination Manual, Automated Clearing House Transactions, available at: http://www.ffiec.gov/bsa_aml_infobase/pages_manual/olm_059.htm
[3] The depository institution of an organization or person that authorizes the Originator to initiate an ACH transaction that receives the ACH transaction from the ACH Operators and credits or debits funds from their receivers' accounts. *Id*.
[4] *Id*.
[5] *Id*.
[6] Remarks of Richard Cordray, Director of the Consumer Financial Protection Bureau (CFPB) at The Clearing House, dated November 20, 2014, available at: http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-clearing-house/.
[7] Comment letter from CFPB in response to NACHA's Proposed Rules for Same Day ACH to Move Payments Faster, dated February 9, 2015, available at: http://files.consumerfinance.gov/f/201507_cfpb_cfpb_letter-to-nacha-proposed-rules-for-same-day-ach-to-move-payments-faster.pdf

consumer protection principles and consist of six broad categories: (1) ubiquity; (2) efficiency; (3) safety and security; (4) speed; (5) legal framework; and (6) governance.[8]

As an illustration, with respect to ubiquity, the Task Force will consider whether a payments system effectively addresses financial inclusion and the needs of the unbanked or underserved to affordably send or receive payments.[9] The Task Force will also consider whether the payments system safeguardserror resolution protections and whether the rights and liabilities of both the payer and payee are clear and easily understood.[10] With respect to remittance transfers, the Task Force has outlined the importance of clear disclosures and specifically noted that remittance transfer providers should clearly disclose advance disclosures of fees, exchange rates and other costs to consumers.[11]

Not surprisingly, consumer protection also plays a central role within the "legal framework" criteria. In particular, the Task Force noted that payment systems should have procedures that allocate legal and financial responsibility, and support error resolution for payments made for personal, family or household purposes.[12]

*CFPB's Vision for New Faster Payment Systems*

The Consumer Financial Protection Bureau (CFPB), which serves as a Steering Committee Member of the Task Force, has also sought to impact faster payment systems by proposing guiding principles that prioritize consumer protection. Specifically, in July 2015, the CFPB articulated its vision in the faster payments space, by outlining the following principles: (1) consumer control over payments; (2) data security and privacy; (3) fraud and error resolution protections; (4) transparency; (5) cost; (6) access; (7) funds availability; (8) security and payment credential value; and (9) accountability mechanisms.[13]

The CFPB's guidance complements the Federal Reserve and NACHA's efforts as it encourages consumers' "real-time access to information about the status of transactions" and "timely disclosure of the costs, risks, funds availability, and security of payments."[14]

*The Clearing House – Real-Time Payments and Consumer Protection Considerations*

The Clearing House (TCH), a banking association and payments company, has also unveiled its plans to create a real-time payments (RTP) system by 2017, to provide consumers and businesses with the ability to send and receive fund transfers within seconds. The RTP system will also be characterized by payment certainty (i.e., a sender will not be able to revoke a transaction once it is initiated), ubiquity, account data privacy and other features.[15] Although the RTP system is still being developed, it is evident that TCH is incorporating consumer protection principles in the design and implementation of the system by considering, for instance, how to update and provide Regulation E disclosures to consumers.[16] In addition, TCH has outlined the incorporation of other protections, including tokenization to safeguard consumer account credentials and enhance data security, and credit push transactions, which decrease the risk of fraudulent debits and increase transparency by allowing consumers to send payments directly from their existing accounts.[17]

*Conclusion*

This article presents just a few examples of how consumer protection considerations are incorporated into faster payment systems. However, because faster payments systems are in their infancy, consumers, industry groups and regulatory bodies have just begun the dialogue concerning this important issue. Although payments innovation can strengthen

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[8] Federal Reserve, Faster Payments Task Force, "Faster Payments Effectiveness Criteria," dated January 26, 2016.
[9] *Id*. at 6.
[10] *Id.* at 8.
[11] *Id.* at 9.
[12] *Id.* at 28.
[13] Consumer Financial Protection Bureau, "Consumer Protection Principles: CFPB's Vision of Consumer Protection in the New Faster Payment Systems," dated July 9, 2015, at 2.
[14] *Id*. at 2.
[15] The Clearing House, "Real-Time Payments Operations Playbook," dated May 2016.
[16] *Id*. at 42.
[17] The Clearing House, "The Clearing House Welcomes Release of CFPB's Consumer Protection Principles for Faster Payment Systems," dated July 2015, available at: https://www.theclearinghouse.org/press-room/in-the-news/2015/2015/07/cfpb-consumer-protection-principles-for-faster-payment-systems

consumer protection, it can, of course, raise new consumer protection concerns and questions as well. One such example is blockchain technology, which, by virtue of a decentralized ledger system, has tremendous potential to make payments cheaper and faster. However, concerns remain regarding whether consumers will be able to understand and access this technology, and how consumers will be able to dispute and reverse transactions due to the irreversible nature of the technology.

In addition, ambiguity surrounding regulatory expectations for consumer protection may inhibit innovation in the faster payments space. For now, it is promising that consumer protection principles are being considered in the design and implementation of faster payment systems.

# First Nail in the Coffin for No-Injury Suits? Supreme Court Makes Clear the Days of Hyper-Technical Lawsuit Claims May Be Over

By Richard Gottlieb, Manatt, Phelps & Phillips, LLP

No actual harm, no lawsuit? That might be the end result from the Supreme Court's ruling in *Spokeo, Inc. v. Robins* that a plaintiff must show an injury in fact before pursuing a claim for violation of the federal Fair Credit Reporting Act (FCRA), a holding that could have major repercussions for consumer plaintiffs pursuing claims under a wide variety of consumer protection statutes. Justice Alito delivered the opinion of the Court, in which Chief Justice Roberts, Justices Kennedy, Thomas, Breyer, and Kagan joined. Justice Clarence Thomas wrote a concurring opinion, while Justice Ginsburg dissented, with Justice Sotomayor joining that dissent.

In addition to its FCRA aspects, the decision may have broad and long-lasting repercussions for the consumer class action bar. There are numerous putative class action lawsuits in which plaintiffs allege a mere technical violation of a federal consumer protection statute without pleading facts showing any actual injury. For example, plaintiffs pursuing claims under the federal Telephone Consumer Protection Act have repeatedly pursued and obtained large class settlements based on mere technical violations, such as the receipt of electronic versions of a blast fax. It may likewise be particularly relevant in the privacy and data security area, where such statutory damages cases predominate. In addition, the decision may constrict plaintiffs' ability to certify a class under the requirements of Federal Rule 23 in that, as just one example, plaintiffs may have a more difficult time demonstrating common types of actual injury.

FCRA seeks to ensure "fair and accurate credit reporting." 15 U.S.C. § 1681(a)(1). The statute therefore regulates the creation and use of "consumer report[s]" by "consumer reporting agenc[ies]" for certain specified purposes, including credit transactions, insurance, licensing, consumer-initiated business transactions and employment. In *Spokeo,* a consumer sued a "people search engine" firm that performs a computerized search of various databases for public data. When a people search produced a variety of inaccurate data about plaintiff, he brought suit, alleging FCRA violations even though there were no facts showing any resulting harm, such as denial of a job. . The suit alleges that Spokeo is a "consumer reporting agency" and therefore is liable as a defendant under the act. Nowhere in the complaint, however, does plaintiff explain what injuries were caused by the inaccurate data or how he even became aware of the inaccuracies.

Under Article III of the United States Constitution, a plaintiff invoking federal jurisdiction must first establish standing by demonstrating (1) an injury in fact that is (2) fairly traceable to the challenged conduct of defendant and that is (3) likely to be redressed by a favorable judicial decision. This includes the requirement that plaintiff show "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife,* 504 U. S. 555, 560 (1992). As the Court puts it, a "concrete" injury must be "de facto"; that is, it must actually exist. In *Spokeo*, the Court concludes that the U.S. Court of Appeals for the Ninth Circuit, in reversing a dismissal at the trial court level, failed to consider the "concreteness" portion of the analysis, and likewise failed to consider whether the alleged FCRA procedural violations entail a degree of risk sufficient to meet such requirement.

The Court noted that plaintiffs must do more than establish a technical or procedural violation of FCRA.

> On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause

> harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

In the dissent, Justice Ginsburg argued that the Court ignores multiple high court rulings where the terms "concrete" and "particularized" have been joined, and that plaintiff Robins' pleadings "allegations carry him across the threshold" of pleading such injury. On the facts, the dissent argued that the allegations go far beyond the incorrect zip code hypothetical, and that Robins had established more than just a bare procedural violation because the misrepresentations of his status arguably created the erroneous impression that he was overqualified, that he might be unwilling to relocate or that his salary demands would exceed what prospective employers were prepared to offer him. Stay tuned.

# American College of Consumer Financial Services Lawyers
# Senator William Proxmire Lifetime Achievement Award

**Presented on April 9, 2016 to**

**ALAN S. KAPLINSKY**

The American College of Consumer Financial Services Lawyers (College) is pleased to present its Senator William Proxmire Lifetime Achievement Award to Alan S. Kaplinsky.

The Proxmire Award is given each year to "a person who has made significant contributions in the field of consumer financial services over that person's career." Alan is a highly deserving recipient of the Award both because of his notable achievements in the area of consumer financial services law and because of the legacy he will ultimately leave behind.

Alan graduated Boston College Law School in 1970 and then clerked on the Third Circuit for Judge John Biggs, Jr. He next joined the Philadelphia law firm of Wolf, Block, Schorr and Solis-Cohen. In 1976, he became General Counsel of Teachers Service Organization, Inc. (TSO) (which later became Advanta Corp.), an organization that made loans by mail to school teachers. Alan handled regulatory issues and managed litigation at TSO at a time when federal consumer financial services laws were in their infancy. TSO's model of soliciting loans by mail, often with the endorsement of a teachers union, was a precursor to the latter-day third-party endorsement programs popularized by the credit-card industry. While at TSO, Alan came up with the idea for TSO to acquire a "nonbank bank," demonstrating his penchant for out-of-the-box thinking and producing a huge step forward for TSO.

In 1979, Alan returned to Wolf, Block, where he founded the firm's banking and consumer financial services practice. He attracted Jeremy Rosenblum and John Culhane, along with litigator Burt Rublin, to join his "group."

At the time, the adoption of the Truth in Lending Act of 1968 (TILA), Senator Proxmire's crowning achievement in our area, was a relatively recent development and there were few lawyers who specialized in this field. Two additional developments, that would play an equal if not greater role in Alan's career, also transpired. First, in 1978, the U.S. Supreme Court held in Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp. that state usury laws regulating interest rates could not be enforced against nationally-chartered banks based in other states that had more liberal interest laws. And in 1980, Congress passed the Depository Institutions Deregulation and Monetary Control Act (DIDA), which, among other things, allowed state-chartered banks to charge the same interest rates as their national bank counterparts. In order to take advantage of these legal developments, many banks relocated their credit card businesses to states like South Dakota and Delaware that had deregulated their usury laws. The use of credit cards subsequently increased, as did the number of fee-related lawsuits filed by consumers.

In October 1989, the Commonwealth of Massachusetts advised Greenwood Trust Company (GTC) that the imposition of a $10 late fee on its Discover card violated Massachusetts law. GTC was a federally-insured state bank chartered under Delaware law, which permitted the late charge. It took the position that it had the federal right under DIDA and Marquette to "export" that late charge as a form of "interest" to its customers residing in other states, including, of course, Massachusetts. The District Court rejected Discover's arguments, and found that the Massachusetts law governed.

GTC had not retained Wolf Block to represent it in the district court proceedings, but the weekend after the decision, Alan assembled the Wolf Block team, which then produced on an unsolicited basis an analysis of the decision's shortcomings. College member Hugh Hayden, then Discover's General Counsel, was suitably impressed, and retained Wolf Block to handle the appeal. Under Alan's and Hugh's guidance, the firm secured a landmark reversal in the First Circuit.

Unfortunately, by the time the First Circuit weighed in, the District Court opinion had spawned a series of piggy-back class actions throughout the country. Ultimately, the arguments advanced by Alan and his team prevailed, as the U.S. Supreme Court unanimously ruled in favor of the credit-card industry in *Smiley v.*

*Citibank (South Dakota), NA*, thus bringing all of the ancillary fee class actions to an end.

In February 1995, Alan, along with Jeremy, John and Burt, left Wolf, Block to found the Consumer Financial Services Group at Ballard Spahr. Alan has led the Ballard Spahr CFS Group since that time. Alan then led the growth of the Group to include well over 100 attorneys, spread throughout Ballard's 14 offices, making it one of the largest and most well-respected consumer financial services practices in the country.

At Ballard, Alan pioneered the use of arbitration provisions in consumer financial services products, including credit cards, auto finance and leasing transactions and bank deposit contracts. He is the first lawyer in the country to include explicit class action waiver language in arbitration provisions. Since that time, Alan has directed regular improvements to consumer arbitration agreements, consistently coming up with new ways of making each new variant more consumer-friendly. Alan and the Group have now enforced dozens if not hundreds of Ballard Spahr and other arbitration agreements in the face of a host of litigation challenges and have represented a number of the leading industry trade groups in defending arbitration before Congress and the CFPB. (On March 10, 2015, Alan was one of three industry lawyers chosen by the CFPB to testify at a field hearing held in Newark, NJ contemporaneously with the release of the CFPB Arbitration Study pursuant to Section 1028 of the Dodd-Frank Act.) After more than a decade of litigation over the enforceability of class action waivers in arbitration contracts, the U.S. Supreme Court, in *AT&T Mobility LLC v. Concepcion*, upheld Alan's creation, vindicating class action waivers in arbitration agreements under the Federal Arbitration Act notwithstanding state law to the contrary. In *Concepcion*, Alan filed an amicus brief on behalf of the American Bankers Association, Consumer Bankers Association and other trade groups.

Client service was hardly Alan's sole contribution to the field of consumer financial services. Alan served as Chair of the American Bar Association Committee on Consumer Financial Services from 1986-1990. In that capacity, Alan was instrumental in launching an innovative consumer fellowship program where the ABA pays the registration and travel expenses of four consumer advocates to attend and participate in the activities of the Committee. (He was also takes great pride in having instituted the Committee's bi-annual Winter meetings at Park City or other ski resorts.) Alan has chaired the Practicing Law Institute's Annual Institute on Consumer Financial Services since its inception in 1995. This program, which is held each year in New York City and Chicago, is widely considered the premier CLE program in the country for consumer financial services attorneys. Not coincidentally, he was also the first President of this College from 1996-1998.

On July 21, 2011 (the day the CFPB commenced operations), Alan's efforts over a period of months culminated with the launch of CFPBMonitor.com, a blog devoted to doings at the CFPB. The blog has thousands of subscribers and, for three years running, has been named as one of the top 100 law blogs by the ABA Journal and now serves as one of the leading sources of information on the CFPB.

Since 2006, Alan has been recognized annually by Chambers USA as a leading lawyer in banking and finance, and, since 2007, has been recognized annually by The Best Lawyers in America as a top financial services lawyer. Alan was selected as one of The National Law Journal's 2015 Litigation Trailblazers. Alan is currently an adviser to the American Law Institute (ALI) in connection with its ongoing project to create a Restatement of the Law Third, Consumer Contracts.

As suggested by the above summary of Alan's career, Alan's influence on the law of consumer financial services will be felt for many years. But far more important to Alan, he is also a loving husband to his wife Ellen and the proud father of three children (Rachel, Adam and Jared) as well as the proud grandfather of two grandsons (Austin and Ryder). The presence at this dinner of Ellen, Alan and Ellen's children and their husband and significant others testify to the family's love and pride.

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Alan is a most deserving recipient of the Proxmire Award. He has forever altered the course of consumer financial services law.