Banking and Finance Law Daily Wrap Up, TOP STORY—CFPB moves to eliminate payday lenders' underwriting obligations, (Feb. 6, 2019)

Banking and Finance Law Daily Wrap Up

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A proposed amendment to the CFPB's short-term loan rule would relieve lenders of any regulatory obligation to consider whether a consumer will be able to make required payments before they extend credit.

As promised last year by Acting Director Mick Mulvaney, the Consumer Financial Protection Bureau is proposing amendments to 12 CFR Part 1041—Payday, Vehicle Title, and Certain High-Cost Installment Loans rules that would allow lenders to extend short-term, high-cost loans to consumers without needing to satisfy regulatory underwriting requirements. In addition to proposing to eliminate the underwriting requirements, the Bureau is proposing to extend the compliance date of the rule's underwriting duties by 15 months, which would enable the CFPB to eliminate the requirements before they take effect.

According to the CFPB press release, the underwriting requirement was adopted without enough evidence or legal support. Moreover, it will restrict consumers' access to credit in states that permit payday and other short-term loans.

The CFPB's rule was adopted on Oct. 5, 2017, with most of its terms—including the underwriting requirements —scheduled to take effect on Aug. 19, 2019 (see *Banking and Finance Law Daily*, Oct. 5, 2017). The delay proposal says the Bureau is concerned over the costs the underwriting requirement will impose on lenders, given that the requirement might eventually be withdrawn.

Payday loan rule terms. The underwriting requirements, which the CFPB referred to as the full-payment test, broadly provide that it is an unfair and abusive act to make a covered loan if the consumer will not be able to make the required loan payments, meet basic living expenses, and cover major financial obligations during the shorter of the life of the loan or 45 days after the credit is extended and for 30 days after the highest payment required by the loan. Specific repayment terms apply depending on a loan's size and maturity.

The press release points out that some significant consumer protections of the short-term loan rule would not be affected by the proposal. The proposal would not change the restrictions on lenders' ability to debit consumers' bank accounts for payments. However, the proposals do not pledge there will be no further amendments; in fact, other possible amendments are under consideration.

Problems with bases for rule. The proposal observes that the Bureau generally acts to make credit more available to consumers and enhance competition. However, the underwriting requirement has the opposite effect, reducing both credit availability and competition. Given that, combined with regulatory efforts in states that permit payday and title loans, there is not enough evidence to conclude that loans that are not underwritten as required cause consumers substantial injury they cannot reasonable avoid and that is not outweighed by the benefits to consumers and competition. In other words, the affected lending was not shown to be unfair or abusive, the Bureau says.

The proposal also takes issue with the factual evidence behind the underwriting requirement. The significant effects the requirement will have on the industry and its customers require greater evidentiary support than was present, the Bureau now says, calling for evidence of unfairness to consumers that is "robust and reliable."

The evidence on which the requirement was based does not clear that hurdle, according to the CFPB.

The determinations about the legal and factual bases for the rule are said to be preliminary. They are subject to public comment.

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