



# CFSA 2017 Conference & Expo

February 28-March 2, 2017  
La Quinta Resort  
Palm Springs, California



# Legal and Regulatory Compliance: Hot Topics in Consumer Lending



Robert W. Cardwell  
Managing Director, RISC  
[robert.cardwell@fisglobal.com](mailto:robert.cardwell@fisglobal.com)



Jonathan L. Pompan  
Partner, Venable  
[jlpompan@venable.com](mailto:jlpompan@venable.com)

Kara M. Ward  
Counsel, Venable  
[kmward@venable.com](mailto:kmward@venable.com)

# Important Information

*This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.*

*This presentation does not represent any undertaking to keep recipients advised as to all or any relevant legal developments.*

*ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome.*



# Themes We Will Cover Today

- Overview of the Political and Legislative Landscape
- CFPB Challenges
- Regulatory Outlook
- Innovation and Investments
- Supervision and Examinations
- Enforcement
- Questions and Closing Observations



# Overview of the Political and Legislative Landscape

# Overview of the Political and Legislative Landscape



## Key House Leadership

## Key Senate Leadership

### Republican Majority Leaders



Left: Kevin McCarthy (House of Representatives),  
Right: Steve Scalise (Majority Whip)

### Speaker of the House



Rep. Paul Ryan (R-WI)

### DEMOCRATIC MINORITY LEADERS



Left: Nancy Pelosi (House of Representatives),  
Right: Steny Hoyer (Minority Whip)

### Republicans



Left to right: Majority Whip Rep. John Cornyn (R-TX)  
and Majority Leader Rep. Mitch McConnell (R-KY)

### Democrats



Left to right: Minority Leader Rep. Chuck Schumer (D-NY)  
and Minority Whip Rep. Dick Durbin (D-IL)



# Key Congressional Players for CFSA

## House Financial Services Committee



Rep. Maxine Waters (D-CA)  
*Ranking*

Rep. Jeb Hensarling (R-TX)  
*Chair*

## Senate Banking Committee



Senator Sherrod Brown (D-OH)  
*Ranking*



Senator Mike Crapo (R-ID)  
*Chair*

## Senate Commerce Committee Consumer Protection Subcommittee



Senator Richard Blumenthal (D-CT)  
*Ranking*

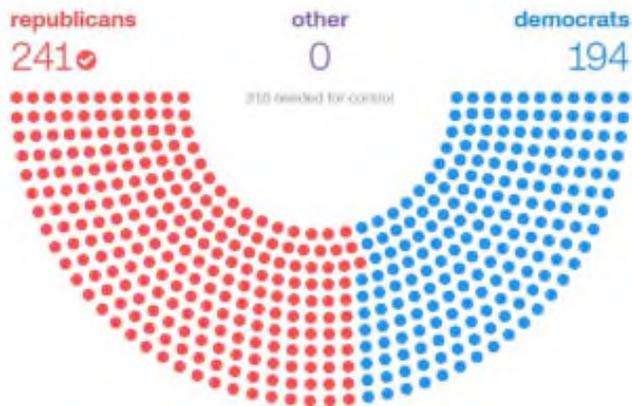


Senator Jerry Moran (R-KS)  
*Chair*

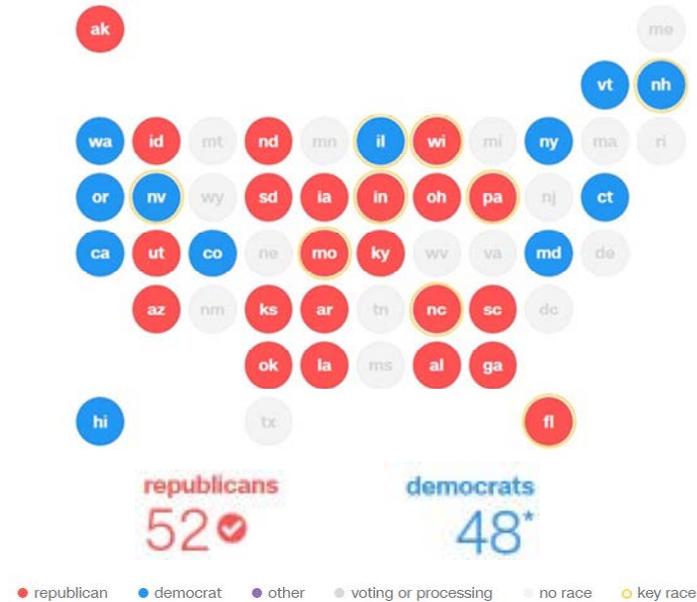


# Overview of the Political and Legislative Landscape

- House Elections – GOP Retains Control



- Senate Elections – GOP Retains Control



# Trump's Key Conceptual Framework

“From this moment on, it's going to be America First. Every decision on trade, on taxes, on immigration, on foreign affairs, will be made to benefit American workers and American families. We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs. Protection will lead to great prosperity and strength. I will fight for you with every breath in my body – and I will never, ever let you down. America will start winning again, winning like never before. We will bring back our jobs.”

- Jobs: Create new jobs, or bring them back onshore.
- Save money for working-class families
- Create opportunities for economic advancement
- Reduce government regulation and the costs of doing business



# Executive Actions of Note

Executive Order	Date	Details
 <p><i>Freezing federal government hiring</i></p>	Jan. 23, 2017	<ul style="list-style-type: none"> <li>This directive <b>instructed all federal agencies not to hire any new personnel, except agencies related to the “military, public safety, and public health”</b></li> <li>It is part of Trump's effort to reduce government debt and decrease the size of the federal workforce</li> <li>The action does not specifically address independent government agencies so they will have to decide for themselves whether they will assert their independence by continuing to hire new employees during the freeze</li> </ul>
 <p><i>Reducing federal regulation</i></p>	Jan. 30, 2017	<ul style="list-style-type: none"> <li>This order requires <b>any executive department or agency that proposes a new regulation to identify two regulations to be repealed</b></li> <li>For fiscal year 2017 it also instructs that the total (incremental) cost of all new regulations and repealed regulations should be no greater than zero</li> <li>For fiscal year 2018, the director of the Office of Management and Budget is required to set a maximum total cost of all new and repealed regulations for each agency—this maximum may not be exceeded “unless required by law or approved in writing” by the OMB director</li> </ul>
 <p><i>Regulating the financial system</i></p>	Feb. 3, 2017	<ul style="list-style-type: none"> <li>This lays out a series of regulations for the financial system that start the <b>roll back of the Dodd-Frank regulations</b> established in the wake of the 2008 financial crisis</li> <li>The order <b>promotes U.S. corporations’ ability to compete with international companies</b>, thereby fostering economic growth</li> <li>It also <b>prevents taxpayer-funded bailouts</b> and seeks to make regulation more efficient</li> <li>The order also instructs the Financial Stability Oversight Council to report to the president within 120 days on how current laws and regulations promote deregulation and economic growth</li> </ul>
 <p><i>Changing Obama's fiduciary standard</i> <a href="#">Full text</a></p>	Feb. 3, 2017	<ul style="list-style-type: none"> <li>This memorandum instructs the DOL to <b>review the Obama administration’s “Fiduciary Rule,”</b> which requires financial advisers to serve the best interests of their clients</li> </ul>



# Rolling Back the Administrative State

## Executive Order

## Date

## Details

### ***Enforcing the regulatory reform agenda***

*Feb. 24, 2017*

Just last Friday, President Donald Trump issued an executive order requiring federal agencies to establish task forces to evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement or modification. Below is a brief summary of the executive order.



The executive order, titled “Enforcing the Regulatory Reform Agenda,” requires the head of each agency to designate an agency official as its “Regulatory Reform Officer” (“RRO”) to oversee the regulatory reform initiatives and policies. Each task force is to be comprised of at least six members, including the RRO. Specifically, the regulatory reform task forces must identify regulations that:

- eliminate jobs, or inhibit job creation;
- are outdated, unnecessary, or ineffective;
- impose costs that exceed benefits;
- create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

The task force must provide a report to the agency head within 90 days. Each task force will also have to provide reports according to a schedule determined by the agency head after issuance of the initial report.

Section five of the executive order states that the Director of the Office of Management and Budget can waive compliance with the executive order for an agency that “generally issues very few or no regulations...” and that agency’s head submitted a waiver request. Waivers can be revoked at any time and a list of agencies with current waivers must be published at least once every three months.

[Full text](#)



# 115th Congress – Financial Services

## Financial Services Policy

- Focus on pro-growth policies
- Nominations: Treasury; Fed Governors; SEC
- **Dodd-Frank Reform**
- JOBS Act
- GSE Reform
- “FinTech”
- DOL Fiduciary Duty Reform /Repeal
- **CFPB Reform**
- Federal Reserve Reform
- **Cybersecurity**
- Sanctions / AML – Iran

## Regulatory Reform

SENATE: **Federal Regulatory Improvement Act (S. 1484)**

HOUSE: **Financial CHOICE (H.R. 5983)**

### **Consensus Views and Commonalities:**

- “Too Big to Fail”/ SIFI/ FSOC Changes
- Community Bank Relief: Streamline exams, Mortgage rules
- Federal Reserve transparency
- Capital Formation for emerging businesses and other JOBS Act



# 115<sup>th</sup> Congress – Financial CHOICE Act

## The Financial CHOICE Act

“Repeal and replacement” of the Dodd-Frank Act is a priority for Chairman Hensarling, but may be overstating the reach of the proposal:

- Repeal the Durbin Amendment
- “Operation Choke Point”: Prohibits a financial regulator to suggest termination of a customer relationship based on reputational risk alone.
- CFPB:
  - Replace the single director with a 5 person board? (draft still in process) and place it under the appropriations process
  - Revise the mission of exclusive consumer protection to include ensuring a “competitive marketplace”- a nod to business interests that parallels similarly situated regulators like the SEC
  - Remove UDAP authority entirely; Remove civil monetary penalties and consumer relief
  - Removes supervisory authority
  - Repeal the indirect auto lending guidance.
- Other legislative priorities for the HFSC: Comprehensive housing finance reform and cybersecurity.



# 115th Congress – Legislation of Note

## Introduced in the 115th Congress

- [S.159](#)\* —A bill to terminate Operation Choke
- [H.R.389](#)\* —**Credit Union Residential Loan Parity Act** (excludes a loan secured by a non-owner occupied 1- to 4-family dwelling from the definition of a member business loan)
- [H.R.402](#) **To amend the Fair Credit Reporting Act to require the inclusion of credit scores with free annual credit reports provided to consumers, and for other purposes.**
- [H.R. 864](#).\* —**The Stop Debt Collection Abuse Act of 2016** (amends definitions of debt, debt collector and deems collection of fees outside the original debt an “unfair practice”, with some exceptions)
- [H.R. 924](#) —**The Financial Institutions Due Process Act of 2017** (establishes a three-judge independent examination review panel to mediate examination findings, compels timely reports)
  - [H.J.Res.73](#) —Repeal the prepaid card rule



\* Denotes Republican-sponsored legislation

# Tools Available to the Trump Administration

1. Presidential Executive Orders
2. “Midnight regulations” options
3. Disapproval under the *Congressional Review Act* (for “major” rules only)
4. Appointments & Regulatory Interpretation
5. Legislative repeal
6. New, Deregulatory Rulemakings
7. Federal Budget Process and Appropriations



# Regulators: Who is Staying, Who is Going?

## **FDIC:**

- Chairman Gruenberg intends to stay on and serve out his term ( expires November 2017).

## **Fed:**

- Chairwoman Yellen shared that it is her intention to remain in place for at least another two years.
- Governor Tarullo will be leaving April 2017, leaving 3 vacancies.

## **CFPB:**

- Director Cordray's term expires in July 2018, but there are a number of variables in play that may cut that short.

## **OCC:**

- Comptroller Curry's term expires April 2017.

## **FTC:**

- Chairwoman: Edith Ramirez's (D) will resign Feb. 10, Commissioner: Maureen K. Ohlhausen's (R) term ends April 2019, Commissioner Terrell McSweeney's (D) term ends April 2021.
- 3 vacancies: Two Republicans, and one Democratic.



# Regulatory Outlook

# CFPB's Announced Regulatory Agenda (Still on track?)

Prerule Stage	Supervision of Larger Participants in Installment Loan and Vehicle Title Loan Markets
Prerule Stage	Business Lending Data (Regulation B)
Prerule Stage	Debt Collection Rule
Prerule Stage	Overdraft
Proposed Rule Stage	Payday Loans and Deposit Advance Products
Proposed Rule Stage	Amendments to FIRREA Concerning Appraisals (Automated Valuation Models)
Proposed Rule Stage	Technical Corrections and Clarifying Amendments to Home Mortgage Disclosure Act (Regulation C) October 2015 Final Rule
Proposed Rule Stage	Reconciling Equal Credit Opportunity Act (Regulation B) and Home Mortgage Disclosure Act (Regulation C) Ethnicity and Race Information Collection
Final Rule Stage	Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z)
Final Rule Stage	The Expedited Funds Availability Act (Regulation CC)
Final Rule Stage	Consumer Financial Civil Penalty Fund
Final Rule Stage	Arbitration
Final Rule Stage	Gramm-Leach-Bliley Act (GLBA) (Regulation P)
Final Rule Stage	Amendments to Federal Mortgage Disclosure Requirements Under the Truth in Lending Act (Regulation Z)
Final Rule Stage	Civil Penalty Inflation Adjustment Rule
Final Rule Stage	Amendments Relating to Disclosure of Records and Information
Final Rule Stage	Consumer Leasing (Regulation M)
Final Rule Stage	Truth in Lending (Regulation Z)
Final Rule Stage	Appraisals for Higher-Priced Mortgage Loans Exemption Threshold



# Highlights on Key Pending Rulemakings

- **Arbitration**

- Proposed rule would ban consumer financial companies from using mandatory pre-dispute arbitration clauses with class action waivers in consumer financial contracts.

- **Installment Loan and Vehicle Title Loan Markets**

- Proposed rule would regulate small-dollar lenders and subject them to strict underwriting requirements.

- **Debt Collection**

- CFPB continues to explore formal debt collection regulations covering (1) information integrity and substantiation of claims of indebtedness, (2) litigation-related disclosures, (3) communications with consumers, and (4) debt transfers and recordkeeping. Rules for first party on a separate (and slower) track.

- **Overdraft**

- No proposed rule yet; CFPB continues to research.



# Debt Collection Rulemaking

- CFPB is authorized to issue debt collection rules under the FDCPA *and* Dodd-Frank Act's UDAAP provisions.
- In November 2013, CFPB announced Advanced Notice of Proposed Rulemaking, seeking comments, data, and information from the public about debt collection. CFPB received more than 23,000 comments.
- July 2016, CFPB issued Outline of Proposals Under Consideration and Alternatives Considered.
- Held SBREFA sessions in late August 2016.
- What's next?

July 28, 2016

SMALL BUSINESS REVIEW PANEL FOR  
DEBT COLLECTOR AND DEBT BUYER RULEMAKING

OUTLINE OF PROPOSALS UNDER CONSIDERATION  
AND ALTERNATIVES CONSIDERED

I. Introduction	1
A. Background	1
B. Scope of proposals under consideration	4
II. The SBREFA Process	5
III. Information Integrity and Related Concerns	5
A. Proposals under consideration to prohibit unsubstantiated claims of indebtedness	6
B. Proposal under consideration to require notice and transfer of certain information	13
C. Validation notice and statement of rights	15
IV. Other Consumer Understanding Initiatives	18
A. Litigation disclosure	18
B. Time-barred debt and obsolete debt	19
V. Collector Communication Practices	22
A. Proposals under consideration regarding contact frequency and the leaving of messages	23
B. General time, place, manner restrictions	28
C. Issues concerning decedent debt	32
D. Consumer consent	34
VI. Additional Proposals	35
A. Prohibition on transferring debt to certain entities or in certain circumstances	35
B. Recordkeeping	35
VII. Potential Impacts on Small Entities	36
A. Entities subject to the proposals under consideration	36

1



# What Proposed Rules May Cover: Information Integrity & Substantiation

Summary of Substantiation Requirements under Consideration		
When	Actor(s)	Action(s)
Prior to making initial claim of indebtedness	Collector	<ul style="list-style-type: none"> <li>Review information sufficient to substantiate claims of indebtedness</li> <li>May obtain list of fundamental information and representation of accuracy from debt owner, as discussed in Appendix C of the Outline and discussed below</li> <li>Determine whether there are warning signs</li> <li>Obtain and review additional information or documentation as needed to address any warning signs discovered during initial review</li> </ul>
During the course of collections generally	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> <li>Look for warning signs that may arise during the course of collections</li> <li>Cease claims of indebtedness to the consumer until collector obtains and reviews information or documentation as needed to address any warning signs discovered during ongoing review</li> </ul>
After a dispute generally	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> <li>Cease claims of indebtedness to the consumer until collector reviews documentation as needed to address the dispute submitted by the consumer</li> <li>May obtain and review documentation for relevant dispute category, as specified in Appendix D of the Outline, discussed below</li> <li>Collector that receives dispute must note dispute status when transferring debt</li> <li>If collector has not responded to dispute, subsequent collector must review documentation as needed to address the dispute submitted by the consumer before making initial claims of indebtedness to the consumer</li> </ul>
After a written dispute within 30 days of the validation notice	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> <li>General dispute requirements described above, plus collector must provide consumer copy of verification responsive to consumer's dispute (or subsequent collector, if applicable, must address dispute)</li> </ul>
After an oral dispute within 30 days of the validation notice	Collector + subsequent collector, if applicable	<ul style="list-style-type: none"> <li>General dispute requirements described above, plus either notify consumer of right to receive verification in response to written disputes within 30 days of the validation notice or simply provide verification in response to timely oral disputes</li> </ul>
Prior to making claim of indebtedness in litigation	Collector	<ul style="list-style-type: none"> <li>Review documentation sufficient to substantiate claims of indebtedness</li> <li>May obtain and review all of the documentation specified in Appendix D of the Outline, discussed below</li> </ul>



# What Proposed Rules May Cover: Litigation & Time-Barred Debt Disclosures

- A specific "litigation disclosure" in all written and oral communication in which a debt collector expresses an intent to sue;
- A "time-barred debt" disclosure whenever a debt collector seeks payment on time-barred debt; and
- An "obsolescence disclosure" explaining whether a debt can or cannot appear on a credit report.
- Moreover, the CFPB is considering whether to prohibit collectors from collection on time-barred debt that can be revised under state law *unless* they waive the right to sue on the debt.



# What Proposed Rules May Cover: Communications with Consumers

Summary of Communication with Consumer Proposals	
Communication Type	Proposals
Frequency of Consumer Contact Attempts	Weekly numerical restrictions (per unique phone number/address, per third party, and per account), depending on whether the collector has successfully established contact with the consumer, as described below.
Frequency of Third-Party Location Contact Attempts	Weekly numerical restrictions (per unique phone number/address and total attempts), depending on whether the collector has successfully established contact with the consumer, as described below.
Leaving Messages with Consumers	Voice mail not considered a communication under the FDCPA if message only conveys the debt collector's name, consumer's name, and toll-free method that the consumer can use to reply to the collector.
Inconvenient Times	When debt collector has conflicting location information for the consumer, and in the absence of knowledge to contrary, must establish that it's convenient in all of the locations in which the collector's information indicates the consumer might be.
Inconvenient Places	The following would be presumptively inconvenient places for consumers (unless consumer consents): <ul style="list-style-type: none"> <li>= Medical facilities</li> <li>= Places of worship</li> <li>= Places of burial or grieving</li> <li>= Daycare or childcare centers</li> </ul>
Inconvenient Communication Methods	Email address that collector knows or should know is the consumer's workplace email (unless consumer consents).
Decedent Debt	Generally permissible for collectors to contact surviving spouses, parents of deceased minors, and designated personal representatives of an estate under state law, but only after 30 days after consumer's death.



# What Proposed Rules May Cover: Debt Transfers & Recordkeeping

- The CFPB has proposed additional limits on debt buyers. For example, it is considering a **prohibition on the placement or sale of debt to an entity that lacks any license to purchase or collect debt**, as applicable.
- Finally, the proposal would impose a **three year record retention requirement on all records documenting a debt collector's action with respect to a debt and that were relied upon for the validation notice and other claims of indebtedness.**



# Regulation by Enforcement: Reasonable Basis to Collect & Litigate

Case	Allegations	Outcome
Pressler & Pressler	<p>Firm filed misleading collection lawsuits based on insubstantial or nonexistent evidence.</p> <ul style="list-style-type: none"> <li>• Use of automated claim preparation system and non-attorney staff to determine whether to file suit</li> <li>• Failure to verify debt after consumer disputed and proceeded to file suit</li> <li>• Some court filings relied solely on summary data</li> </ul>	Firm required to review specific media before it can threaten or file suit.
Encore & PRA	<p>Debt buyers deceptively collected on unsubstantiated and inaccurate debt.</p> <ul style="list-style-type: none"> <li>• Failure to adequately investigate disputes</li> <li>• Failed to review media before filing suit or when it had reasons to believe debt portfolio has inaccurate data</li> </ul>	Both required to review media in a number of scenarios, including before filing suit
Chase	Sold bad debts to third-party buyers that had already been paid, settled, discharged in bankruptcy, missing information, etc.	Required to send buyers certain media; banned from selling certain accounts; affidavits must be accurate and capable of being supported by competent and reliable evidence
Hanna	<p>Firm filed deceptive court filings and introduced unsubstantiated evidence.</p> <ul style="list-style-type: none"> <li>• No meaningful attorney involvement in preparation complaints</li> <li>• Relied on sworn statements from clients (debt buyers) attesting to facts the clients could not possibly attest to</li> </ul>	Firm required to have specific media before it can threaten or file suit and required to revise attorney review processes.



# Regulation by Enforcement: Time-Barred Debt

Case	Allegations	Outcome
Encore & PRA	<p>Firms filed debt collection lawsuits even though the actions were time-barred.</p> <ul style="list-style-type: none"> <li>• Sent letters offering to “settle” a lawsuits without revealing the debt was too old for litigation</li> <li>• Filed lawsuits past statute of limitations</li> </ul>	Both firms required to stop debt collections they can’t verify, ensure accuracy when filing lawsuits, provide consumers with information before filing suits, and use accurate affidavits.
Delgado v. Capital Management Services	<p>CFPB and FTC submitted an amicus brief in support of a cause of action against a debt collector that failed to disclose that a debt was time-barred</p> <ul style="list-style-type: none"> <li>• Sent letters offering to “settle” a debt that was time-barred</li> <li>• Agencies assert this deceives and misleads consumers</li> </ul>	On 3/11/16, the Seventh Circuit affirmed the lower court’s denial of the defendant’s motion to dismiss, expressly deferring to the FTC and CFPB. <u>Juanita Delgado v. Capital Management Services, L, No. 13-2030 (7<sup>th</sup> Circ. 2015).</u>
Buchanan v. Northland Group	<p>CFPB and FTC submitted an amicus brief in support of a cause of action against a debt collector that failed to disclose that a debt was time-barred</p> <ul style="list-style-type: none"> <li>• Sent letters offering to “settle” a debt that was too old to litigate</li> <li>• Agencies argue that the district court erred in dismissing the complaint because the action misled consumers</li> </ul>	On 1/13/15, the Sixth Circuit reversed and remanded, consistent with the “instructive” positions of the CFPB and FTC. <u>Buchanan v. Northland Group Inc, No. 13-2524 (6<sup>th</sup> Cir. 2015).</u>



# Regulation by Enforcement: Debt Sales & Contract Provisions

Case	Allegations	Outcome
Encore & PRA	<p>Firms collected bad debts, despite warnings from sellers that:</p> <ul style="list-style-type: none"> <li>• The consumer debt balances were “approximate”</li> <li>• The debts did not have reflect the most recent consumer payments</li> <li>• Documents were not available for some of the accounts</li> </ul>	Firms ordered to stop reselling debts and stop collecting debts they cannot verify
Chase	<p>Chase sold bad debts to third-party debt buyers.</p> <ul style="list-style-type: none"> <li>• Chase knew that certain debts they sold had been settled by agreement, paid in full, discharged in bankruptcy, fraudulent, or no longer owned</li> </ul>	Chase ordered to cease collecting on 528,000 accounts., prohibit debt buyers from reselling accounts, confirm debt before selling to debt buyers, notify consumers that their debt has been sold and make their account info available to them, not sell zombie debts and other specified debts, withdraw, dismiss, or terminate collections litigation, stop signing robo-signing affidavits, and verify debts when filing a lawsuit.
Citibank	<p>Citibank sold inflated debts to third-party debt buyers.</p> <ul style="list-style-type: none"> <li>• Citibank provided incorrect and inflated APR information for nearly 130,000 credit card accounts that it sold to debt buyers.</li> <li>• Citibank failed to promptly forward to the debt buyers approximately 14,000 customer payments related to such debts.</li> </ul>	Citibank to provide specific account documents when it sells debt, to stop selling unverified debt, to include protections in debt sales contracts, and to provide debt sale information to consumers.



# CFPB Promises Business as Usual Post-PHH and Post-Obama

USCA Case #15-1177 Document #1561581 Filed 02/16/2017 Page 1 of 2

**United States Court of Appeals**  
For The District of Columbia Circuit

**No. 15-1177** **September Term, 2016**

**CFPB-2014-CFPB-0302**  
Filed On: February 16, 2017

PHH Corporation, et al.,  
Petitioners

v.  
Consumer Financial Protection Bureau,  
Respondent

**BEFORE:** Garland\*, Chief Judge, and Henderson, Rogers, Tabel, Brown, Griffin, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

**ORDER**

Upon consideration of respondent's petition for rehearing en banc, the briefs amici curiae in support of the petition, the response of the United States to the petition, the response of the petitioners to the petition, the supplemental response of petitioners, and the vote in favor of the petition by a majority of judges eligible to participate, it is

**ORDERED** the petition be granted. Case No. 15-1177 will be reheard by the court sitting en banc. It is

**FURTHER ORDERED** that the judgment filed October 11, 2016 be vacated. It is

**FURTHER ORDERED** that oral argument before the en banc court be heard on Wednesday, May 24, 2017, in Courtroom # 20, Sixth Floor. It is

**FURTHER ORDERED** that, in addition to filing briefs electronically, the parties file 30 paper copies of each of their final briefs and the deferred appendix, in accordance with the following schedule:

Brief for Petitioners	March 10, 2017
Deferred Appendix (Public Filed 1/30/15 & Sealed Filed 12/1/15)	March 10, 2017

\*Chief Judge Garland did not participate in this matter.

USCA Case #15-1177 Document #1561581 Filed 02/16/2017 Page 2 of 2

**United States Court of Appeals**  
For The District of Columbia Circuit

**No. 15-1177** **September Term, 2016**

Brief(s) for Amici Curiae	March 10, 2017
Brief for Respondent	March 31, 2017
Brief(s) for Amici Curiae	March 31, 2017
Reply Brief for Petitioners	April 10, 2017

While not otherwise limited, the parties are directed to address in their briefs the following issues:

1. Is the CFPB's structure as a single-Director independent agency consistent with Article II of the Constitution and, if not, is the proper remedy to sever the for-cause provision of the statute?
2. May the court appropriately avoid deciding that constitutional question given the panel's ruling on the statutory issues in this case?
3. If the en banc court, which has today separately ordered en banc consideration of *Luckie v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), concludes in that case that the administrative-law judge who handled that case was an inferior officer rather than an employee, what is the appropriate disposition of this case?

Parties are directed to hand deliver the paper copies of their submissions to the Clerk's office by the date due. To enhance the clarity of their briefs, the parties are urged to limit the use of abbreviations, including acronyms. While acronyms may be used for entities and statutes with widely recognized initials, briefs should not contain acronyms that are not widely known. See D.C. Circuit Handbook of Practice and Internal Procedures 41 (2017); Notice Regarding Use of Acronyms (D.C. Cir. Jan. 26, 2010).

Because the briefing schedule is keyed to the date of oral argument, the court will grant requests for extension of time limits only for extraordinarily compelling reasons. The briefs and appendix must contain the date the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(5).

Separate order(s) will issue scheduling the time of oral argument and allocating oral argument time.

**Per Curiam**

**FOR THE COURT:**  
Mark J. Langer, Clerk

BY: /s/  
Michael C. McGrail  
Deputy Clerk

Page 2

In the last several weeks, actions regarding:

- Student loan debt collection (parallel state AG action)
- Overdraft service fees
- Law firm collection of medical debt
- Credit Reporting
- Small-dollar loan marketing and collection



# Federal Trade Commission: Consumer Protection Agenda

- Fraud
- Clear Consumer Harm
  - Limiting redress to situations of real, core fraud and not in cases where the issue relates to the quantity and quality of support for advertising claims.
  - Move the redress discussion away from revenue and to demonstrable consumer harm.
- Transparency and Business Education
  - Increase use of alternative tools the FTC has such as business education
  - Release more information about investigations that have been closed with no enforcement



# Regulatory Developments: Lead Generation

## FTC Workshop & Report

News & Events » Events Calendar » Follow the Lead: An FTC Workshop on Lead Generation

Follow the Lead: An FTC Workshop on Lead Generation

**Follow the Lead**  
An FTC Workshop on Lead Generation

**RELATED PRACTICES**  
Advertising and Marketing  
Banking and Financial Services Regulatory

**RELATED INDUSTRIES**  
Consumer Financial Services  
Financial Services  
Credit Counseling and Debt Services

**ARCHIVES**  
2017 - 2018 - 2016  
2015 - 2012 - 2008  
2011 - 2011 - 2007  
2014 - 2010

**ARTICLES**  
February 22, 2017  
**CALIFORNIA SENATE BILL WOULD REQUIRE REGISTRATION FOR LEAD GENERATOR "FINDEARS"**

**Lead generation** is the practice of identifying or cultivating consumer interest in a product or service, and distributing this information to third parties. For example, as consumers search the Internet for all kinds of goods and services, they may express interest in or make an inquiry regarding specific products or services, such as educational programs, mortgages, or small-business loans by submitting their personal information. These consumer "leads" sometimes contain sensitive personal and financial information that may travel through multiple online marketing entities before connecting with the desired businesses. This workshop will explore the consumer protection issues raised by the practices of the lead generation industry, and what consumers and businesses should know and do to address them.

**VIDEO FROM THE EVENT**

- Overview of the Lead Generation Industry
- Case Study on Lead Generation in Lending
- Panel 1: Case Study on Lead Generation in Education
- Panel 2: Case Study on Lead Generation in Marketing
- Overview of Consumer Protection Concepts & the Legal Landscape
- Looking Ahead - Planning & Educating Consumers

## CFPB Enforcement

1 ANTHONY ALEXIS, DC Bar #384545  
Email: anthony.alexis@cfpb.gov

2 JEFFREY PAUL EHRLICH, FL Bar #51561  
Email: jeff.ehrlich@cfpb.gov

3 JOHN C. WELLS, DC Bar #491292  
Email: john.wells@cfpb.gov

4 KARA K. MILLER, VA Bar #47821  
Email: kara.miller@cfpb.gov

5 MEGHAN SHERMAN CATER, NY Bar #4473120  
Telephone: (202) 435-9165

6 LEANNE E. HARTMANN, CA Bar #264787  
Email: leanne.hartmann@cfpb.gov

7 Telephone: (415) 844-9787  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552  
Facsimile: (202) 435-7329  
Attorneys for Plaintiff

8  
9  
10  
11  
12  
13

14 Consumer Financial Protection  
Bureau,  
15 Plaintiff,  
16  
17 v.  
18 D and D Marketing, Inc., d/b/a  
T3Leads, Grigor Demirchyan,  
19 and Marina Demirchyan,  
20 Defendants.  
21

Case No. 2:15-cv-9692  
COMPLAINT FOR VIOLATIONS  
OF THE CONSUMER FINANCIAL  
PROTECTION ACT OF 2010

## New Registration On the Way?

**VENABLE LLP**

**ARTICLES**  
February 22, 2017  
**CALIFORNIA SENATE BILL WOULD REQUIRE REGISTRATION FOR LEAD GENERATOR "FINDEARS"**

**RELATED PRACTICES**  
Advertising and Marketing  
Banking and Financial Services Regulatory

**RELATED INDUSTRIES**  
Consumer Financial Services  
Financial Services  
Credit Counseling and Debt Services

**ARCHIVES**  
2017 - 2018 - 2016  
2015 - 2012 - 2008  
2011 - 2011 - 2007  
2014 - 2010

**ARTICLES**  
February 22, 2017  
**CALIFORNIA SENATE BILL WOULD REQUIRE REGISTRATION FOR LEAD GENERATOR "FINDEARS"**

Lead generation is the practice of identifying or cultivating consumer interest in a product or service, and distributing this information to third parties. For example, as consumers search the Internet for all kinds of goods and services, they may express interest in or make an inquiry regarding specific products or services, such as educational programs, mortgages, or small-business loans by submitting their personal information. These consumer "leads" sometimes contain sensitive personal and financial information that may travel through multiple online marketing entities before connecting with the desired businesses. This workshop will explore the consumer protection issues raised by the practices of the lead generation industry, and what consumers and businesses should know and do to address them.

**VIDEO FROM THE EVENT**

- Overview of the Lead Generation Industry
- Case Study on Lead Generation in Lending
- Panel 1: Case Study on Lead Generation in Education
- Panel 2: Case Study on Lead Generation in Marketing
- Overview of Consumer Protection Concepts & the Legal Landscape
- Looking Ahead - Planning & Educating Consumers

**Case No. 2:15-cv-9692  
COMPLAINT FOR VIOLATIONS  
OF THE CONSUMER FINANCIAL  
PROTECTION ACT OF 2010**

**DEFINITION OF "FINDEAR"**

"Findear" is defined as "any person who helps facilitate a loan subject to [the CFPB] by performing one or more of the following activities:

- Collecting specific personal identification information, such as social security number, tax identification number, bank account number, bank routing number, or other recognizable personal identification information, from prospective borrowers in anticipation of selling or submitting the information to one or more finance lenders.
- Introducing or marketing prospective borrowers and prospective lenders after completing prospective borrower activities with prospective lender underwriting requirements.



## FinTech Series: Marketplace Lending



FINTECH SERIES  
Marketplace  
Lending



FINTECH SERIES  
Crowdfunding &  
Peer-to-Peer Payments

# Innovation and Investments

FTC Orders Bankrupt Personal Bankruptcy Filing Location Package Protection from Lending Risks

December 11, 2014

Bankruptcy | Consumer Protection | Credit and Debtors | Debtors and Creditors | Debtors and Creditors | Debtors and Creditors

FTC Orders Bankrupt Personal Bankruptcy Filing Location Package Protection from Lending Risks

The Federal Trade Commission (FTC) today issued an order requiring a bankruptcy court to protect consumers from the risks of lending to a bankrupt debtor. The order is the first of its kind, and it is a landmark decision for consumers who are considering lending to a bankrupt debtor.

The order requires the bankruptcy court to require the lender to provide a written disclosure of the risks of lending to a bankrupt debtor. The order also requires the lender to provide a written disclosure of the risks of lending to a bankrupt debtor.

The order is the first of its kind, and it is a landmark decision for consumers who are considering lending to a bankrupt debtor.

## A Survey of 15 Marketplace Lenders' Online Presence

FTC Marketplace Lending Forum  
June 9 2016

Phoebe Rouge and Christina Yeung  
Office of Technology Research and Investigation

FTC Charges Data Broker with Facilitating the Theft of Millions of Dollars from Consumers' Accounts

Company Sold Personal Financial Information to Scammers

December 11, 2014

Bankruptcy | Consumer Protection | Credit and Debtors | Debtors and Creditors | Debtors and Creditors | Debtors and Creditors

FTC Charges Data Broker with Facilitating the Theft of Millions of Dollars from Consumers' Accounts

The Federal Trade Commission (FTC) today issued an order requiring a data broker to stop selling personal financial information to scammers. The order is the first of its kind, and it is a landmark decision for consumers who are considering lending to a bankrupt debtor.

The order requires the data broker to stop selling personal financial information to scammers. The order also requires the data broker to provide a written disclosure of the risks of lending to a bankrupt debtor.

The order is the first of its kind, and it is a landmark decision for consumers who are considering lending to a bankrupt debtor.

# Innovation and Fintech

- **CFPB Developments**

- Request for Information on Data Access (comments due Feb. 21, 2017)
  - Seeks comments on consumer access to financial account and account-related data, including access by entities acting with consumer permission, in connection with the provision of products or services that make use of that information.
- Project Catalyst report (Oct. 2016)
  - Provides insight into the types of “fintech” product and services that align with CFPB's expectations.

- **Other Developments**

- Office of the Comptroller of the Currency proposed fintech charter
- Obama Administration's parting guidelines on promoting responsible fintech
- FDIC Third Party Loan Program Guidance
- True Lender and Partner Lending models tested in litigation (e.g., Madden v. Midland (NY, CT, VT), CashCall, and related matters)



# Payments

- **Ongoing CFPB litigation involving payment processors**
  - *CFPB v. Intercept*: CFPB filed suit against Intercept and its President and CEO for allegedly processing ACH withdrawals from consumer accounts by payday lenders and other financial services providers in the face of numerous red flags, including high return rates and warnings from banks and consumers.
  - *CFPB v. Universal Debt & Payment Solutions*: CFPB alleged that processors and ISOs enabled unlawful debt collection scheme by ignoring underwriting red flags.
- **Other regulators**
  - *FTC v. Western Union* (filed on Jan. 19, 2017): Western Union agreed to forfeit \$586 million related to allegations of BSA/AML failures and consumer fraud.
  - *PacNet Group*: On September 22, 2016, the DOJ, the U.S. Postal Inspection Service (USPIS), and Treasury's Office of Foreign Assets Control (OFAC) launched civil and criminal actions against PacNet Group, a Canadian payment processor, and its customer merchants, for allegedly sending fraudulent mail solicitations to vulnerable U.S. persons.



# Payment Cards



Prepaid Account  
Protections

  
Prepaid Cards

  
Digital Wallet  
Accounts

**CFPB's main intent is safer use of prepaid accounts:**

- **Disclosures** – clear and upfront information for consumers
- **Coverage** – funds are generally protected for stolen/lost devices, or if the account is wrongly charged
- **Monitoring** – institutions are required to allow consumers the ability to monitor their account at no additional charge



# PREPAID ACCOUNTS



## Payroll Card Accounts

Currently subject to Regulation E



## Government Benefit Accounts

Currently subject to Regulation E



## Accounts marketed/labeled as “prepaid”

That are redeemable upon presentation at multiple unaffiliated merchants for goods and services, or that are usable at ATMs



## Accounts issued on a prepaid basis

- Issued on a prepaid basis in a specified amount, or capable of being loaded after issuance
- Primary function is to conduct open-loop, ATM or peer-to-peer (P2P) transactions
- Not a checking account, share draft account or NOW account



# Prepaid Account

## Prepaid Account

### Definitions

A payroll card account; a government benefit account; an account that is marketed or labeled as prepaid, and that is redeemable upon presentation at multiple, unaffiliated merchants for goods or services or usable at ATMs; an account that is issued on a prepaid basis in a specified amount (or not issued on a prepaid basis but capable of being loaded with funds thereafter), in which the primary function is to conduct transactions with multiple, unaffiliated merchants for goods or services or at ATMs or to conduct **P2P** transfers, and the product is not a checking account, share draft account or negotiable order of withdrawal (NOW) account.

### Person-to-person Transfers

—An online technology that allows customers to transfer funds from their account to another individual's account by the internet or a mobile device

# Disclosure Requirements

## Four Disclosures



Pre-acquisition Disclosures  
(Short Form & Long Form)

Error Resolution & Limited Liability  
for Consumers

Periodic Statements or Alternatives

Posted Agreements



# Effective Dates



Prepaid account rules go into effect\*

October 1, 2017



October 1, 2018



Requirement to submit prepaid account agreements to the CFPB goes into effect

## \* Exceptions

- Prepaid account packaging materials that were prepared in the normal course of business, prior to October 1, 2017
- Change in terms, updated initial disclosures and rolling compliance with certain access to account information requirements if the financial institution does not have readily accessible data necessary to comply



# Summary



- ▶ **Understand the scope of the new rules and their impact on your institution**
- ▶ **Work with forms vendor to ensure use of required disclosures by the effective date**
- ▶ **Revise policies, procedures and processes to accommodate the new requirements**
- ▶ **Modify any consumer account banking electronic platform or IVR system in order to provide the requested information either electronically or by phone**
- ▶ **Train employees who handle prepaid access products and error resolution claims**



# Supervision & Examinations

# How the Supervision Program May Change

- For banks subject to CFPB's supervision authority, could see significant changes given requirements for CFPB examiners to coordinate exams and conduct simultaneous exams with prudential regulators.
- For non-banks, unlikely to see major changes to exam process, scope, and rigor applied by examiners.
  - Appeals Process Developments
    - What rises to the level of enforcement and/or consumer relief?
    - Continued coordination with Federal Agencies and State Regulators, including joint examinations



# Focus on UDA(A)P and Technical Compliance with Consumer Financial Law

- Examiners looking beyond compliance with technical legal requirements.
- Increasingly comfortable and versed in spotting practices deemed, from CFPB's perspective, to be UDA(A)P.
- Frequently extrapolating from small sample and isolated observations to conclude that systemic UDA(A)P issues exist.
- Non-Transparent Appeals Process



# The “Abusive” Prong of UDAAP

- Historically, the abusive standard has been brought to bear only in conjunction with the unfairness prong or the deceptive prong
- In 2016, we saw the first enforcement actions in which the abusive standard was applied independently from the unfairness and deceptive prongs
- Abusive practices to watch out for include:
  - Steering to products less advantageous to a consumer who qualifies for more advantageous-termed products because the product is more profitable to the institution
  - Overly complex disclosures and arrangements for consumers, especially with respect to “financially unsophisticated” consumers
  - Servicing and collection practices that are too complicated to either understand or comply with by the consumer



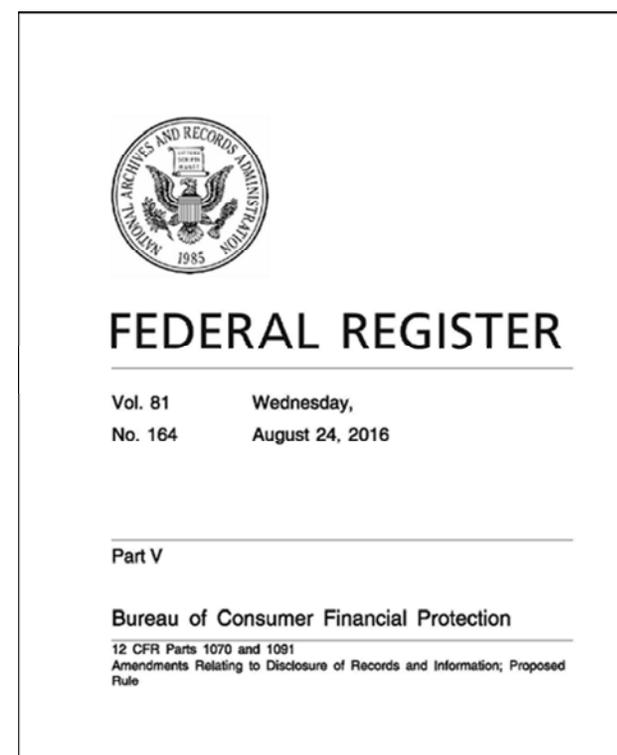
# The Stakes Have Been High: Exam Findings Often Lead to Public Enforcement Actions

- 12/16/2015: the CFPB announced a consent order with a **short-term, small-dollar lender**, for illegal debt collection practices, discovered during the course of a Bureau examination.
  - The lender was ordered to refund **\$7.5 million** to 93,000 consumers, pay a **\$3 million** civil money penalty, and stop collection of remaining payday and installment loan debts owed by roughly 130,000 consumers. The company is additionally barred from in-person debt collection.
- 3/6/2015: From January 2013 through May 2013, the Bureau conducted an examination that reviewed **an indirect auto lending business** for compliance with ECOA and Regulation B, which lead to a referral to the DOJ.
  - The auto lender was ordered to substantially reduce or eliminate dealer discretion, pay **\$18 million** in damages for consumer harm, and pay to hire a settlement administrator to distribute funds to victims. The DOJ filed a separate enforcement action.
- 10/9/2014, the CFPB found that a **bank** harmed credit card consumers by practicing illegal and discriminatory credit card practices. These practices were discovered during a routine CFPB supervision exam.
  - Enforcement action: The consent order requires the bank pay **\$25 million** in direct loan subsidies to qualified borrowers in the affected communities, **\$2.25 million** in community programs and outreach, and a **\$5.5 million** penalty. This represents the largest redlining settlement in history as measured by such direct subsidies.
- 6/19/2014, the CFPB, found that a **bank** caused consumers to be subjected to deceptive marketing practices when being sold debt cancellation credit card add-on products by telemarketers. The enforcement action stems from a CFPB examination which was conducted between December 2012 and February 2013.
  - The bank paid a total of approximately **\$201 million** in redress including payments, credits, interest, and debt forgiveness to approximately 133,463 eligible consumers.
- 3/19/2013: the CFPB found that a **bank** had a policy of allowing dealers to increase or “mark up” consumers' risk-based interest rates, and paying dealers from those markups, and that the policy lacked adequate controls or monitoring.
  - The Bureau forced the bank to pay **\$80 million** in damages to harmed African-American, Hispanic, and Asian and/or Pacific Islander borrowers. Additionally, the bank paid approximately **\$38.9 million** to consumers that the bank determined were both eligible and overcharged on auto loans.



# Enforcement Beyond CFPB? Are D-AGs the Back-up Plan?

- Coordination with State Attorneys General and Regulators
- CFPB able to share supervisory information with other regulators; but rules restrain information sharing.
- CFPB has proposed a rule to expand its discretion to share confidential supervisory information (CSI) with other ***domestic and foreign government governmental entities***
  - “Federal, State, or foreign governmental authority, or an entity exercising governmental authority” regardless of whether the authority has jurisdiction over the company whose CSI is shared
  - Replaces the CFPB General Counsel as the person who decides whether to disclose CSI with the head of Supervision, Enforcement, and Fair Lending
- Comment period closed on October 24, 2016



# Enforcement Outlook

# Uptick in State Attorneys General and Regulatory Agency Investigations and Enforcement

BUSINESS INSIDER

## 'First line of defense': Democratic attorneys general vow to fight Trump in court



Lawrence Hurley, Reuters  
Nov. 18, 2016, 6:37 AM ▲ 10,250

On consumer protection, states can both challenge any Trump efforts to loosen regulations and ramp up their own enforcement efforts, said Doug Gansler, a Democrat who served as Maryland's attorney general from 2007 to 2015.

"If the federal government abdicates that responsibility, the more aggressive and progressive state attorneys general will fill that vacuum," he said.

Those state agencies have wide latitude to take action, particularly against nonbank financial services firms like debt collectors, independent mortgage servicers, consumer credit reporting bureaus and even broker-dealers.

Several federal laws, including the Truth In Lending Act and the Fair Credit Reporting Act, specifically give state attorneys general enforcement authority. They also have the ability to enforce state consumer protection laws and go after unfair, deceptive acts and practices.



## State Regulators Aim To Fill Trump's Vacuum

By Evan Weinberger





# Consumer Protection Laws Enforced by State AGs and Regulators

- AGs and regulators investigate and bring actions under their states' respective unfair, deceptive, and abusive practices laws (UDAP laws).
- Most states also have specific consumer protection laws regulating:
  - Debt collection
  - Credit reporting
  - Credit services
  - Lending and loan servicing
    - Debt relief services
    - Money transmission
    - Often more...



# Recent Attorney General Consumer Protection Actions and Initiatives



Office of the Attorney General

Wednesday, January 11, 2017

Settlement Ends Lawsuit Attorney General Racine Filed over Unlawful Predatory Lending



Commonwealth of Virginia  
Office of the Attorney General

**Virginia consumers will be receiving \$27.4 million in forgiven debt as part of the largest multi-state consumer settlement ever led by Virginia.**



NORTH CAROLINA  
DEPARTMENT OF JUSTICE  
ATTORNEY GENERAL JOSH STEIN

**AG STEIN PROTECTS CONSUMERS FROM UNFAIR  
DEBT COLLECTION PRACTICES**

Release date: 1/12/2017



The Official Website of the Attorney General of Massachusetts

For Immediate Release - January 13, 2017

**Attorney General  
Maura Healey**

**AG Healey Announces \$30 Million in Debt Relief**



ILLINOIS ATTORNEY GENERAL

**Lisa Madigan**

January 5, 2017

MADIGAN URGES DEPARTMENT OF EDUCATION TO FORGIVE LOANS

[www.IllinoisAttorneyGeneral.gov](http://www.IllinoisAttorneyGeneral.gov)



# Tips and Next Steps

# Importance of a Compliance Management System

“At one or more institutions, examiners concluded that a weak compliance management system allowed violations of Regulations X and Z to occur. As a result, these entities were unable to institute timely corrective-action measures, failed to maintain adequate systems, and had insufficient preventive controls to ensure compliance and the correct implementation of established policies and procedures. Supervision notified the entities’ management of these findings, and **corrective action was taken to improve the entities’ compliance management systems**”

-- *Supervisory Highlights, Winter 2016*



“The CFPB expects every regulated entity under its supervision and enforcement authority to have an effective compliance management system adapted to its business strategy and operations.”

-- *CFPB Examination Manual*

CFPB’s supervisory actions have also caused financial institutions to make changes to compliance management systems that prevented violations, reduced risks to consumers, and resulted in financial restitution to many thousands of additional consumers.”

-- *Written Testimony of CFPB Director Richard Cordray, January 27, 2014*



# Thank you – For More Information



**Jonathan L. Pompan**  
**Venable LLP**  
*Partner and Co-Chair of Consumer Financial Services Practice*  
202.344.4383  
[jjpompan@Venable.com](mailto:jjpompan@Venable.com)



**Kara M. Ward**  
**Venable LLP**  
*Counsel*  
202.344.4120  
[kmward@venable.com](mailto:kmward@venable.com)



**Robert W. Cardwell**  
**FIS RISC Solutions**  
*Managing Director*  
*Consumer Finance & Fair Banking*  
[robert.cardwell@fisglobal.com](mailto:robert.cardwell@fisglobal.com)

