



# CONSUMER FINANCIAL SERVICES COMMITTEE NEWSLETTER

November 2017

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## Important Dates

### [Business Law Section Spring Meeting](#)

April 12-14, 2018  
Orlando, FL

## Newsletter Editors

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## Membership Minute

**CFSC by the Numbers:** As of August 2017, total members = 1,374, which represents a decrease of approximately 2% compared to August 2016. Keep spreading the word about joining the ABA's CFSC - encourage your clients and colleagues to check it out!

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**Get Involved in the CFSC:** Want to get more involved in the CFSC? Feel free to contact [Grace Powers](#) and [Judy Mok](#), CFSC Membership Subcommittee Chair and Vice-Chair, for information.

## Leadership Message



Andrew Smith, Chair  
Consumer Financial Services Committee

It's time to register for our Committee's upcoming Winter Meeting in Park City, Utah on January 6-9, 2018. In this Chairman's Message, we will outline our plans for the Winter Meeting, as well as recap our successful Annual Meeting in Chicago and the Eighth Annual National Institute on Consumer Financial Services Basics, which was held October 19-20, 2017, in Arlington, Virginia.

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## Meeting Promo



Register now for the Consumer Financial Services Committee Winter Meeting 2018 featuring approximately 17 CLE sessions and opportunities to network with Consumer Financial Services Committee colleagues.

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## Legal Features

### **Individual Attorney Liability in CFPB Enforcement Actions Panel at Business Section Annual Meeting** By Sara Solano

At this year's American Bar Association ("ABA") Business Section Annual Meeting in Chicago, Illinois, the Consumer Financial Services Committee hosted a panel presentation covering recent developments and trends with respect to individual attorney liability in Consumer Financial Protection Bureau ("CFPB") enforcement proceedings. The panel, moderated by J.H. Jennifer Lee of Dorsey & Whitney LLP, featured Christopher L. Peterson, John J. Flynn Endowed Professor of Law at the S.J. Quinney College of Law at the University of Utah, and C. Hunter Wiggins of Jones Day. The discussion focused on an analysis of the CFPB's more aggressive approach to regulating the financial services industry, specifically with respect to a number of recent notable CFPB enforcement actions involving claims levied against attorneys in their individual capacity.

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### **NACHA: An Overview of the Same-Day Payment Rule** By Miguel Cordano, Alexander M. Goerss, and

## Legal Features

### **Reyes v. Lincoln Automotive Financial Services: A Silver Bullet or Fool's Gold?** By Michael DeFrank

If your practice involves Telephone Consumer Protection Act ("TCPA") claims, you are no doubt aware of the recent opinion by the Second Circuit in *Reyes v. Lincoln Automotive Financial Services* in which the court held that the TCPA, "does not permit a consumer to revoke its consent to be called when that consent forms part of a bargained-for exchange." Does this decision represent a sea change in TCPA cases, or is it an outlier that is destined to be relegated to obscurity?

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### **The OCC Fintech Charter: Status Report** By Chris Capurso

Nearly a year ago, on December 2, 2016, Comptroller of the Currency Thomas Curry announced at Georgetown University Law Center that the Office of the Comptroller of the Currency (OCC) planned to start considering applications from financial technology (Fintech) firms to become special purpose national banks. In concert with these remarks, the OCC

### **Sergio Fernandez-Soto**

On May 18, 2015, the National Automated Clearing House Association (NACHA) approved the rule entitled "Same Day ACH: Moving Payments Faster Rule". This rule amended the NACHA Operating Rules to allow for same-day processing of any ACH payment. In order to allow banks and other financial institutions time to gradually adjust, the rule was separated into three phases, with the final phase going into effect on March 16<sup>th</sup>, 2018. This rule provides originating financial institutions (ODFIs) the option to send same-day ACH transactions to any accounts at receiving financial institutions (RDFIs). This service imposes a "same-day" processing fee of 5.2 cents per transaction, paid by the ODFI to the RDFI. This processing fee is meant to offset RDFIs' operating costs of enabling and supporting same-day ACH payments.

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### **Regulation of Payment Services Providers in Canada: New Retail Payments Regulatory Regime** **By Suhuyini Abudulai**

The rapid pace of technological advancement and innovation has transformed the financial services sector, introducing a variety of payment services providers ("PSPs") providing different types of products and services (e.g., e-wallets, mobile payments, peer-to-peer money transfers) in areas including banking, lending, insurance, payments, and wealth management.

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released a white paper (the "Fintech White Paper") outlining the various issues and conditions the OCC would look for in evaluating companies for a special purpose national bank charter ("fintech charter").

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### **A Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act** **By Adam D. Maarec and Christopher R. Rahl**

This is our latest article in a series that surveys activities identified as unfair, deceptive or abusive acts or practices ("UDAAPs") by the Consumer Financial Protection Bureau ("CFPB"), and state attorneys general and consumer financial services regulators, using federal UDAAP powers created by the Dodd-Frank Act.<sup>1</sup> This article covers relevant UDAAP activity that occurred between January 1, 2017 and June 30, 2017, and surveys enforcement actions and other statements by the CFPB in reports that discuss UDAAP violations.<sup>2</sup> These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.

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## **Leadership Succession and Opportunities**

On behalf of the CFSC, I would like to welcome the incoming leaders of our subcommittees and task forces, and thank our outgoing leaders for their outstanding service to our Committee. As a relatively large Committee with nearly 1500 members, I invite you to take advantage of the many opportunities to serve in leadership and make a contribution.

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## Chairman's Message

It's time to register for our Committee's upcoming Winter Meeting in Park City, Utah on January 6-9, 2018. In this Chairman's Message, we will outline our plans for the Winter Meeting, as well as recap our successful Annual Meeting in Chicago and the Eighth Annual National Institute on Consumer Financial Services Basics, which was held October 19-20, 2017, in Arlington, Virginia.

### **Business Law Section Annual Meeting**

We had a successful Annual Meeting in Chicago, September 13-16, with a full slate of CLE programming. The materials for the CLE programs can be found [here](#). You'll be glad to know that CFSC (almost) ran the table with four of the five best attended CLE programs –

1. Ethics in CFS – 138
2. On line advertising – 126
3. Housing finance – 116
4. On line lending and e-commerce – 113
5. Block chain (M&A Committee) – 111

While in Chicago, our Pro Bono Subcommittee held an event at a senior citizen center where we presented a financial exploitation seminar for approximately 75 people. We coordinated with Catholic Charities as our local agency. Materials and other assistance were provided by our CFPB friends (Mauricio Videla and Jenefer Duane). Special thanks to Young Lawyer Liason Jennifer Newton and subcommittee member Ling Ling Ang for helping put this together.

### **National Institute on CFS Basics**

Our Committee hosted the Eighth Annual National Institute on Consumer Financial Services Basics on October 19-20 in Arlington, Virginia. It was another sell-out crowd thanks to the organizational efforts of Meeting Chair Katrina Christakis and her team. We had speakers from the FTC, CFPB and banking agencies, in addition to our usual passel of industry experts, academics and consumer advocates.

The program is designed for lawyers who are new to consumer financial services, but every year we find several experienced lawyers who attend and benefit from the presentations. Keep an eye out for next year's program, which will probably be scheduled for October 2018.

### **Winter Meeting Preview**

We are in the throes of planning our Committee's programming, meetings and social events for our upcoming CFSC stand-alone Winter Meeting at The Canyons on January 6-9, 2018. Register now for our Winter Meeting [here](#).

- Our programming begins at 4:00 PM on **Saturday, January 6**, with **Beer & Basics**, followed by a **Welcome Reception**.
- Our programs are scheduled to end on **Tuesday, January 9**, at 12:00 PM.

In between Saturday afternoon and Tuesday morning, we have 19.5 hours of CLE programming, including a special track of mortgage-related programming. We are planning presentations on:

- Federal Trade Secret Act and impact on mortgage originator recruiting;
- History, purpose and future of ILC's;
- CFPB's Final Small Dollar Credit Rule;
- Fair lending and advertising;
- What's next for prepaid cards;
- Online identity verification services;
- Data breach response in the era of the mega-breach;
- UDAAP and consumer shopping behavior;
- Diverse legal career paths in CFS;
- TCPA litigation;
- Developments in servicemember lending and servicing;
- Comparative perspective on US and Canada CFS regulation;
- Review of incremental TILA changes;
- HMDA – privacy, implementation in the developments; and
- Cybersecurity compliance in light of the evolving regulatory landscape.

We are also planning our **Committee Dinner** for the evening of **Sunday, January 7**. When you [register](#) for the meeting, you also can purchase your Dinner tickets. We need additional sponsors for the Welcome Reception and the Committee Dinner – sponsorship benefits include your logo on the meeting website, in the meeting materials, and on event signage, as well as a complimentary ticket to the event. Please contact [me](#) for details.

## Individual Attorney Liability in CFPB Enforcement Actions Panel at Business Section Annual Meeting

By Sara Solano\*

At this year's American Bar Association ("ABA") Business Section Annual Meeting in Chicago, Illinois, the Consumer Financial Services Committee hosted a panel presentation covering recent developments and trends with respect to individual attorney liability in Consumer Financial Protection Bureau ("CFPB") enforcement proceedings. The panel, moderated by J.H. Jennifer Lee of Dorsey & Whitney LLP, featured Christopher L. Peterson, John J. Flynn Endowed Professor of Law at the S.J. Quinney College of Law at the University of Utah, and C. Hunter Wiggins of Jones Day. The discussion focused on an analysis of the CFPB's more aggressive approach to regulating the financial services industry, specifically with respect to a number of recent notable CFPB enforcement actions involving claims levied against attorneys in their individual capacity.

The panelists initially provided a brief overview of the CFPB's jurisdiction over individual attorneys as defined under federal law. Specifically, 12 U.S.C § 5481 defines a "covered person" under the purview of the CFPB's jurisdiction to include "any affiliate of a person [that engages in offering or providing a consumer financial product or service]" including "any independent contractor (including any attorney . . .) who knowingly or recklessly participates in any . . . violation of any provision of law or regulation; or breach of a fiduciary duty." Furthermore, § 5517 states that although the CFPB cannot exercise authority over an attorney engaging in the practice of law in any state, this does not limit the CFPB's jurisdiction over the marketplace of financial products or services. To this effect, the Northern District of Georgia held in a 2015 decision that "the [Consumer Financial Protection Act] expressly provides the Bureau a narrow scope of authority over lawyers engaged in activity that is otherwise part of the practice of law."<sup>1</sup>

In reviewing a table of cases from 2012 through 2016, Mr. Peterson parsed through proceedings in which the CFPB charged an individual as a defendant and which individuals were attorneys. Between 2012 and 2016, the CFPB charged individuals in 46 cases—10 of which involved attorneys—out of 164 total enforcement actions. Although this certainly does not constitute a majority, 6% of all cases involved an attorney charged in his or her individual capacity. Indeed, attorneys made up about 40.6% of all individuals charged. Notably, Mr. Peterson pointed

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*\*Sara Solano is an Associate in the Fort Lauderdale office of Burr & Forman, LLP, where she practices in the firm's Financial Services Litigation group.*

<sup>1</sup> CFPB v. Frederick J. Hanna & Associates, P.C., 114 F. Supp. 3d 1342, 1359 (N.D. Ga. 2015).

out that nine out of 10 CFPB cases charging an attorney as a defendant were contested at the time of filing, compared to the 28% contested rate in all other CFPB matters.

Mr. Peterson went on to discuss four individual enforcement cases involving individual attorney liability: (1) CFPB v. Gordon Law Firm, involving foreclosure relief services; (2) CFPB v. Borders & Borders, involving RESPA claims; (3) CFPB v. Access Funding, LLC, involving structured settlement financing; and (4) CFPB v. Cash Call, involving a payday loan scheme. In three of the four cases discussed—and, according to Mr. Peterson, every successful enforcement action against an individual attorney—the CFPB alleged that the attorney engaged in a “deceptive” practice, defined by the CFPB to mean a representation, omission, act or practice that mislead or was likely to mislead a reasonable consumer. Likewise, the instances in which the CFPB succeeded were when the defendants took actions inconsistent with their ethical obligations required under applicable ethical rules governing attorneys.

The distinction of whether an attorney has engaged in the practice of law is key in determining CFPB’s jurisdiction over an individual attorney’s actions. Nevertheless, despite the language of the provisions governing CFPB’s jurisdiction over individual attorneys, there is indeed “significant overlap” between an attorney’s ethical obligations under state professional responsibility directives and CFPB regulations memorialized in the Supervision and Examination Manual<sup>2</sup>, specifically with regard to misleading or false statements made to third parties. For example, ABA Model Rule 1.6, which has been adopted by numerous states in whole or in part, includes language providing that an attorney holds a particular ethical obligation to provide confidential information if it may be used to prevent a client from causing financial harm to others.<sup>3</sup>

Unfair, Deceptive, or Abusive Acts or Practices (“UDAAPs”), as defined by the CFPB, present numerous instances under which the CFPB may allege that an attorney has engaged in improper conduct with respect to individual consumers. Based on the cases discussed in the presentation, most enforcement actions are brought in relation conduct that is allegedly unfair, deceptive, and/or abusive. However, as Mr. Peterson pointed out, even if the CFPB is excluded from bringing a particular claim under UDAAP, it may still be able to pursue actions under other enumerated consumer protection statutes, such as the Truth-in-Lending Act (“TILA”) or Real Estate Settlement and Procedures Act (“RESPA”).

Also included in the presentation was Ms. Lee’s article, co-authored with John R. Marti of Dorsey & Whitney LLP, which explores the general framework of the CFPB’s coordination with the U.S. Department of Justice (“DOJ”) to pursue civil actions against individuals under Title X

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<sup>2</sup> See CONSUMER FINANCIAL PROTECTION BUREAU, SUPERVISION AND EXAMINATION MANUAL 1488 (last updated Aug. 2017), available at [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201708\\_cfpb\\_supervision-and-examination-manual.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201708_cfpb_supervision-and-examination-manual.pdf).

<sup>3</sup> Specifically, ABA Model Rule 1.6 provides that an attorney may disclose confidential information in order to “prevent [a] client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services” and “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”

of the Dodd-Frank Act (“CFP Act”) and to defer potential criminal investigations to the U.S. Attorney General. As with the CFPB enforcement actions discussed above, Ms. Lee and Mr. Marti concluded that such cases must involve some form of “fraudulent activity”—rather than merely regulatory violations—to justify bringing forth an indictment in these CFPB-DOJ hybrid proceedings.<sup>4</sup> Indeed, in the consumer finance context, there are already cases on record of the DOJ applying RICO theories to prosecute parties involved in payday lending schemes.<sup>5</sup>

The panelists concluded by acknowledging that although state bar associations and the ABA have developed ethical obligations to which attorneys must adhere, neither entity is adequately situated to relieve individuals victimized by an attorney’s potentially deceptive and fraudulent conduct. Indeed, it is role of the CFPB in particular to provide such relief to consumers. Ultimately, attorneys seeking to avoid liability in such instances must be cognizant of both their ethical obligations as provided under state bar ethical rules and regulations, as well as conduct that may fall within the purview of unfair, deceptive, or abusive as defined by the CFPB.

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<sup>4</sup> J.H. Jennifer Lee & John R. Marti, *Consumer Protection, the CFPB, and Prison: How Jail Sentences Arose Out of Civil Consumer Financial Protection Matters*, 31 AMERICAN BAR ASSOCIATION ANTITRUST 3, 20 (Summer 2017).

<sup>5</sup> *See id.* at 23.

# NACHA: An Overview of the Same-Day Payment Rule

By: Miguel Cordano, Alexander M. Goerss, and Sergio Fernandez-Soto\*

## I. New Rule: Same Day ACH Payments

On May 18, 2015, the National Automated Clearing House Association (NACHA) approved the rule entitled “Same Day ACH: Moving Payments Faster Rule”. This rule amended the NACHA Operating Rules to allow for same-day processing of any ACH payment.<sup>1</sup> In order to allow banks and other financial institutions time to gradually adjust, the rule was separated into three phases, with the final phase going into effect on March 16<sup>th</sup>, 2018. This rule provides originating financial institutions (ODFIs) the option to send same-day ACH transactions to any accounts at receiving financial institutions (RDFIs). This service imposes a “same-day” processing fee of 5.2 cents per transaction, paid by the ODFI to the RDFI. This processing fee is meant to offset RDFIs’ operating costs of enabling and supporting same-day ACH payments. All RDFIs are required to accept these same-day payments as long as the ODFIs comply with the two new clearing windows:

- A morning submission deadline at 10:30 AM ET, with settlement occurring at 1:00 PM ET.

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*Alexander M. Goerss is a graduate of University of Florida College of Law, with a Law Masters in taxation. Mr. Goerss has been practicing in the area of financial institution litigation since 2011. He represents clients in a diverse array of matters, including consumer finance litigation, nonparty subpoenas, and garnishment actions. Previously, Mr. Goerss served as assistant general counsel for the Complex Business Litigation Division of the 11<sup>th</sup> Judicial Circuit Court in and for Miami-Dade County, Florida.*

*Sergio Fernandez-Soto is a law clerk at Liebler, Gonzalez & Portuondo. He joined the firm in 2016. Currently, Mr. Fernandez-Soto is in his third-year of law school at the University of Miami and is expected to graduate in the spring. At the University of Miami, he serves as a member of numerous student organizations. Mr. Fernandez-Soto earned his B.A. in 2014 from Lehigh University.*

<sup>1</sup> See Nat’l Automated Clearing House Ass’n, 2016 ACH Rules: A Complete Guide to Rules and Regulations Governing the ACH Network (Same Day ACH: Moving Payments Faster).

- An afternoon submission deadline at 2:45 PM ET, with settlement occurring at 5:00 PM ET.

Phase 1 was implemented on September 23, 2016, and is only applied to ACH credit transactions. Nearly a year later, the second phase was implemented, which included both credit and debit transactions.<sup>2</sup> An ACH credit transaction occurs when an originator authorizes a financial institution to send money from its account to a recipient's account. These are transactions where one person pushes money from their bank account to another. Some examples of credit-based ACH payments include direct deposit, payroll, person to person, and vendor payments. Conversely, a debit transaction is when an originator authorizes the recipient to withdraw money from an account. The debit function aids in account-to-account transfers, where an account is debited to credit another account.

## **II. Advantages of Same Day ACH**

According to NACHA's volume figures, consumers and businesses took advantage of same-day ACH almost immediately. Within the first seven months, same-day ACH payments were responsible for over 13 million credit transactions totaling close to \$17 billion. Same-day ACH was most utilized with direct deposits, business to business transactions (B2B), and person to person payments (P2P). Within this time frame, direct deposits made up 52 percent of same-day ACH volume, B2B transactions made up 32 percent, and P2P payments constituted almost 14 percent.<sup>3</sup>

Same-day ACH payments extend the amount of time that an employer has to make payroll deposits into their employee's checking accounts. This provides employers flexibility for late payroll submissions and missed deadlines. Like their employers who are benefiting from same-day ACH, employees now have access to their same-day funds faster. Quicker access to funds is particularly important to those who rely on short-term cash flow.<sup>4</sup>

## **III. The Receiver's Role in Same-Day ACH**

In light of the changes to the ACH rule, it is more important than ever for the receiver to review account transactions on a regular basis to identify any irregularity. Receivers have always been obligated to pay close attention to transactions posted to their account. The advent of the same-day ACH rule merely serves to heighten the receiver's role in ACH transactions.

As Phase 2 became effective on September 15<sup>th</sup>, 2017, both credits and debits will be eligible for same-day processing. This means that the volume of same-day ACH transactions will rise exponentially, at the same time that the settlement window has decreased to a matter of

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<sup>2</sup> See Nat'l Automated Clearing House Ass'n, 2017 ACH Rules: A Complete Guide to Rules and Regulations Governing the ACH Network (Same Day ACH: Moving Payments Faster).

<sup>3</sup> ACH Volume Grows to More Than 25 Billion Payments and \$43 Trillion in Value in 2016 (April 2017) available at [www.nacha.org/news/ach-volume-grows-more-25-billion-payments-and-43-trillion-value-2016](http://www.nacha.org/news/ach-volume-grows-more-25-billion-payments-and-43-trillion-value-2016).

<sup>4</sup> Same Day ACH: Moving Payments Faster (Phase 1) available at [www.nacha.org/rules/same-day-ach-moving-payments-faster](http://www.nacha.org/rules/same-day-ach-moving-payments-faster).

hours. In light of the foregoing changes, corporate receivers should ensure that employees understand the potential risk that ACH fraud poses to their company.

Accordingly, the corporate receiver should educate employees on some, though not all, of the protocols in place to prevent internal fraud. Additionally, the corporate receiver should provide employees with examples of fraudulent emails, seeking to capture login information, as well as the steps to take if a suspicious email is received. Further, the corporate receiver should limit the disclosure of account information, including signatures, which could be used to initiate fraudulent payment instructions.

Most importantly, corporate receivers should reconcile the activity in their accounts on a regular basis to identify any unauthorized transactions as quickly as possible. Thus, while the implementation of the same-day ACH rule has myriad benefits, the compressed time frame during which an ACH transaction is completed means the receiver's role in monitoring account activity is increasingly important.

# Regulation of Payment Services Providers in Canada: New Retail Payments Regulatory Regime

By: [Suhuyini Abudulai\\*](#)

The rapid pace of technological advancement and innovation has transformed the financial services sector, introducing a variety of payment services providers (“PSPs”) providing different types of products and services (*e.g.*, e-wallets, mobile payments, peer-to-peer money transfers) in areas including banking, lending, insurance, payments, and wealth management.

In the summer of 2017, the Government of Canada (Department of Finance) released a consultation paper for public commentary, “*A New Retail Payments Oversight Framework*” (the “**Consultation Paper**”), proposing a new federal retail payments oversight framework (the “**Framework**”) that will apply to PSPs. The regime is particularly relevant to non-traditional PSPs operating in Canada that are not subject to the same legislative requirements as regulated financial services providers (*e.g.*, banks). Regulated financial services providers are subject to complex laws, whereas a number of PSPs are subject to minimal, if any, federal oversight. In an effort to level the playing field, the Framework will regulate PSPs by what they do rather than who they are.

## Current legal framework

Canada’s oversight of payments focuses on the core national payment clearing and settlement systems: (i) the Large Value Transfer System, a real-time, electronic wire transfer system that processes large-value or time-sensitive payments over the course of a day, and (ii) the Automated Clearing Settlement System, which clears retail payments such as pre-authorized debits, checks and small-value electronic payments (*e.g.*, POS debits or ATM transactions). National retail payments are supported by regulated financial services providers (*e.g.*, card networks).

The legal framework for retail payments in Canada involves a mix of laws and voluntary arrangements including payment clearing and settlement laws, consumer protection laws, anti-money laundering and anti-terrorist financing laws, privacy laws, and laws regulating financial institutions. Voluntary arrangements include the Code of Conduct for the Credit and Debit Card Industry in Canada.<sup>1</sup>

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\* *Suhuyini Abudulai is a Partner in the Financial Services Group at the Toronto office of Cassels Brock & Blackwell LLP. Her practice focuses on regulatory compliance matters in financial services and the payments industry. She regularly advises on compliance with consumer protection laws in Canada, including documentation and compliance*

## Scope of proposed framework

The Framework would apply to a PSP performing one or more of five identified core functions in the context of electronic funds transfers (“EFTs”) ordered by an end-user. It is not yet known if the Framework will apply to both consumer and business transactions.

Any of the following five core functions performed by a PSP would trigger application of the Framework:

- *Provision and Maintenance of a Payment Account*: Provides and maintains an account held in the name of one or more end-users for the purpose of making EFTs;
- *Payment Initiation*: Enables the initiation of a payment at the request of an end-user;
- *Authorization and Transmission*: Provides service to approve a transaction and/or enables the transmission of payment messages;
- *Holding of Funds*: Enables end-users to hold funds in an account held with a PSP until it is withdrawn by the end-user or transferred to a third party through an EFT; and
- *Clearing and Settlement*: Enables the process of exchanging and reconciling the payment items (clearing) that result in the transfer of funds and/or adjustment of financial positions (settlement).

The Framework would cover a wide-range of transactions, including credit card transactions, online payments, debit transactions, peer-to-peer money transfers, pre-authorized payments, and pay deposits. Certain types of transactions have been excluded on the basis that they pose limited risk to end-users. The exclusions include the following:

- Transactions made entirely in cash;
- ATM transactions for cash withdrawals or cash deposits;
- Closed-loop card transactions (*e.g.*, store specific cards);
- Clearing and settlement transactions made through systems designated under the *Payment Clearing and Settlement Act* (Canada);<sup>2</sup>

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*requirements. Her practice also involves commercial lending transactions, acting for lenders and borrowers in a variety of domestic and multijurisdictional transactions. Among other publications, Suhuyini is the author of the Annotated Ontario Consumer Protection Act. For more information on Suhuyini, please visit [http://www.casselsbrock.com/People/Suhuyini\\_Abudulai](http://www.casselsbrock.com/People/Suhuyini_Abudulai).*

<sup>1</sup> The Code of Conduct for the Credit and Debit Card Industry in Canada has been adopted by all credit and debit card networks operating in Canada and applies to these networks and their participants (*e.g.*, card issuers and acquirers).

<sup>2</sup> The *Payment Clearing and Settlement Act* gives the Bank of Canada oversight of payment, clearing and settlement systems in Canada for the purpose of controlling systemic risk.

- Transactions between entities of the same corporate group, if no intermediary outside of the group is involved in the transaction; and
- Transactions related to securities asset servicing (*e.g.*, dividends distribution, redemption or sale) and derivatives.
- Transactions conducted via an agent authorized to negotiate or conclude the sale or purchase of goods or services on behalf of the payer or the payee, if the funds held by the agent on behalf of the payer or payee is kept in a trust (*e.g.*, real estate agent or lawyer).

Additionally, the Framework would apply only to fiat currency, though the Government of Canada will continue to monitor the use of virtual currencies in retail payments and propose amendments to the Framework as warranted.

### **Proposed measures**

The following measures for implementing the oversight are proposed in the Consultation Paper:<sup>3</sup>

- *End-user fund safeguarding*: PSPs that hold end-user funds overnight or longer would be subject to certain fund safeguarding requirements, including holding the funds in a segregated trust account at a Canadian financial institution and keeping records.
- *Operational standards*: PSPs would have to comply with a set of operational standards, including establishing an operational-risk management framework, defining management roles and responsibilities, establishing a business continuity plan, and establishing physical and information security policies.
- *Disclosure requirements*: PSPs would be required to provide end-users with mandated information on key characteristics of the service or product (*e.g.*, charges, fees, functions, limitations and security guidelines), the customer and the PSP's respective responsibilities, terms and conditions, end-user history of payment transactions, and receipts for transactions.
- *Dispute resolution process*: PSPs would be required to implement a dispute resolution process to address consumer complaints. An external complaints body would be designated to address disputes that cannot be resolved through the PSP's dispute resolution process.
- *Liability for unauthorized transactions and errors*: Payment authorizing PSPs would be required to refund end-users for losses resulting from unauthorized transactions or errors, except where such transactions are a result of an end-user's fraudulent act or failure to fulfill certain obligations (*e.g.*, not taking reasonable care to protect a password, providing

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<sup>3</sup> The Framework aims to use measures that are commensurate to the level of risk posed by each PSP. This would be done through three mechanisms: (i) exempt PSPs from having to implement a measure that the PSP is subject to under a substantially similar federal, provincial, or territorial statute (the Regulator would have the discretion of determining whether the exemption would apply); (ii) requiring PSPs to implement the measures in a manner commensurate with their size, business model, and level of risk associated with the activities performed by the PSP; and (iii) for lower risk PSPs, tiering specific measures (*e.g.*, a PSP under a certain threshold would not be subject to the same requirements as one operating over the threshold).

the PSP with incorrect payee information, or not giving a PSP timely notice of a lost or stolen payment instrument or password breach.

- *Registration requirement:* PSPs would be required to register with a designated federal retail payments regulator (the “**Regulator**”). Owners and directors of a PSP would be required to undergo criminal record checks. A significant proposed requirement is that the registration scheme would also promote compliance with Canada’s anti-money laundering and anti-terrorist financing regime under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (Canada) (the “**PCMLFTA**”) and its associated regulations. It is not yet known what would constitute “promoting compliance”, however, the Regulator would have the authority to deny or revoke a PSP’s registration if the Financial Transactions and Reports Analysis Centre of Canada (“**FINTRAC**”), Canada’s financial intelligence unit, penalizes the PSP for a “very serious violation”<sup>4</sup> or, in the case of a PSP that is a money services business, the PSP is not registered with FINTRAC.<sup>5</sup>
- *Personal information:* The federal *Personal Information Protection and Electronic Documents Act* applies to the collection, use, and disclosure of personal information by private sector organizations operating in Canada.<sup>6</sup> The Regulator would be tasked with the promotion of awareness of, and compliance with, Canadian privacy laws.

### **Advisory service for small PSPs**

The Consultation Paper proposes the establishment of an advisory service for small PSPs launching a new product, process or service. As these new entrants to the market may have limited resources, the advisory service would assist them in understanding and navigating the Canadian regulatory landscape.

### **Conclusion**

The comment period for the consultation process ended in early October 2017. Based on the commentary received, the federal government will propose legislation to implement the Framework. Given the broad application of the Framework to a range of products and services, PSPs operating in Canada or considering establishing business operations in Canada should review the Consultation Paper and ensure that due regard is paid to its anticipated impacted.

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<sup>4</sup> Determination of a “very serious violation” may be on a subjective basis. For example, a very serious violation is a failure of a reporting entity (as designed by the PCMLFTA e.g., a bank) to report suspicious transactions to FINTRAC.

<sup>5</sup> Money services businesses operating in Canada must be registered with FINTRAC and are required to file reports, keep records, identify clients, and have a compliance regime.

<sup>6</sup> Some Canadian jurisdictions have their own privacy laws, substantially similar to the federal law. Organizations operating entirely in these jurisdictions would have to comply with these laws.

# *Reyes v. Lincoln Automotive Financial Services: A Silver Bullet or Fool's Gold?*

By: Michael DeFrank\*

If your practice involves Telephone Consumer Protection Act (“TCPA”)<sup>1</sup> claims, you are no doubt aware of the recent opinion by the Second Circuit in *Reyes v. Lincoln Automotive Financial Services*<sup>2</sup> in which the court held that the TCPA, “does not permit a consumer to revoke its consent to be called when that consent forms part of a bargained-for exchange.”<sup>3</sup> Does this decision represent a sea change in TCPA cases, or is it an outlier that is destined to be relegated to obscurity?

## **The Reyes Opinion**

In *Reyes*, the plaintiff leased a vehicle from a dealership. In the written lease agreement, he consented to receive telephone calls from the lessor, their affiliates and agents using an automatic telephone dialing system (“ATDS”), as well as other means of communication.<sup>4</sup> Plaintiff alleged that he provided written revocation of consent to be called, but that the defendant continued to call him in violation of the TCPA.<sup>5</sup> On June 26, 2016, the district court granted summary judgment for the defendant.<sup>6</sup> Although the district court decision was predicated on the lack of credible evidence of revocation of consent, the court also held that the TCPA does not permit a party to a legally binding contract to unilaterally revoke bargained-for consent to be contacted by telephone.<sup>7</sup>

On appeal, the Second Circuit held that while there was enough evidence of revocation of consent to preclude summary judgment, summary judgment for the defendant was still appropriate

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<sup>1</sup> 47 U.S.C. § 227 *et al.*

<sup>2</sup> 861 F.3d 51 (2d Cir. 2017).

<sup>3</sup> *Id.* at 53.

<sup>4</sup> *See id.* at 53-54.

<sup>5</sup> *See id.* at 54.

<sup>6</sup> *Reyes v. Lincoln Automotive Fin. Servs.*, No. 15-560, 2016 WL 3453651 (E.D.N.Y. June 20, 2016).

<sup>7</sup> *See id.* at \*3.

because contractual consent provisions cannot be unilaterally withdrawn by the consumer when they are part of bargained-for exchange.<sup>8</sup>

Likely appreciating that this decision was a radical departure from other TCPA decisions, the Second Circuit noted that this question had not previously been addressed by the Federal Communications Commission (“FCC”) or any other federal court of appeals.<sup>9</sup> It additionally distinguished the Third Circuit’s decision in *Gager v. Dell Financial Services*,<sup>10</sup> and the Eleventh Circuit’s decision in *Osario v. State Farm Bank, F.S.B.*<sup>11</sup> from the facts in *Reyes*.<sup>12</sup> Consent to call was provided in a credit application in *Gager*, and in an insurance application in *Osario*.<sup>13</sup> In both cases, the court relied on the common law, where consent is generally revocable, to hold that prior express consent is revocable under the TCPA.<sup>14</sup> The Second Circuit explained that those cases addressed, “whether the TCPA allows a consumer who has freely and unilaterally given his or her informed consent to be contacted to later revoke that consent.”<sup>15</sup> In contrast, the court held that *Reyes* dealt with the issue of, “whether the TCPA also permits a consumer to unilaterally revoke his or her consent to be contacted. . . when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract.”<sup>16</sup> The court went on to hold that consent can be revoked when it is voluntarily supplied consent that is gratuitously given as in *Gager* and *Osario*, but that is “black-letter law that one party may not alter a bilateral contract by revoking a term without the consent of the counterparty.”<sup>17</sup> In *Reyes*, the plaintiff’s consent to be called using ATDS, “was not provided gratuitously; it was included as an express provision of a contract to lease an automobile from Lincoln,” and was therefore not revocable under the TCPA.<sup>18</sup>

### Decisions Citing Reyes

Because the *Reyes* opinion was issued on June 22, 2017, there are less than a handful of other decisions that have discussed it in any depth. In *Jae v. ABC Financial Services, Inc.*,<sup>19</sup> a TCPA case where revocation of consent was at issue, the District Court of Massachusetts included a footnote referencing *Reyes*. The footnote states, in part, “[n]either party has argued that plaintiff’s consent was not revocable under the circumstances. Cf. *Reyes v. Lincoln Fin. Servs.*”<sup>20</sup> However, the *Reyes* opinion was issued less than two weeks before the decision in *Jae*, so defendant’s counsel did not have its benefit while briefing the motion for summary judgment in *Jae*.

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<sup>8</sup> See *Reyes*, 861 F.3d at 55-58.

<sup>9</sup> See *id.* at 56.

<sup>10</sup> 727 F.3d 265 (3d Cir. 2013).

<sup>11</sup> 746 F.3d 1242 (11th Cir. 2014).

<sup>12</sup> See *Reyes*, 861 F.3d at 56-57.

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> *Id.* at 56.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 57.

<sup>18</sup> *Id.*

<sup>19</sup> No. 16-11534, 2017 WL 2872821 (D. Mass. July 5, 2017).

<sup>20</sup> *Jae*, 2017 WL 2872821, at \*3-4 n.4.

The plaintiff in the TCPA case of *Anthony v. GE Capital Retail Bank*,<sup>21</sup> was a party to a credit card agreement in which he consented to being contacted by telephone using an ATDS. In an August 16, 2017, unpublished decision, the Southern District of New York Court granted summary judgment for the defendant, holding that, “[p]laintiff’s acceptance of the terms of the GAP card, which included his ‘consent to communication’ was the kind of bargained-for consideration that is not unilaterally revocable.”<sup>22</sup> Although the Southern District of New York relied on *Reyes*, which is the law of the circuit, the court also held that whether the plaintiff’s consent to be called was bargained-for exchange or unilaterally given was irrelevant in this instance because the plaintiff provided no evidence of revocation of consent, so summary judgment was appropriate in any event.<sup>23</sup> The *Anthony* case settled shortly after this decision.

A month later, the Western District of Pennsylvania declined to follow *Reyes* in *McBride v. Ally Financial, Inc.*<sup>24</sup> It is hardly surprising that a district court in the Third Circuit would be hesitant to follow *Reyes* since it is contradictory to *Gager*, which is a Third Circuit opinion. The *McBride* decision offers a thoughtful discussion of the opposite outcomes dictated by following *Reyes* versus *Gager*. In a footnote, the court stated:

Admittedly, the detailed common law and statutory interpretations in *Reyes* are not without logical appeal, and they appear at least somewhat persuasive. Honestly, it is difficult to predict whether the Court of Appeals for the Third Circuit would, or would not, find *Reyes* convincing (including the Second Circuit Court’s purported harmonizing of its case with *Gager*). All the undersigned can say at this juncture is, *Reyes* reflects a potential sea-change in the area of TCPA-litigation, and the Court will not adopt it, through supplemental filings and at this late stage in the case, absent clearer indications in the law of this Circuit.<sup>25</sup>

Although the Western District declined to follow *Reyes* in *McBride*, the comments in the footnote above hardly foreclose the possibility at some later point in time. It remains to be seen whether and what “clearer indications” come from the Third Circuit.

### **Of Silver and Gold**

Given the high number of TCPA cases that are filed each day, it stands to reason that there will be ample interpretation of *Reyes* sooner rather than later. It will also be interesting to see whether this decision holds sway with the D.C. Circuit when it issues its opinion on the FCC’s Omnibus in the *ACA International* case.

For the time being, whether *Reyes* is a silver bullet or fool’s gold will largely depend on the party making the assertion. For a party defending a TCPA claim, there is a compelling argument that consent cannot be revoked when it is supplied as part of a bargained-for contractual term. For a TCPA plaintiff, *Reyes* is an outlier from the Second Circuit, and *Gager* and *Osario*

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<sup>21</sup> No. 1:14-cv-2809, 2015 WL 10846141 (S.D.N.Y. Sept. 30, 2015).

<sup>22</sup> *Id.* at \*7.

<sup>23</sup> *See id.* at \*7-8.

<sup>24</sup> No. 15-867, 2017 WL 3873615 (W.D. Pa. Sept. 5, 2017).

<sup>25</sup> *Id.* at 2 n.4.

mean that consent may be revoked regardless of how and where it was provided. Either way, *Reyes* will remain front and center in TCPA cases for the foreseeable future.

# The OCC Fintech Charter: Status Report

By: Chris Capurso\*

Nearly a year ago, on December 2, 2016, Comptroller of the Currency Thomas Curry announced at Georgetown University Law Center that the Office of the Comptroller of the Currency (OCC) planned to start considering applications from financial technology (Fintech) firms to become special purpose national banks.<sup>1</sup> In concert with these remarks, the OCC released a white paper (the “Fintech White Paper”) outlining the various issues and conditions the OCC would look for in evaluating companies for a special purpose national bank charter (“fintech charter”).

Just two months after the comment period for the Fintech White Paper ended, on March 15, 2017, the OCC issued a draft supplement to its Licensing Manual (“Draft Supplement”) that provided more detail on how companies applying for the fintech charter would be evaluated.<sup>2</sup> With such progress in a short span of time, it seemed as though a fintech charter was on the immediate horizon. However, as productive as those first few months were, the last several months have barely seen the fintech charter initiative budge.

Now, that’s not to say that the idea has laid completely dormant, collecting dust while other priorities take precedent. In fact, it is quite the opposite. Much has happened that affects the fintech charter.

## The States Are Not Fans

Even before the OCC released the Fintech White Paper, state regulators made it clear that they do not believe that the OCC has the authority to grant special purpose bank charters to fintech companies. In response to a proposed rulemaking by the OCC regarding receiverships for uninsured national banks,<sup>3</sup> the Conference of State Bank Supervisors (CSBS) submitted a

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<sup>1</sup> Press Release, OCC to Consider Fintech Charter Applications, Office of the Comptroller of the Currency, <https://occ.gov/news-issuances/news-releases/2016/nr-occ-2016-152.html>.

<sup>2</sup> Press Release, OCC Issues Draft Licensing Manual Supplement for Evaluating Charter Applications From Financial Technology Companies, Will Accept Comments Through April 14, Office of the Comptroller of the Currency, <https://occ.gov/news-issuances/news-releases/2017/nr-occ-2017-31.html>.

<sup>3</sup> Office of the Comptroller of the Currency, Proposed Rule: Receiverships for Uninsured National

comment that primarily took issue with a very small portion of the proposed rulemaking in which the OCC argued that it had the power to grant fintech charters. Why are the states so concerned? By their own admission, “[s]tate regulators are firmly opposed to any expansion of the Comptroller’s chartering authority that would enable wholesale preemption of State oversight and consumer protection laws for a group of entities conducting activities that are only loosely related to banking.”<sup>4</sup> Essentially, the states do not want the OCC encroaching on their turf.

The CSBS’s opposition to a possible OCC fintech charter became even more pronounced following the release of the Draft Supplement. Less than two weeks after the comment period for the Draft Supplement ended, the CSBS sued the OCC, claiming that the OCC is overstepping its jurisdiction by planning to offer a fintech charter.<sup>5</sup> In July, the OCC filed a motion to dismiss the CSBS suit, arguing that the suit was not ripe because the agency had not yet formally decided to offer the fintech charter.<sup>6</sup>

As if the challenge from a group representing the interests of regulators from all 50 states wasn’t enough, the New York Department of Financial Services (DFS) has also thrown its hat into the ring. Much like the CSBS, the opinions of DFS were first made clear in a comment letter.<sup>7</sup> In voicing its objections to the Fintech White Paper, DFS reiterated CSBS’s concerns that the OCC did not have the authority to grant such a charter and that, even if the OCC had the authority, it would be unnecessary because there is already effective state regulation in place.<sup>8</sup> On May 12, 2017, DFS took it one step further and filed a lawsuit, contending that the fintech charter was beyond the OCC’s statutory authority under the National Banking Act and thus violated the Tenth Amendment.<sup>9</sup> Reacting as it did to the CSBS lawsuit, the OCC filed a motion to dismiss in August, noting once again that the issue was not yet ripe.<sup>10</sup>

Regardless of the outcome of these suits, it is clear that regulators are preparing for a world without the OCC fintech charter. In May 2017, CSBS announced several initiatives aimed at making its Nationwide Multistate Licensing System—which was originally designed for the

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Banks, 81 Fed. Reg. 62835 (Sept. 13, 2016) <https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-110a.pdf>.

<sup>4</sup> Conference of State Bank Supervisors, Comment Re: Receiverships for Uninsured National Banks, Proposed Rule; Docket ID OCC-2016-0017 at 2, (Nov. 14, 2016), (<https://www.csbs.org/regulatory/policy/Documents/2016/CSBS%20Comment%20Letter%20on%20OCC%20Receiverships%20for%20Uninsured%20National%20Banks%20NPRM.pdf>).

<sup>5</sup> Rachel Witkowski, *State Banking Regulators Sue Federal Agency to Stop Charters for Fintech Firms*, Wall Street Journal (Apr. 26, 2017), <https://www.wsj.com/articles/state-banking-regulators-sue-federal-agency-to-stop-charters-for-financial-tech-firms-1493220557>.

<sup>6</sup> Lalita Clozel, OCC files motion to dismiss fintech charter lawsuit, American Banker (July 31, 2017), <https://www.americanbanker.com/news/occ-files-motion-to-dismiss-fintech-charter-lawsuit>.

<sup>7</sup> New York Department of Financial Services, Comment Re: Exploring Special Purpose National Bank Charters for Fintech Companies (Jan. 17, 2017), [http://www.dfs.ny.gov/about/occ\\_letter1-17-17.pdf](http://www.dfs.ny.gov/about/occ_letter1-17-17.pdf).

<sup>8</sup> *Id.* at 2.

<sup>9</sup> Jeffrey Alberts & Ingrid He, OCC vs. New York DFS: Battle for the Future of FinTech, Bloomberg BNA (July 17, 2017), <https://www.bna.com/occ-vs-new-n73014461841/>.

<sup>10</sup> See Memorandum of Law in Support of Defendants’ Motion to Dismiss the Complaint, *Vullo v. Office of the Comptroller of Currency, et al*, No. 17-CV-3574 (NRB) (S.D.N.Y. Aug. 18, 2017).

mortgage market—more attractive to fintech companies.<sup>11</sup> The very next day, DFS announced that it would join the Nationwide Multistate Licensing System.<sup>12</sup>

### **A Change in Leadership**

Shortly after the release of the Draft Supplement, on April 9, 2017, Thomas Curry’s five-year tenure as Comptroller of the Currency ended. Though he continued to serve in the role for nearly an additional month, Curry eventually stepped down and Keith Noreika took over as Acting Comptroller of the Currency.<sup>13</sup> Unlike Curry, who was a career government attorney,<sup>14</sup> Noreika came into the job with a background in private practice.<sup>15</sup> It would be logical to think that, given his background and appointment by a Republican administration, Noreika’s arrival might have signaled a death knell for the fintech charter. That has not been the case.

While the program hasn’t necessarily gotten off the ground as one might have expected given its running start, it is still very much alive. In a speech before the Exchequer Club in July 2017, Acting Comptroller Noreika noted that he felt the idea of chartering fintech companies was a “good idea that deserves the thorough analysis and the careful consideration [the OCC is] giving it.”<sup>16</sup> Perhaps more importantly, Noreika emphatically defended the authority of the OCC to grant such charters.<sup>17</sup>

### **Fintechs are Ready. Is the OCC?**

Since the release of the Draft Supplement, multiple fintechs have taken the first step in trying to become banks. Varo Money applied to the Federal Deposit Insurance Corporation for the ability to take deposits, as well as to the OCC for a national bank charter.<sup>18</sup> Square has applied to become an industrial loan company in Utah.<sup>19</sup> SoFi had been exploring the same path until management woes forced the company to withdraw its application.<sup>20</sup>

So, with all of this in mind, where is the OCC right now in offering fintech charters? The short answer is: not just yet. In September 2017, Acting Comptroller Noreika announced that the

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<sup>11</sup> Lalita Clozel, States move to obviate fintech charter, *American Banker* (May 10, 2017), <https://www.americanbanker.com/news/states-try-to-obviate-need-for-federal-fintech-charter>.

<sup>12</sup> Lalita Clozel, New York joins common state licensing platform for fintechs, *American Banker* (May 11, 2017), <https://www.americanbanker.com/news/new-york-joins-common-state-licensing-platform-for-fintechs?tag=00000159-ad66-d644-af5f-eff61aca0000>.

<sup>13</sup> Ryan Tracy, Trump Administration Names Acting Comptroller of the Currency, *Wall Street Journal* (May 3, 2017), <https://www.wsj.com/articles/trump-administration-names-acting-comptroller-of-the-currency-1493825125>.

<sup>14</sup> Press Release, Thomas J. Curry Takes Office as the 30th Comptroller of the Currency, Office of the Comptroller of the Currency, <https://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-58.html>.

<sup>15</sup> Profile: Keith Noreika, Office of the Comptroller of the Currency, <https://www.occ.gov/about/who-we-are/comptroller-of-the-currency/keith-noreika.html>.

<sup>16</sup> Keith Noreika, Remarks Before the Exchequer Club (July 19, 2017), <https://www.occ.gov/news-issuances/speeches/2017/pub-speech-2017-82.pdf>.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> Telis Demos, Fintech Firm Backed by Warburg Pincus Files for Bank Charter, *Wall Street Journal* (July 25, 2017), <https://www.wsj.com/articles/fintech-firm-backed-by-warburg-pincus-files-for-bank-charter-1500981409>.

<sup>19</sup> John Maxfield, Payment Company Square Applies for Bank Charter, *Motley Fool* (Sept. 7, 2017), <https://www.fool.com/investing/2017/09/07/payment-company-square-applies-for-bank-charter.aspx>.

<sup>20</sup> Peter Rudegear, Embattled Fintech Firm SoFi Drops Plan to Open a Bank, *Wall Street Journal* (Oct. 13, 2017), <https://www.wsj.com/articles/fintech-firm-sofi-drops-plan-to-open-a-bank-1507917648>.

OCC was still in the exploratory phase of the process and not ready to proceed with considering applications.<sup>21</sup> This news shouldn't come as a surprise, considering the reasoning for the OCC's motions to dismiss against both the CSBS and DFS lawsuits.

### **Final Thoughts**

In the end, though much has happened since the Draft Supplement was introduced, the OCC is still not considering applications for the fintech charter. Further, the OCC has given no indication of when it will be ready to do so. That could become clearer when Joseph Otting is eventually confirmed as the next Comptroller of the Currency. In the meantime, it is simply a case of wait and see.

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<sup>21</sup> Anna Irrera, U.S. banking regulator not ready for fintech charter applications, Reuters (Sept. 13, 2017), <https://www.reuters.com/article/us-occ-fintech/u-s-banking-regulator-not-ready-for-fintech-charter-applications-idUSKCN1BO2SA>.

## **A Survey of Activities Identified as Unfair, Deceptive, or Abusive Under the Dodd-Frank Act**

by

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American Bar Association Consumer Financial Services Committee  
Federal and State Trade Practices Subcommittee

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### **I. Introduction**

This is our latest article in a series that surveys activities identified as unfair, deceptive or abusive acts or practices (“UDAAPs”) by the Consumer Financial Protection Bureau (“CFPB”), and state attorneys general and consumer financial services regulators, using federal UDAAP powers created by the Dodd-Frank Act.<sup>1</sup> This article covers relevant UDAAP activity that occurred between January 1, 2017 and June 30, 2017, and surveys enforcement actions and other statements by the CFPB in reports that discuss UDAAP violations.<sup>2</sup> These activities provide insight into the specific types of practices that could be considered UDAAP violations in the future.<sup>3</sup>

We intend to publish periodic updates to this article cataloging new UDAAP activity based upon the federal UDAAP powers contained in the Dodd-Frank Act.

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301 *et seq.* (the “Dodd-Frank Act”); *see, e.g.*, 12 U.S.C. § 5552 (2017).

<sup>2</sup> We have attempted to make this survey as comprehensive as possible; however, it is not exhaustive and there may be other relevant actions that are not discussed in this paper. Also, it must be noted that this area of law is rapidly evolving and new actions arise regularly.

<sup>3</sup> The term “unfair” is defined in the Dodd-Frank Act as an act or practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers [and the] injury is not outweighed by countervailing benefits to consumers or to competition.” 12 USC § 5531(c)(1). The term “deceptive” is not statutorily defined, but it is defined in the CFPB’s examination manual as “a material representation, omission, act or practice that misleads or is likely to mislead a consumer, provided the consumer’s interpretation is reasonable under the circumstances.” CFPB Examination Manual V.2, UDAAP 5 (October 2012), available at [http://files.consumerfinance.gov/f/201210\\_cfpb\\_supervision-and-examination-manual-v2.pdf](http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf). The Dodd-Frank Act introduced the term “abusive” and defined it as an act or practice that either:

[1] materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

[2] takes unreasonable advantage of [either]:

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person [such as a bank or other financial institution] to act in the interests of the consumer. 12 USC § 5531(d).

## **II. Overview: Identification of Unfair, Deceptive, or Abusive Acts or Practices**

Between January 1, 2017 and June 30, 2017 the CFPB engaged in 14 public enforcement actions involving alleged UDAAP violations. Past UDAAP actions can provide a road map for industry participants to identify and better understand acts or practices that are considered problematic by law enforcement authorities. UDAAP enforcement actions during the period of this summary involved marketing, servicing, debt collection, and credit reporting. The CFPB highlighted other UDAAP issues involving student loan servicing and mortgage loan servicing in its Supervisory Highlights report. During this period there was one joint enforcement action between the CFPB and a state attorney general and there were no enforcement actions filed independently by state regulators or attorneys general alleging violations of the federal UDAAP prohibition. We provide an update on two litigated cases that were described in previous surveys.

Summaries of the UDAAP actions below appear in chronological order and are intended to provide a straightforward identification of the specific acts or practices that were alleged to be unfair, deceptive, or abusive under the Dodd-Frank Act.

## **III. CFPB Enforcement Actions**

### **a. Equifax Inc. and Equifax Consumer Services LLC – January 2017 (Marketing)<sup>4</sup>**

Equifax Inc. and Equifax Consumer Services LLC (collectively the “company”) entered into a consent order with the CFPB related to allegedly deceptive practices in connection with the sale of credit scores and credit-related subscription services. The CFPB alleged that the company engaged in the following deceptive practices:

- Representing that the company’s proprietary “Equifax Credit Score” was the same score that lenders would use to make credit decisions when the score was actually an “educational score” rarely used in credit decisions and providing disclaimers regarding the nature of the credit score in fine print, far removed from the claims they were intended to modify, and thus in a manner that was not clear and conspicuous; and
- Stating that credit scores and credit score products were “free” without adequately disclosing the negative option billing structure of the offers, where consumers were automatically enrolled into a subscription plan with recurring fees unless the consumer cancelled during the free trial period, and the free trial terms were provided in fine print, in low contrast, and in a less prominent location at the bottom of a webpage, grouped with other disclosures.

Pursuant to the consent order, the company agreed to pay a \$2.5 million civil money penalty and \$3,795,643 in consumer redress to resolve the above allegations of deceptive conduct, along with alleged violations of Regulation V.

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<sup>4</sup> *In the Matter of: Equifax Inc. and Equifax Consumer Services LLC*, File No. 2017-CFPB-0001, Consent Order (January 3, 2017).

b. TransUnion Interactive Inc., TransUnion, LLC, and TransUnion – January 2017 (Marketing)<sup>5</sup>

TransUnion Interactive Inc., TransUnion, LLC, and TransUnion (collectively “the company”) provide credit scores and credit reports to consumers, among other things. The CFPB entered into a consent order with the company in connection with allegedly deceptive claims regarding a proprietary credit score, based on a model from VantageScore Solutions, LLC, referred to as a TransUnion “VantageScore”. Although this score has been marketed to lenders, the CFPB alleged that the “vast majority of credit decisions made by lenders... are not based on VantageScore credit scores” and that there are significant differences between the VantageScore and other scores typically used by lenders.

The CFPB alleged that the following conduct was deceptive:

- Representing that the credit score provided was the same score typically used by lenders or other commercial users for credit decisions, including the use of:
  - Ads urging consumers to “Make sure you know your Credit Score when looking for a car. Lenders typically will check your credit before buying and financing a car;” and
  - Landing pages with additional claims, such as “With a good credit score, you may pay less with lower interest rates on mortgages, auto loans, and credit cards” and disclosures about the nature of these scores only appearing at the bottom of the landing page, “buried at the bottom of the advertisement in fine print, far removed from the claims”, or in some cases the disclosure wouldn’t appear “until the first or second step of the order pages.”
- Representing that consumers could obtain their credit score or credit report for free or for \$1 when in-fact the consumer was enrolling in a negative option subscription plan based on a recurring monthly fee unless the consumer cancelled during the trial period.

Pursuant to the consent order, the company agreed to pay \$13.93 million in consumer redress and a \$3 million civil money penalty.

c. TCF National Bank – January 2017 (Marketing)<sup>6</sup>

The CFPB filed a lawsuit in federal district court against TCF National Bank in connection with the company’s overdraft “opt-in” practices. Regulation E requires specific disclosures and an affirmative opt-in by consumers before they may be assessed an overdraft fee in connection with the payment of ATM and one-time debit card purchases.<sup>7</sup>

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<sup>5</sup> *In the Matter of: TransUnion Interactive, Inc., TransUnion, LLC, and TransUnion*, File No. 2017-CFPB-0002, Consent Order (January 3, 2017).

<sup>6</sup> *Consumer Financial Protection Bureau v. TCF National Bank*, Case 0:17-cv-00166 (Dist. MN Jan. 19, 2017)

<sup>7</sup> 12 U.S.C. 1005.17 (2017).

The CFPB alleged that the following practices were abusive:

- Using a deposit account opening process that interfered with a consumer’s ability to read and consider notices required by Regulation E regarding overdraft opt-ins;
- Using misleading deposit account-opening disclosures that characterized overdraft opt-ins as an included account benefit without adequately disclosing other relevant terms (such as fees);
- Presenting the opt-in decision in a way that made consumers believe they were required to provide consent to open a deposit account (and directing employees to withhold information from consumers that would have corrected this misimpression); and
- Offering employee incentives to impermissibly encourage consumer opt-ins for ATM and one-time debit card purchases, including bonuses, and sales and performance goals that indirectly impacted pay and job security, triggered specifically by customer opt-in rates.

The CFPB alleged that the following practices were deceptive:

- Using an account opening process that discouraged consumers from reading and considering required Regulation E notices;
- Using misleading account-opening disclosures that characterized opt-ins as a benefit without adequately disclosing other relevant terms (such as fees); and
- Presenting the opt-in decision in a way that made consumers believe they were required to provide consent to open an account.

The company moved to dismiss all of the CFPB’s claims and on September 8, 2017 the district court granted in part and denied in part, the company’s motion. The district court held that the CFPB alleged plausible UDAAP claims under the Consumer Financial Protection Act of 2010, but only as to conduct arising on or after its effective date. The district court granted the company’s motion to dismiss the CFPB’s Regulation E claims. This case was not resolved at the time of publication.

d. CitiFinancial Servicing, LLC -- January 2017 (Servicing/Credit Reporting)<sup>8</sup>

CitiFinancial Servicing, LLC, CitiFinancial Company, CitiFinancial Services, Inc., and CitiFinancial, Inc. (collectively the “company”) entered into a consent order with the CFPB involving allegedly deceptive acts or practices related to residential mortgage loan servicing and credit reporting.

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<sup>8</sup> *In the Matter of: CitiFinancial Servicing, LLC (DE), CitiFinancial Company (DE), CitiFinancial Services, Inc. (MN), and CitiFinancial, Inc. (WV)*, File No. 2017-CFPB-0004, Consent Order (January 23, 2017).

The CFPB alleged that the following practices were deceptive:

- Failing to disclose the amount of interest that would accrue during a deferment period, when such interest would be collected, that a deferment would significantly reduce the amount of principal reduction (resulting in increased interest over the life of a loan), and how a borrower's next monthly payment would be applied;
- Misrepresenting the impact of receiving a payment deferral by adequately disclosing to impacted borrowers that interest for deferred payments would be due upon collection of the next monthly installment (when related deferral disclosures suggested that deferred interest would be added to the end of a loan); and
- Failing to cancel optional insurance products in accordance with the terms of loan documents (e.g., when past due insurance premiums equaled or exceeded four (4) times the amount of the first monthly insurance premium) and improperly cancelling some optional insurance policies prematurely, and denying subsequent insurance claims.

The company agreed to provide \$4.4 million in consumer redress and pay a \$4.4 million civil money penalty to resolve these allegations along with alleged violations of the Real Estate Settlement Procedures Act and Regulation X and the Fair Credit Reporting Act and Regulation V.

e. CitiMortgage, Inc. – January 2017 (Servicing)<sup>9</sup>

CitiMortgage, Inc. services consumer residential mortgage loans. The company entered into a consent order with the CFPB involving allegedly deceptive mortgage loan servicing practices.

The Company allegedly sent borrowers a notice of incomplete information letter (“NOII letter”) as a standard response to most borrower inquiries concerning loss mitigation. The NOII letters stated that borrowers were required to provide a long list of documents before it would process a borrower's loss mitigation application but the letters allegedly failed to inform borrowers which of the documents applied to each borrower's individual situation.

The CFPB alleged that the following practices were deceptive:

- Directing borrowers to submit documents that were not required when borrowers contacted the Company concerning loss mitigation applications; and
- Requesting documents that borrowers had already provided to the Company when borrowers contacted the Company concerning loss mitigation applications.

The Company agreed to provide \$17 million in consumer redress and pay a \$3 million civil money penalty to resolve these allegations, along with alleged violation of Real Estate Settlement Procedures Act and Regulation X.

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<sup>9</sup> *In the Matter of: CitiMortgage, Inc.*, File No. 2017-CFPB-0005, Consent Order (January 23, 2017).

f. Navient Corporation, Navient Solutions, Inc., and Pioneer Credit Recovery, Inc. – January 2017 (Servicing)<sup>10</sup>

Navient Corporation and Navient Solutions, Inc. (formerly Sallie Mae, Inc.) (collectively the “servicer”) is the largest student loan servicer in the U.S. and Pioneer Credit Recovery, Inc. (the “debt collector”) is a large federal student loan debt collector collectively the “companies.” The CFPB filed a complaint against the companies alleging a host of loan servicing failures.

The CFPB alleged that the servicer engaged in the following unfair practices:

- Steering borrowers experiencing long-term hardships into forbearance programs without providing any or adequate information about alternative repayment plans, which caused or was likely to cause a drastic increase in the total cost of borrowers’ loans;
- For borrowers that provided consent to receive electronic disclosures, inadequately providing notice that an income-driven repayment renewal notice was available (via an email notice that that did not include information about the purpose or contents of the renewal notice in the subject line or body) in a manner that caused or was likely to cause income-based repayment plans to inadvertently expire and result in additional costs to borrowers; and
- Misallocating and misapplying payments in a manner that caused or was likely to cause injury through late fees, interest charges, and negative credit reporting.

The CFPB alleged that the servicer and the debt collector engaged in the following deceptive practices:

- Sending income-driven repayment renewal notices claiming that any incomplete or inaccurate information would delay the renewal process but failing to identify other severe consequences that could occur, including increased monthly payments, the addition of unpaid interest to principal, and the loss of interest subsidies (servicer only);
- Representing that a co-signer release would be available if a certain number of “consecutive, on-time principal and interest payments” were made without disclosing that payments had to be made even in billing periods where no payment was due to be eligible (servicer only);
- Representing that completed loan rehabilitation programs would result in the removal of all adverse information regarding the student loan from the borrower’s credit report when certain late payment and delinquency information would remain in the borrower’s credit report (servicer and debt collector); and
- Representing that *all* collection fees would be forgiven by the U.S. Department of Education upon completion of a rehabilitation program when approximately 20% of each

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<sup>10</sup> *Consumer Financial Protection Bureau v. Navient Corporation; Navient Solutions, Inc.; and Pioneer Credit Recovery, Inc.*, 3:17-cv-00101-RDM (Dist. PA January 18, 2017).

payment made under the rehabilitation program was allocated toward collection fees (servicer and debt collector).

The CFPB alleged that the servicer engaged in the following abusive practices:

- Taking unreasonable advantage of borrowers' reliance on the servicer to act in their interests by encouraging borrowers to rely on the servicer to provide advice but steering borrowers experiencing long-term hardships into forbearance programs (which were less expensive for the servicer to administer than other programs), rather than income-based repayment programs that would have been more financially beneficial to the borrower.

This case was not resolved at the time of publication.

g. RD Legal Funding, LLC et al – February 2017 (Marketing/Servicing)<sup>11</sup>

RD Legal Funding, LLC, RD Legal Finance, LLC, and RD Legal Funding Partners, LP (collectively “the company”) offered advances to consumers that are entitled to receive compensation from a settlement fund or court ordered judgment, typically paid to a consumer in connection the wrongful onset of a serious illness or disease. The CFPB and the New York Attorney General filed a lawsuit against the company and its owner in his individual capacity arising out of allegations that the advances were improperly characterized as “assignments” and should have been treated as consumer loans.

The CFPB and New York Attorney General alleged that the company engaged in the following deceptive practices:

- Representing that its assignment contracts were valid and enforceable when the contracts were not in fact valid and enforceable;
- Representing that it could “cut through red tape” to accelerate the payment of a consumer’s compensation when: (1) it didn’t actually accelerate such payments; and (2) consumers could not be expected to have information about the compensation programs sufficient to evaluate such a claim;
- Representing that it would deliver funds to consumers on a certain date but delaying disbursements beyond the specified date; and
- Creating the false impression that its contracts were enforceable by attempting to collect payments when, in fact, customers were not obligated to repay the debts since they were void under state law or in excess of state usury caps.

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<sup>11</sup> *Consumer Financial Protection Bureau and the People of the State of New York, by Eric T. Schneiderman, Attorney General for the State of New York v. RD Legal Funding, LLC, RD Legal Finance, LLC, RD Legal Funding Partners, LP, and Roni Dersovitz*, 1:17-cv-00890 (S.D. N.Y. February 7, 2017).

The CFPB and New York Attorney General alleged that the company engaged in the following abusive practices:

- Misrepresenting the nature of the transaction and its validity in a manner that undermined consumers' understanding of the offer, thereby preventing consumers from understanding and evaluating the offer (including the ability to compare costs), materially interfering with consumers' ability to understand the terms of credit, and ultimately rendering consumers unable to protect their own interests.

The New York Attorney General also filed independent claims for alleged violations of New York law. This case was not resolved at the time of publication.

h. UniRush LLC – February 2017 (Servicing)<sup>12</sup>

UniRush LLC (the “company”) and Mastercard International Incorporated (the “processor”) entered into a consent order with the CFPB involving allegedly unfair acts or practices related to a system conversion of the company’s pre-paid cards. The company markets and administers pre-paid cards that allow consumers to load funds (including wages and government benefit payments) onto the cards by ACH direct deposit; add funds at certain retail locations; make bill payments using the cards; and make card-to-card transfers.

When the Company elected to switch to the processor’s card processing system for its ongoing card processing needs, the company and the Processor allegedly failed to adequately plan for the card conversion process and perform system tests to ensure that the card conversion would allow consumer cards to function properly. Following the conversion to the processor, the CFPB alleged that the company failed to adequately service consumers’ prepaid accounts, including failing to take sufficient actions to remedy conversion problems that left consumers without access to their funds.

The CFPB alleged that the following actions by the company and the processor constituted unfair practices:

- Mock testing conducted by the company and the processor did not accurately simulate the actual conversion conditions and the parties failed to complete sufficient mock testing of the conversion conditions, resulting in inaccurate and/or incomplete data transfer during the conversion;
- The parties ended the “blackout” period (the period during which consumers could not use their cards) before all necessary data concerning card account activity had been accurately transferred to the new processing system, resulting in the transfer of incorrect data and the incorrect configuration of data on the processor’s processing system;
- The company failed to establish a contingency plan to enable it to properly staff its customer service needs during the conversion process;

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<sup>12</sup> *In the Matter of: UniRush LLC and Mastercard International Incorporated*, File No. 2017-CFPB-0010, Consent Order (February 1, 2017).

- Post-conversion, the company did not credit certain direct deposits (including the deposit of government benefit payments) for some consumers within the time periods represented to consumers during certain pre-conversion communications;
- The company incorrectly processed or rejected incoming direct deposits for some consumers;
- The company failed to timely process transactions initiated by consumers near the time of conversion;
- Without prior notice to consumers, the company used subsequently loaded funds to offset negative balances caused by direct deposits that the Company had incorrectly processed; and
- Because of the company’s post-conversion failures and administrative actions, some consumers: (a) could not access funds; (b) obtained incorrect card balance and transaction information through the company’s consumer-facing card portal (and therefore either did not attempt transactions that they wished to initiate or initiated transactions that were in excess of their actual card balances); (c) were unable to process requested transactions; (d) received inadequate customer service; and (e) were improperly assessed maintenance fees.

Pursuant to the consent order, the company and the processor jointly and severally agreed to provide \$10 million in consumer redress and pay a \$3 million civil money penalty to resolve these allegations.

- i. Experian Holdings, Inc. Experian Information Solutions, Inc., and ConsumerInfo.com, Inc.– March 2017 (Marketing)<sup>13</sup>

Experian Holdings Inc., Experian Information Solutions, Inc., and ConsumerInfo.com, Inc., dba Experian Consumer Services (collectively the “company”) offer credit scores, credit reports, and other credit-related products to consumers. The company entered into a consent order with the CFPB to resolve allegedly deceptive practices in connection with the sale of its proprietary credit score, referred to as the “PLUS Score”, which is an “educational” credit score not used by lenders.

The CFPB alleged that the following practices were deceptive:

- Representing that the score was used by lenders or other commercial users to make credit decisions when the score was not in fact typically used by lenders or other commercial users, including the use of:

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<sup>13</sup> *In the Matter of: Experian Holdings, Inc., Experian Information Solutions, Inc., and ConsumerInfo.com, Inc., dba Experian Consumer Services, 2017-CFPB-0012, Consent Order (March 23, 2017).*

- Ads stating: “Lenders review your credit information and so should you. Check your credit score to know what to expect”; and
- Disclosures indicating that the score was “not the same score used by lenders” but presenting the disclosure in an inconspicuous manner and “in many instances, far removed from the claims the disclosure was intended to modify.”

Pursuant to the consent order, the company agreed to pay a \$3 million civil money penalty to resolve these allegations and alleged violations of the Fair Credit Reporting Act and Regulation V.

j. Weltman, Weinberg & Reis Co., L.P.A. – April 2017 (Debt Collection)<sup>14</sup>

The CFPB filed a complaint against Weltman, Weinberg & Reis, L.P.A., an Ohio law firm primarily engaged in debt collection. The company collects consumer credit card, installment loan, mortgage loan, and student loan debts on behalf of original creditors and debt buyers.

The CFPB alleged that the company engaged in the following deceptive practices:

- Sending collection letters that indicated the meaningful involvement of collection attorneys, when loan files were not reviewed by attorneys of the firm and the collection process was largely automated; and
- Sending demand and similar collection letters that threatened legal action, improperly influencing consumers to pay debts in situations where the consumers may not otherwise have agreed to make payment.

The CFPB’s complaint also alleged violations of the Fair Debt Collection Practices Act. This case was not resolved at the time of publication.

k. Ocwen Financial Corporation, Ocwen Mortgage Servicing, Inc., and Ocwen Loan Servicing, LLC – April 2017 (Servicing)<sup>15</sup>

The CFPB filed a complaint against Ocwen Financial Corporation, Ocwen Mortgage Servicing, Inc., and Ocwen Loan Servicing, LLC (collectively the “company”) alleging a series of UDAAP violations in connection with its mortgage servicing practices, along with alleged violations of the Fair Debt Collection Practices Act, the Real Estate Settlement Procedures Act and Regulation X, the Truth in Lending Act and Regulation Z, and the Homeowners Protection Act.

The CFPB alleged that the company engaged in the following unfair practices:

- Incorporating inaccurate and/or incomplete information about borrowers’ loans in its system of record, thereby generating inaccurate information about borrowers’ loans

<sup>14</sup> *Consumer Financial Protection Bureau v. Weltman, Weinberg & Reis Co., L.P.A.*, Case No. 1:17-cv-00817 (N. Dist. OH April 17, 2017).

<sup>15</sup> *Consumer Financial Protection Bureau v. Ocwen Financial Corporation, Ocwen Mortgage Servicing, Inc., and Ocwen Loan Servicing, LLC*, 9:17-CV-80495 (Dist. FL April 20, 2017).

(including loan terms, balloon payments, maturity dates, amounts received and owed, escrow balances/disbursements, insurance coverage/disbursements/amounts due, and loss mitigation/foreclosure information); resulting in the “unlawful commencement of foreclosures, improper handling of loss mitigation applications, misapplication of borrowers’ payments, collection and billing of inaccurate and incorrect amounts, the imposition of inappropriate fees and charges, inaccurate delinquency statuses, inaccurate negative credit reporting, and/or emotional distress.”

- Foreclosing on consumers that were in compliance with the terms of loss mitigation agreements, resulting in unilateral breaches of contract; and
- Billing, collecting and processing payments for add-on products that consumers did not consent to purchase.

The CFPB alleged that the company engaged in the following deceptive practices:

- Making inaccurate representations to borrowers regarding various aspects of borrowers’ loans based on inaccurate information from prior loan servicers when the company had “knowledge or reason to believe” that the information it received from prior servicers and its system of record was inaccurate or incomplete, and borrowers had disputed the information;
- Misrepresenting to borrowers that they had 30 days to respond to requests for additional information in connection with a loss mitigation application but commencing foreclosure before the 30 days expired; and
- Offering consumers a cash voucher or refund check without adequately disclosing that in order to receive either offer the consumer had to enroll in an add-on product with a monthly fee, and with respect to the voucher, that the borrower had to be enrolled in the product for a year and pay the monthly fee that entire time to receive the full value of the voucher offered over quarterly installments.

This case was not resolved at the time of publication.

1. Golden Valley Lending, Inc. – April 2017 (Debt Collection)<sup>16</sup>

The CFPB filed a complaint against Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Mountain Summit Financial, Inc., and Majestic Lake Financial, Inc. (collectively the “online lending entities”), related entities all allegedly owned or controlled by the Habematolel Pomo of Upper Lake Indian Tribe (the “tribe”). The CFPB’s complaint alleges that the online lending entities operated various internet websites promoting small dollar consumer installment loans on a nationwide basis with annual percentage rates ranging from 440% to 950%. The CFPB’s complaint alleges UDAAP violations along with violations of the Truth in Lending Act and its implementing regulation, Regulation Z (based on improper annual percentage rate disclosures).

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<sup>16</sup> *Consumer Financial Protection Bureau v. Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Mountain Summit Financial, Inc., and Majestic Lake Financial, Inc.*, Case No. 1:17-cv-03155 (N. Dist. IL E.D. April 27, 2017).

The CFPB’s complaint contends that the online lending entities are not owned or operated by the tribe, and that loans made by the online lending entities are therefore subject to state law and violate state usury and other laws concerning the terms of small dollar consumer installment loans. The CFPB’s complaint asserts that, based on these state law violations, the loans originated by the online lending entities through internet websites operated by the online lending entities and through third party lead generators were void at their inception.

The CFPB alleged that the online lending entities engaged in the following deceptive practices:

- Sending demand letters for payment of, originating ACH debit entries from consumer bank accounts for the payment of, and contacting consumers by telephone to demand repayment of loans that were illegal and unenforceable under applicable state law; and
- Failing to disclose that the online lending entities had no right to collect loan payments because consumers had no legal obligation to repay the related, unenforceable loans.

The CFPB alleged that the online lending entities engaged in the following unfair practices:

- Servicing, extracting payments for, and collecting on loans that were void at inception and unenforceable under applicable state law.

The CFPB alleged that the online lending entities engaged in the following abusive practices:

- Taking unreasonable advantage of a consumer’s lack of understanding that its loans were void at inception and unenforceable under applicable state law; and
- Collecting debts to which the online lending entities were not entitled.

This case was not resolved at the time of publication.

- m. Commercial Credit Consultants L.L.C. et al.<sup>17</sup> and Park View Law Inc. et al.<sup>18</sup> – June 2017 (Marketing)

Commercial Credit Consultants, IMC Capital L.L.C., and Prime Credit, L.L.C. offered credit repair services to consumers through telemarketing. Park View Law was also engaged in the offering of credit repair services through telemarketing and had a contractual relationship with Prime Credit, L.L.C. to market and perform credit repair services (Commercial Credit Consultants, IMC Capital L.L.C., Prime Credit, L.L.C., and Park View Law, collectively the “companies”).

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<sup>17</sup> *Consumer Financial Protection Bureau v. Commercial Credit Consultants (d.b.a. Accurise); IMC Capital L.L.C. (a.k.a. Imperial Meridian Capital L.L.C., Imperial Capital, and IMCA Capital L.L.C.); Prime Credit, L.L.C. (a.k.a. Prime Marketing, L.L.C.; d.b.a. Prime Credit Consultants); Blake Johnson; and Eric Schlegel*, 2:17-cv-04720 (C. D. CA June 27, 2017).

<sup>18</sup> *Consumer Financial Protection Bureau v. Park View Law, Inc. (f.k.a. Prime Law Experts, Inc.), and Arthur Barens*, 2:17-cv-4721 (C. D. CA June 27, 2017).

The CFPB alleged in nearly identical complaints against the companies that they engaged in the following deceptive practices:

- Representing, without any reasonable basis, that its credit repair services would or would likely:
  - Result in the removal of negative entries on a consumer’s credit report, without regard to whether the entries were accurate or obsolete; and
  - Result in a “substantial increase” to the purchaser’s credit score;
- Misrepresenting the nature of its “guarantee” by giving the net impression that consumers could obtain a full refund if they were unsatisfied with the credit repair services but only providing refunds under the guarantee if the company failed to remove at least one disputed item from a consumer’s credit report within six months *and* the consumer paid for the credit repair services for those six months; and
- Failing to disclose monthly fees associated with the service and thereby misrepresenting the cost of services provided.

Commercial Credit Consultants, IMC Capital L.L.C., and Prime Credit, L.L.C. agreed to resolve the CFPB’s allegations of deceptive conduct, in addition to alleged violations of the Telemarketing Sales Rule (TSR), in a stipulated final judgment that required payment of \$1.53 million in civil money penalties. Park View Law agreed to resolve the CFPB’s allegations of deceptive conduct, in addition to alleged violations of the TSR, in a stipulated final judgment that required the disgorgement of \$500,000.

#### **IV. CFPB Guidance**

##### **a. Phone Pay Fees**<sup>19</sup>

The CFPB published a compliance bulletin to address the payment made by phone, particularly with respect to fees charged for payments made by phone. The bulletin identifies a series of practices that may constitute UDAAPs, including:

- Not disclosing the fees of all materially different phone payment options;
- Misrepresenting the nature of phone payment options and the existence of fees;
- Adding phone payment fees to a consumer’s payment in a manner that disguises the fee; and
- Inadequate employee monitoring and service provider oversight to prevent the problems identified above.

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<sup>19</sup> CFPB Compliance Bulletin 2017-01, *Phone Pay Fees* (July 31, 2017), available at [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707\\_cfpb\\_compliance-bulletin-phone-pay-fee.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_compliance-bulletin-phone-pay-fee.pdf).

## V. CFPB Supervisory Highlights

The CFPB periodically issues Supervisory Highlights reports that summarize its supervisory activity over a period of time and identify, among other things, allegedly unfair, deceptive or abusive conduct that may not have otherwise been publicly disclosed in enforcement actions.

### a. Spring 2017 Supervisory Highlights (Published in April 2017)<sup>20</sup>

The CFPB's Spring 2017 Supervisory Highlights report identified confidentially resolved UDAAPs in connection with the servicing of mortgages and student loans.

With respect to mortgage servicing, the CFPB cited a servicer for unfair practices when it improperly disbursed funds from a borrower's escrow account to pay insurance premiums owed by other borrowers, creating unavoidable escrow shortages and increased monthly payments for affected borrowers.

With respect to student loan servicing, the CFPB indicated that:

- One or more servicers' receipt of incorrect information from a third-party enrollment service provider caused it to prematurely terminate loan deferments for certain borrowers, and while the servicer retroactively reinstated the deferment, the servicers' failure to refund late fees and capitalized interest that occurred because of the improper deferment was an unfair practice; and
- One or more servicers' were placing student loan borrowers into successive periods of forbearance or deferment and capitalizing interest after each period rather than waiting to capitalize interest a single time at the end of the successive periods, but that the servicers deceptively misrepresented this practice by stating to consumers that interest would capitalize at the end of the deferment period rather than at the end of each deferment period.

## VI. Updates on Past Cases

### a. Intercept Corporation – March 2017 (Payment Processing)<sup>21</sup>

We previously reported that the CFPB filed a civil complaint against Intercept Corporation, a third-party payment processor that facilitates the movement of funds through the Automated Clearing House (ACH) network between consumer bank accounts and other providers of consumer financial services, namely payday lenders, debt collectors, and auto title lenders. The CFPB's complaint alleged that the company engaged in unfair practices when it failed to conduct

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<sup>20</sup> CFPB Supervisory Highlights, Issue 15 (April 2017), available at [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704\\_cfpb\\_Supervisory-Highlights\\_Issue-15.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704_cfpb_Supervisory-Highlights_Issue-15.pdf).

<sup>21</sup> *Consumer Financial Protection Bureau v. Intercept Corporation, d/b/a InterceptEFT, Bryan Smith, and Craig Dresser*, Case No. 3:16cv00144-ARS (E.D. ND. March 17, 2017). Note that the CFPB also alleged that company's individual owners and operators were individually liable for the company's conduct.

due diligence on its customers and ignored warning signs that it was processing payments for companies that were engaged in fraudulent conduct.

In a March 17, 2017 order, the district court granted the company's motion to dismiss, finding that the CFPB's complaint failed to plead "facts sufficient to support the legal conclusion [necessary to prove an unfairness claim, namely] that consumers were injured or likely to be injured."

The opinion recites the statutory definition of unfairness and holds that neither the injury nor countervailing benefit to consumer prongs of an unfairness claim were sufficiently pled to survive a motion to dismiss. Specifically, the district court notes that the CFPB's complaint:

- Failed "to sufficiently allege facts tending to show that [payment processing industry] standards were violated";
- Failed to include facts allowing a determination of whether "any potential injury was or was not counterbalanced by benefits to consumers"; and
- Failed to include facts demonstrating that the company interfered with consumers' ability to understand the terms of their arrangements with clients or that the company took unlawful advantage of consumers, both of which are aspects of an abusiveness claim rather than an unfairness claim (though abusiveness was not plead in this case).

The district court concluded that "[a] complaint containing mere conclusory statements without sufficient factual allegations to support the conclusory statements cannot survive a motion to dismiss" and the case was dismissed.

b. NDG Fin. Corp. – December 2016 (Debt Collection)<sup>22</sup>

We previously reported that the CFPB had filed a complaint against NDG Fin. Corp. and related offshore companies (collectively the "company") alleging that, through various internet websites, the company originated and then collected on small dollar consumer installment loans without required state licensing and/or at interest rates that exceeded state usury caps.

The CFPB filed an amended complaint on December 11, 2015 and the company subsequently filed motions to dismiss the CFPB's amended complaint based on: (a) lack of personal jurisdiction; and (b) failure to state a claim upon which relief can be granted because: 1) the claims were time-barred or retroactive; and 2) the CFPB itself was unconstitutional.

On December 2, 2016, the district court denied the motions to dismiss and held that the CFPB had adequately pled, among other things, UDAAP claims under the Consumer Financial Protection Act of 2010.

This case was not resolved at the time of publication.

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<sup>22</sup> *Consumer Financial Protection Bureau v. NDG Fin. Corp.*, Case No. 1:15-cv-05211 (S. Dist. N.Y. July 31, 2015).

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Adam Maarec is a member of Davis Wright Tremaine LLP's Payments Team, located in Washington, D.C. He concentrates his practice on consumer financial services, primarily advising financial institutions on regulatory compliance matters involving payment and credit product structures, marketing, and servicing. Adam has experience with a broad range of financial services laws including Dodd-Frank, the Truth in Lending Act, the CARD Act, the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, and the Real Estate Settlement Procedures Act, as well as state-based insurance regulations. His regulatory practice involves helping companies comply with various laws and regulations, drafting rulemaking comment letters, meeting with government agencies, and responding to regulatory investigations.

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Christopher Rahl is the chair of Gordon Feinblatt's Financial Services group, located in Baltimore, Maryland. He provides legal advice concerning a broad range of legal issues, including regulatory compliance; transactional matters; corporate governance; and litigation avoidance and management. Chris advises clients in connection with state and federal lending, deposit, debt adjustment, credit service business, money transmission, and privacy statutes and regulations. His regulatory and transactional practice involves helping clients with: licensing requirements and applications; compliance with state and federal laws and regulations; negotiation and review of vendor agreements; new product structure and documentation; development of online policies and terms of use; and business entity choice and formation.

# Leadership Succession and Opportunities

By [Andrew Smith](#)\*

On behalf of the CFSC, I would like to welcome the incoming leaders of our subcommittees and task forces, and thank our outgoing leaders for their outstanding service to our Committee. As a relatively large Committee with nearly 1500 members, I invite you to take advantage of the many opportunities to serve in leadership and make a contribution:

- **Subcommittees and Task Forces:** We have 15 subcommittees and task forces that are primarily responsible for organizing CLE programs at our three annual meetings. Each of these subcommittees and task forces has one chair and two vice chairs. In addition each has at least two **Young Lawyer Liaisons** (YLLs) who help with coordinating panels and presentations.
  - Several new YLLs will be appointed to the subcommittees and task forces in advance of the September 2018 Annual Meeting. If you are interested in serving as a YLL, keep an eye on your email for an announcement in late spring or early summer of 2018.
  - Our **Pro Bono Subcommittee**, under the leadership of David Esquivel and Katrina Christakis, organizes pro bono financial education events at senior centers and community centers in connection with our face-to-face meetings. Not only do these events give you an opportunity to provide a positive benefit to individuals in need, but they give you an opportunity to work shoulder to shoulder with your fellow CFSC members and make new friends.
- **Publications and Content:** We have a quarterly Newsletter (which you are reading now), an active website and social media presence, a couple of treatises that we publish, as well as The Annual Survey of Consumer Financial Services Law in The Business Lawyer. The Newsletter has three co-editors plus YLLs, and the Website/Publications also have three leaders and YLLs.
  - Our Newsletter, Website and publications allow countless opportunities for CFSC members to make real and lasting contributions to the CFSC as well as to consumer financial services legal scholarship.

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\* Andrew Smith is a partner in the Washington, D.C. office of Covington & Burling LLP and is Chair of the Consumer Financial Services Committee.

- In advance of each new issue of our Newsletter, we will solicit articles, including recaps of recent presentations, subcommittee spotlights, profiles of particularly exalted CFSC members, and substantive articles on a CFS topic of your choosing.
- **Membership and Engagement:** We have a Membership Subcommittee, as well as our Young Lawyers Subcommittee, which are responsible for integrating new members and younger lawyers into the Committee and creating opportunities for member engagement.
- **Administrative Committee Directors:** CFSC is also a part of the larger ABA Business Law Section, and we interact with the BLS in a number of ways, including through appointing Directors to various BLS Administrative Committees, including committees responsible for programs, education, publications, content, diversity, technology, membership and pro bono.
- **Fellows and Mentors:** We have an active program of Consumer Fellows – advocates and academics who attend and participate in our meetings. We also have several BLS Fellows – younger and diverse lawyers – who attend and participate in our meetings. More experienced members of CFSC graciously serve as their mentors, to show them the ropes of the Committee.
- **Programming:** We also have a Chair (yours truly), vice chairs, and programming chairs and vice chairs for the full Committee. The chair and vice chairs of the Committee are responsible for making sure that the trains generally run on time, while the programming leaders are responsible for corralling topics and materials for the more than 50 hours of CLE programming that we present each year. They also organize the non-CLE webinars and roundtables that we present.

I am frequently asked how one goes about becoming a subcommittee or task force leader. I think that the most important qualification for the job is a commitment to the CFSC, as demonstrated by attendance at our three annual face-to-face meetings and contributions to CFSC efforts (such as the Newsletter or webinars). It also would be helpful to contribute to programming, such as by organizing a Roundtable or pitching program ideas to subcommittee leaders and then helping to organize the actual program. Finally, with respect to subcommittees that have a substantive focus (such as privacy, housing finance, or fair access to services), it is important that you have the substantive expertise to organize the high quality and sophisticated programming that CFSC members depend upon.

Throughout the year we are appointing new individuals to the various leadership positions in the CFSC. Most of the leadership turnover occurs after the Annual Meeting, held each year in September. This year was no exception. The following CFSC members have cycled off of or onto CFSC leadership over the last month:

<b>SUBCOMMITTEE</b>	<b>OUTGOING</b>	<b>INCOMING</b>
Full Committee	Lynette Hotchkiss	Katrina Christakis
Annual Survey of CFS Law	Keith Rowley	

CFSC Newsletter	Yolanda Gamboa	
Compliance Management	Christine Poulon	Monika McCarthy
	Lauren Campisi	Kirk Jensen
Consumer Fellows	Ellie Blume	Nick Smyth
Debt Collection & Bankruptcy	Don Maurice	Sabrina Neff
Deposit Products	Lois Woodward	Nancy Brooks
	David Thompson	Duncan Douglass
Diversity Task Force	Anthony Sharett	Mauricio Videla
	Shara Chang	Robin Nunn
Electronic Financial Services		Yolanda Gamboa
Fair Access to Services	Jonice Tucker	Chris Willis
Federal Regulation of CFS Treatise		Jenny Lee
Housing Finance	Dave Permut	Jim Milano
	Melissa Klimkiewicz	Tom Kearney
In-House Counsel Roundtable	Julie Caggiano	Meg Milroy
	Nancy Brooks	Anthony Sharett
Litigation & Arbitration		Maria Early
Personal Property	Michael Benoit	Kelly Lipinski
	Scott Shea	
Privacy & Data Security	Peter Gilbert	Agnes Bundy Scanlan
	Tara Potashnik	Jim Rau
Pro Bono		Jennifer Newton

Thank you so much to all of the outgoing leaders for your stellar service to CFSC members, and a hearty welcome to the new leaders. We look forward to working with you for many years to come.