Strategic Perspectives

Top 10 banking law developments in August

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August was a month that featured banking law court opinions as well as some regulatory highlights. The Consumer Financial Protection Bureau survived a challenge to its small business data collection rule, an appellate court decision on the statutory application of home equity lines of credit (HELOC), a case ruling in favor of a consumer against credit reporting agency Equinox Information Solutions, Inc., the failure of the CFPB to state eight of 10 claims it brought against Snap Finance LLC. The U.S. Court of Appeals for the Seventh Circuit affirmed dismissal of a consumer's Fair Credit Reporting Act lawsuit against Equifax, and defendant's 'willfulness' claims in a foreign banking account reporting (FBAR) case rejected. Finally, the CFPB argued in a brief that it's late fee rule should be allowed to take effect.

In regulatory news, the CFPB released an advisory opinion and research report examining contract-for-deed home purchases. The Federal Deposit Insurance Corporation notified FDIC-supervised institutions of a final amendment by the U.S. Department of Labor to its "Prohibited Transaction Class Exemption rule" for "Qualified Professional Asset Manager (QPAM) exemptions." Finally, the Financial Enforcement Network (FinCEN) adopted a final rule targeted toward combatting illicit finance activity and national security threats in the investment adviser sector.

Challenge to CFPB's small business data collection rule rejected

The CFPB did not exceed its authority by promulgating a small business data collection rule implementing §1071 of the Dodd-Frank Act, and its resulting final rule does not violate the Administrative Procedure Act (APA), the federal district court in McAllen, Texas, decided. The court rejected arguments by a group of bankers' associations and aligned businesses that the Bureau had failed to respond to industry feedback or to conduct a proper cost-benefit analysis of the rule, and it therefore granted judgment as a matter of law to the CFPB defendants on each of the plaintiff associations' APA claims. Accordingly, the court also denied the plaintiffs' and intervenors' motions to supplement the administrative record and for summary judgment. At the same time, because the court "must still rule on the Farm Credit Intervenors' Motion to Amend the Complaint in Intervention, the resolution of which may introduce an additional claim to this case," the court found that entry of a final judgment would be "inappropriate at this juncture" (*Texas Bankers Assn. v. CFPB*, No. 7:23-CV-144 (S.D. Tex. Aug. 26, 2024)).

While TILA applies to home equity lines of credit, RESPA does not

The U.S. Court of Appeals for the Fourth Circuit has partially affirmed and partially reversed a federal trial court, ruling that one consumer protection statute did apply and one did not apply to a HELOC. The court ruled that the Truth in Lending Act does apply to HELOCs, but that because of a CFPB exemption, the Real Estate Settlement Procedures Act does not similarly apply to HELOCs (*Lyons v. PNC Bank, N.A.*, No. 22-1943 (4th Cir. Aug. 14, 2024)). The federal district court in Baltimore, Md. had found that neither statute applied to a HELOC.

Court rules in favor of consumer plaintiff in FCRA case against Experian

A consumer filed a claim under the Fair Credit Reporting Act against credit reporting agency Experian claiming the company negligently or willfully published inaccurate information in his consumer report that he owed spousal and child support. A Michigan federal district court had sided with Experian, but the U.S. Court of Appeals for the Sixth Circuit reversed, holding that the consumer sufficiently pleaded that Experian did not adopt reasonable procedures to ensure maximum possible accuracy and did not reasonably reinvestigate the consumer's

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report after he challenged its accuracy (*Berry v. Experian Information Solutions, Inc.*, No. 23-1961 (6th Cir. Aug. 19, 2024).

CFPB suffers dismissal of most claims against Snap lease-to-own finance company

The CFPB failed to state eight of 10 claims it brought against Snap and related entities, a federal district court in Salt Lake City, Utah, held. The court's main conclusion was that Snap's lease-to-own agreements were not credit arrangements within the statutory definition of "credit" under the Consumer Financial Protection Act, Electronic Fund Transfer Act, and Truth in Lending Act. The court otherwise declined to place the CFPB's characterization of how the lease agreements worked or how consumers perceived them to work as credit over the actual terms of the agreements. The court's dismissals were without prejudice to the extent they turned on the CFPB's failure to plead Snap used its "legacy lease" to finance one-time "services" under the CFPA and EFTA. The CFPB's two surviving claims pertained to alleged violations of the Fair Credit Reporting Act wherein Snap failed to show expiration of the limitations period. The court declined to apply the common enterprise doctrine to certain Snap entities as "too attenuated" from the CFPB's FCRA claim. The court also said it did not want to give the government a "shortcut" for circumventing group-pleading rules (*CFPB v. Snap Finance LLC*, No. 2:23-cv-00462-JCB (D. Utah Aug. 1, 2024)).

FCRA claims against Equifax properly dismissed

The U.S. Court of Appeals for the Seventh Circuit affirmed dismissal of a consumer's Fair Credit Reporting Act lawsuit against Equifax Information Services, LLC, alleging Equifax had reported inaccurate late payments in violation of 15 U.S.C. §§ 1681e(b) and 1681i(a)(1)(A). The district court hearing the lawsuit granted summary judgment to Equifax, ruling that the information furnished and reported by Equifax was true, meaning there was no inaccuracy in Equifax's report. The Seventh Circuit affirmed on that basis and then went further to find (1) that the consumer's claimed damage (denial of a mortgage application) stemmed from a report sent to the bank by a different company and that Equifax cannot be held liable for another company's report; and (2) that Equifax's report did not cause the bank to deny the consumer's loan application. Therefore, the appeals court affirmed the district court's decision. (*Frazier v. Equifax Information Services*, No. 23-2355 (7th Cir. Aug. 7, 2024)).

Defendant's 'willfulness' claims in FBAR case rejected

A federal district court correctly applied an objective "recklessness" standard when it ruled, at conclusion of a bench trial, that civil defendant Timberly Hughes willfully failed to report a FBAR, affirmed the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit noted how the U.S. Supreme Court distinguished between "willfulness" in the civil and criminal contexts in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007). Hughes waived her challenge here, but the court applied its discretion to review it anyway, to clarify the law in the circuit. The appellate court rejected Hughes' challenge that the FBAR requirement was inherently punitive. Other circuits had expressly stated that civil recklessness requires more than mere negligence, and there was no reason to think that any court opinions on-point had conflated mere negligence with recklessness. The district court certainly did not engage in any conflation, given that it found no willful failure to file in two of the four possible filing years tried to conclusion (*U.S. v. Hughes*, Nos. 23-15712 and 23-15713 (9th Cir. Aug. 21, 2024)).

CFPB argues late fee rule should be allowed to take effect

The CFPB argued in a brief filed with United States District Court for the Northern District of Texas that the court should dissolve a preliminary injunction and let its rule capping credit card late fees take effect. The argument came in a lawsuit brought by the U.S. Chamber of Commerce, American Bankers Association, and other business associations, which have sought to prevent the CFPB from capping credit card late fees at generally $8. The groups have argued that the cap, imposed under the agency›s authority under the CARD Act, is consistent with the law (*Chamber of Commerce v. CFPB*, No. 4:24-cv-00213-P (N.D. Tex. Aug. 22, 2024)). The CFPB told the court that the associations misinterpreted the law in claiming that it requires "penalty" fees to exceed the costs imposed on credit card issuers by a violation of their terms, such as making a late payment. "That claim rests on a blinkered interpretation of the word 'penalty' and disrespects Congress's decision to task the Bureau with establishing standards for meeting the statute's 'reasonable and proportional' requirement," the CFPB argued.

Contract-for-deed home purchases are covered by federal mortgage protections

The CFPB released an advisory opinion and research report examining contract-for-deed home purchases. Under contract-for-deed purchases, the seller agrees to turn over a home's deed only after the buyer completes a series of payments. The advisory opinion affirms that federal home lending rules and laws—including the Fair Credit Reporting Act, Truth in Lending Act, and the prohibition against unfair, deceptive, and abusive acts and practices—cover contract-for-deed transactions and provide consumer protections.

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Revised exemption for 'Qualified Professional Asset Managers' may impact banks

In a Financial Institution Letter (FIL-55-2024), the FDIC notified FDIC-supervised institutions of a final amendment by the U.S. Department of Labor to its "Prohibited Transaction Class Exemption rule" for "Qualified Professional Asset Manager (QPAM) exemptions." This QPAM Exemption (also referred to as "PTE 84-14") provides "broad relief for employee benefit plan and individual retirement account transactions that would otherwise be prohibited" by the Employee Retirement Income Security Act and as codified in the Internal Revenue Code. Notably, under the Labor Department's former rule, Qualified Professional Asset Managers did not need to notify the Labor Department that they were relying on the Exemption. In contrast, under the Department's newly amended QPAM Exemption rule, "a one-time notice is now required in order to continue to rely on the Exemption, provided certain conditions are met."

FinCEN rule addressing illicit finance subjects 'at-risk' investment advisors to BSA rules

FinCEN adopted a final rule aimed at combatting illicit finance activity and national security threats in the investment adviser sector. The final rule adds certain "at-risk" investment advisers—specifically SEC-registered investment advisers (RIAs) and exempt reporting advisors (ERAs)—to the definition of financial institution under the regulations that implement the Bank Secrecy Act (BSA). It also prescribes minimum standards for anti-money laundering and countering the financing of terrorism (AML/CFT) programs to be established by such RIAs and ERAs, requires RIAs and ERAs to report suspicious activity to FinCEN, demands that they keep certain records relating to the transmittal of funds, and requires them to fulfill other obligations applicable to financial institutions that are subject to the BSA and FinCEN's implementing regulations, such as special information sharing procedures. The final rule takes effect Jan. 1, 2026.

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