Stuck in a Time Loop: The Compliance Clock Is Still Ticking for Small-Dollar Lenders in 2021

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Introduction

During the past year, small-dollar lenders learned the fate of the Consumer Financial Protection Bureau's ("CFPB") final rulemaking addressing payday, vehicle title, and certain high-cost installment loans. In addition, the CFPB, the Federal Trade Commission ("FTC"), and various states continued to take action to curtail certain practices. While several courts looked at compliance matters involving small-dollar lenders, the U.S. Supreme Court issued an important administrative law decision that involved a small-dollar lender. This survey addresses compliance issues related to the small-dollar lending industry, including federal rulemaking, federal and state enforcement actions, significant court decisions, and state legislation.

Federal Rulemaking

The biggest development for small-dollar lenders this year involved a decision addressing a CFPB rule that will result in significant changes for how they do business. After almost three years of litigation that challenged the validity of the CFPB's rule governing Payday, Vehicle Title, and Certain High-Cost Installment Loans ("Payday Lending Rule"),[1] spanning changes at the CFPB and changes to the rule, the U.S. District Court for the Western District of Texas issued an order resolving the litigation. The court denied a motion for summary

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1. Developments concerning the Payday Lending Rule since the CFPB announced that it was reconsidering the rule in 2018 have been reported in Justin B. Hosie, Hurshell K. Brown, Erica A.N. Kramer, K. Dailey Wilson, Andrea S. Cottrell & Christopher J. Capurso, *Tik Tok: The Compliance Clock Is Ticking for Small-Dollar Lenders in 2020*, 76 Bus. Law. 739, 739–40 (2021) (in the 2021 *Annual Survey*); Justin B. Hosie, K. Dailey Wilson, Erica A.N. Kramer & Christopher J. Capurso, *Small Dollar Lending Regulation in 2019*, 75 Bus. Law. 2025, 2025–26 (2020) (in the 2020 *Annual Survey*); and Justin B. Hosie, Erica A.N. Kramer, K. Dailey Wilson & Andrea S. Cottrell, *The Walking Dead: 2018 Small Dollar Lending Updates—Is the Small Dollar Loan Industry Mostly Dead or Slightly Alive?*, 74 Bus. Law. 553, 553–54 (2019) (in the 2019 *Annual Survey*).

judgment filed by the plaintiff small-dollar lending trade associations and ruled in favor of the CFPB's cross-motion for summary judgment in *Community Financial Services Association of America Ltd. v. CFPB*.[2] While the court ruled in favor of the CFPB on the merits of the case, it did not agree with it that lenders should comply with the Rule in thirty days, and instead set a compliance date 286 days from the date of the order in order to allow time for appeal.[3] This was subsequently extended by the Fifth Circuit to 286 days from the resolution of the appeal.[4]

As a result, subject to appeal, the Payday Lending Rule will take effect on June 13, 2022. With limited exceptions, the Rule places limits on certain types of consumer loans, including those with a repayment term of forty-five days or less; a term of more than forty-five days, but paid in one single-payment; a term of more than forty-five days with a balloon payment; or a term of more than forty-five days that charge an annual percentage rate over 36 percent and involve the consumer providing a "leveraged payment mechanism," a right to transfer money.[5] The Rule deems it an unfair and abusive practice for lenders to attempt to withdraw a third payment from the consumer's bank account on such loans after two attempts fail, unless the lender obtains a new and specific authorization to make further withdrawals.[6] Lenders must also provide advance written notice of a first payment withdrawal and of an unusual payment withdrawal pursuant to certain timeframes.[7] In addition, lenders must provide a specific notice to consumers after the second consecutive withdrawal attempt fails and follow specific procedures for obtaining new authorizations.[8] Lenders are also required to establish and follow a compliance program to comply with the rule and comply with certain recordkeeping requirements such loans.[9]

The only other federal rulemaking efforts regarding small-dollar lending during the past year ended anticlimactically. In November 2020, the CFPB had requested comment on a proposal to test how consumers understand and use payday loan disclosures in order to decide whether to engage in payday loan disclosure rulemaking.[10] By March 2021, the CFPB announced that it had commenced the research to identify ways to improve consumer understanding and aid in their decision making.[11] However, in June 2021, the CFPB announced that it was no longer pursuing this research.[12]

2. No. 1:18-CV-0295-LY, 2021 U.S. Dist. LEXIS 173313 (W.D. Tex. Aug. 31, 2021), *appeal docketed*, No. 21-50826 (5th Cir. Sept. 10, 2021).
3. *Id.* at *35.
4. Order, Cmty. Fin. Servs. Ass'n of Am. Ltd. v. CFPB, No. 21-50826 (5th Cir. Oct. 14, 2021).
5. 12 C.F.R. § 1041.3(b)(1)–(3) (2021).
6. *Id.* §§ 1041.7, 1041.8(c).
7. *Id.* § 1041.9(b).
8. *Id.* § 1041.9(c).
9. *Id.* § 1041.12(a)–(b).
10. Agency Information Collection Activities: Comment Request, 85 Fed. Reg. 71886, 71887 (Nov. 12, 2020).
11. Semiannual Regulatory Agenda, 86 Fed. Reg. 16994, 16996 (Mar. 31, 2021).
12. RIN: 3170-AB06, REGINFO.GOV (June 11, 2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3170-AB06.

Federal Enforcement Actions

The CFPB filed a stipulated final judgment and order against Burlington Financial Group ("Burlington") in June 2021 resolving allegations that Burlington violated the Telemarketing Sales Rule ("TSR") and the Consumer Financial Protection Act.[13] The CFPB alleged that Burlington deceived consumers by using telemarketing to tell them that its services would reduce credit card debt and improve credit scores, neither of which was true for many consumers.[14] Burlington also allegedly charged prohibited advance fees for debt-relief and credit-repair services in violation of the debt-relief services provisions of the TSR.[15] The order permanently bans Burlington from telemarketing any consumer financial product or service and from offering, marketing, selling, or providing any financial advisory, debt-relief, or credit repair service.[16] The order also included suspended judgments for redress of $30,457,853 and a civil penalty of $8,100,000 to the State of Georgia.[17]

In February 2021, the FTC filed an order settling allegations against lenders operating online as Harvest Moon Financial, Gentle Breeze Online, and Green Stream Lending ("Harvest Moon") that permanently prohibits Harvest Moon from making loans or extending credit.[18] The FTC alleged that Harvest Moon used deceptive marketing by stating that loans would be repaid in a fixed number of payments, but instead it withdrew millions of dollars in payments after the loans were due to have been repaid.[19] In one instance, a consumer loan agreement stated that the $250 principal amount would be paid in a single payment of $366.19, but Harvest Moon allegedly took out twelve payments totaling $1,391.64 without applying any payments to the principal amount of the loan.[20] The FTC also alleged that it was difficult, if not impossible, for consumers to contact Harvest Moon or to obtain copies of loan documents.[21] Harvest Moon's actions allegedly forced consumers to close their bank accounts to stop the debits.[22] The order also includes a suspended judgment of $114.3 million.[23]

13. Stipulated Final Judgment and Order, CFPB v. Burlington Fin. Grp., No. 1:21-cv-02595-JPB (N.D. Ga. June 29, 2021), https://files.consumerfinance.gov/f/documents/cfpb_burlington-financial-group-llc-et-al_stipulated-final-jdmt-and-order_2021-06.pdf [hereinafter Burlington Judgment Order].

14. Complaint at 13, CFPB v. Burlington Fin. Grp., No. 1:21-cv-02595-JPB (N.D. Ga. June 28, 2021), https://files.consumerfinance.gov/f/documents/cfpb_burlington-financial-group-llc-et-al_complaint_2021-06.pdf.

15. *Id.* at 23.

16. Burlington Judgment Order, *supra* note 13, at 11, 15.

17. *Id.* at 16.

18. Stipulated Order for Permanent Injunction and Monetary Judgment at 4, FTC v. Lead Express, Inc., No. 2:20-cv-00840-JAD-NJK (D. Nev. Apr. 1, 2021), https://regulatoryresolutions.com/wp-content/uploads/2020/07/Stipulated-Order-for-Permanent-Injunction-and-Monetary-Judgment-Apr.-1-2021.pdf [hereinafter Lead Express Order].

19. Complaint at 8, FTC v. Lead Express, Inc., No. 2:20-cv-00840-JAD-NJK (D. Nev. May 11, 2020), https://www.ftc.gov/system/files/documents/cases/1923208harvestmooncomplaint_0.pdf.

20. Complaint at 14–15, FTC v. Lead Express, Inc., No. 2:20-cv-00840-JAD-NJK (D. Nev. May 11, 2020), https://www.ftc.gov/system/files/documents/cases/1923208harvestmooncomplaint_0.pdf.

21. *Id.* at 8.

22. *Id.* at 15.

23. Lead Express Order, *supra* note 18, at 8.

In January 2021, the CFPB settled its case against LendUp Loans, LLC ("LendUp") for alleged violations of the Military Lending Act. The CFPB alleged that LendUp made more than 4,000 loans with an APR greater than the maximum allowable APR of 36 percent, failed to provide required disclosures, and required military borrowers to enter into arbitration agreements.[24] The Stipulated Final Judgment and Order included a $950,000 civil penalty and $300,000 in consumer redress.[25] Within months of settling this case related to military borrowers, the CFPB filed yet another complaint against LendUp.[26] The CFPB's allegations in the most recent complaint include deceiving consumers and making misrepresentations related to the "LendUp Ladder" in violation of the 2016 Consent Order entered into by the CFPB and LendUp.[27] LendUp also allegedly failed to provide timely and accurate adverse-action notices.[28] The new complaint is pending in the Northern District of California as of this writing.

State Enforcement Actions

In March 2021, the Virginia attorney general entered into a settlement with Allied Title Lending, LLC ("Allied") resolving allegations that Allied violated Virginia's consumer finance statutes.[29] Allied allegedly provided open-end lines of credit to Virginia residents with an annual interest rate that exceeded Virginia's usury limit and failed to comply with Virginia law by charging an origination fee before expiration of a required twenty-five-day grace period.[30] Among other things, Allied agreed to pay $850,000 in consumer restitution and $150,000 in settlement administration fees to the state.[31] Allied also agreed not to collect or accept payments of interest, maintenance, fees, and principal on the lines of credit.[32]

In January 2021, the California Department of Financial Protection and Innovation ("DFPI") announced that it signed memorandums of understanding ("MOU") with five earned wage access ("EWA") companies.[33] "Earned wage access products" are considered to be "an innovative way for employees to

24. Complaint at 4–5, CFPB v. LendUp Loans, LLC, No. 4:20-cv-08583-JSW (N.D. Cal. Dec. 4, 2020), https://files.consumerfinance.gov/f/documents/cfpb_lendup-loans-llc_complaint_2020-12.pdf.

25. Proposed Stipulated Final Judgment and Order at 6, 8, CFPB v. LendUp Loans, LLC, No. 4:20-cv-08583-JSW (N.D. Cal. Jan. 19, 2021), https://files.consumerfinance.gov/f/documents/cfpb_lendup-loans-llc_stipulated-final-judgment-order_2021-01.pdf.

26. *See* Complaint, CFPB v. LendUp Loans, LLC, No. 3:21-cv-06945 (N.D. Cal. Sept. 8, 2021), https://files.consumerfinance.gov/f/documents/cfpb_lendup-loans-llc_complaint_2021-09.pdf.

27. *Id.* at 5–6.

28. *Id.* at 6.

29. Consent Judgment at 2, Va. *ex rel.* Herring v. Allied Title Lending, LLC, No. CL 17004286-00-3 (Va. Cir. Ct. Mar. 4, 2021) [hereinafter Allied Title Judgment].

30. Complaint at 2, 5–6, Va. *ex rel.* Herring v. Allied Title Lending, LLC, No. CL 17004286-00-3 (Va. Cir. Ct. Sept. 12, 2017), https://www.oag.state.va.us/files/Com.v.Allied-Complaint-filed9.12.17.pdf.

31. Allied Title Judgment, *supra* note 29, at 4–5.

32. *Id.* at 6.

33. Press Release, Cal. Dep't of Fin. Prot. & Innovation, The DFPI Signs MOUs Believed to Be Among the Nation's First with Earned Wage Access Companies (Jan. 27, 2021), https://dfpi.ca.gov/2021/01/27/the-dfpi-signs-mous-believed-to-be-the-among-the-nations-first-with-earned-wage-access-companies/ [hereinafter EWA Press Release].

meet short-term liquidity needs that arise between paychecks without turning to more costly alternatives."[34] Generally, such products allow employees "to request a certain amount (or share) of accrued wages, disbursing the requested amounts to the employees prior to payday, and later recouping the funds through payroll deductions or bank account debits on the subsequent payday."[35] Because such products are new, the DFPI sought to learn about the products and to "pave a path so earned wage access companies can continue operating in California" without requiring such companies, at least for the time being, to register under the California Consumer Financial Protection Law.[36] In the MOUs, the EWA companies agreed to deliver quarterly reports to provide the DFPI "with a better understanding of the products and services being offered and the risk and benefits to California consumers."[37] The companies also agreed to follow certain "industry best practices" and to disclose fees assessed.[38]

In September 2020, the DFPI, then known as the Department of Business Oversight, announced an investigation into whether Wheels Financial Group, LLC d/b/a LoanMart ("LoanMart") was "evading California's newly-enacted interest rate caps through its recent partnership with an out-of-state bank."[39] In 2019, California passed an interest rate cap for loans of $2,500 to less than $10,000, which became effective January 1, 2020.[40] Before the interest rate cap went into effect, LoanMart made auto title loans to California residents with rates in excess of 100 percent.[41] Once the interest rate cap became effective, LoanMart discontinued originating auto title loans under its California license and instead entered into a bank partnership with CCBank, in which LoanMart acted as the marketer and servicer for auto title loans originated by CCBank that were not subject to the cap.[42] The DFPI investigation focused on "whether LoanMart's role in the arrangement is so extensive as to require compliance with California's lending laws" and "whether LoanMart's arrangement with CCBank is a direct effort to evade" the interest rate caps, "an effort which the [DFPI] contends would violate state law."[43] As of this writing, the investigation is still pending and no findings have been released.

In August 2020, the Colorado attorney general announced a settlement of two cases involving the state's right to enforce its interest rate limits on consumer

34. Truth in Lending (Regulation Z): Earned Wage Access Programs, 85 Fed. Reg. 79404, 79405 (Dec. 10, 2020).
35. *Id.*
36. EWA Press Release, *supra* note 33.
37. *Id.*
38. *Id.*
39. Press Release, Cal. Dep't of Fin. Prot. & Innovation, DBO Launches Investigation Into Possible Evasion of California's New Interest Rate Caps by Prominent Auto Title Lender, LoanMart (Sept. 3, 2020), https://dfpi.ca.gov/2020/09/03/dbo-launches-investigation-into-possible-evasion-of-californias-new-interest-rate-caps-by-prominent-auto-title-lender-loanmart/ [hereinafter CDFPI Press Release].
40. Cal. Fin. Code § 22304.5 (West 2020).
41. CDFPI Press Release, *supra* note 39.
42. *Id.*
43. *Id.*

loans that had been litigated in state and federal court since 2017.[44] The settlement resolved allegations that Avant of Colorado, LLC and Marlette Funding, LLC d/b/a Best Egg, which entered into bank partnership arrangements to originate consumer loans to Colorado residents that allegedly exceeded Colorado's finance charge limitations for non-banks, were the true lenders in the partnership "because they have the predominant economic interest in loans under their [p]rograms."[45] Among other relief, the parties agreed to pay $1,050,000 to the state for the costs of its consumer protection efforts and $500,000 to the state's MoneyWi$er program, which provides financial literacy skills to Colorado elementary and high school students.[46] The parties also agreed to make certain changes to the bank partnership arrangement, not to lend to Colorado consumers at rates above 36 percent, to provide consumers with other state law protections, and to obtain state licenses under the Colorado Uniform Consumer Credit Code.[47]

Other Consumer Actions

In April 2021, the United States Supreme Court issued its opinion in *AMG Capital Management, LLC v. FTC*.[48] The case stemmed from a 2012 lawsuit filed by the FTC against AMG Services, Inc. and several other companies controlled by Scott Tucker in federal district court in Nevada.[49] The FTC alleged that the companies engaged in deceptive acts and practices in violation of section 5(a) of the Federal Trade Commission Act ("FTC Act")[50] in the offering of payday loan products.[51] In 2016, the court granted the FTC's motion for summary judgment against Tucker and several of the companies.[52] In its order, the district court granted the FTC's

44. Press Release, Colo. Att'y Gen., Colorado Attorney General's Office Settles Lawsuit Against Lenders for Exceeding State Interest Rate Limits on Consumer Loans (Aug. 18, 2020), https://coag.gov/press-releases/8-18-20/. *See* Ashley Simonsen, Andrew Soukup, David A. Stein, Matthew Q. Verdin & Stefan Caris Love, *Recent Developments in Valid-When-Made and True Lender Litigation*, 76 Bus. Law. 645, 650, 651–52 (2021) (in the 2021 *Annual Survey*); Catherine M. Brennan & Latif Zaman, *True Lender Developments: Litigation and State Regulatory Actions*, 74 Bus. Law. 545, 548–49 (2019) (in the 2019 *Annual Survey*); Catherine M. Brennan, Kavitha J. Subramanian & Nora R. Udell, *True Lender Developments: Litigation and State Regulatory Actions*, 73 Bus. Law. 535, 539–41 (2018) (in the 2018 *Annual Survey*).

45. Assurance of Discontinuance at 4–5, *In re* Avant of Colo., LLC (Aug. 7, 2020), https://coag.gov/app/uploads/2020/08/Avant-Marlette-Colorado-Fully-Executed-AOD.pdf [hereinafter Avant Discontinuance].

46. *Id.* at 14–15. *See* Press Release, Colo. Att'y Gen., AG Coffman Announces New Financial Literacy Program for Colorado Kids (Feb. 7, 2017), https://coag.gov/app/uploads/2020/02/pressrelease-ever-fimoneywiser.pdf.

47. Avant Discontinuance, *supra* note 45, at 8–14.

48. 141 S. Ct. 1341 (2021).

49. *See* Complaint, FTC v. AMG Servs., Inc., No. 2:12-cv-00536 (D. Nev. Apr. 2, 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120402amgcmpt.pdf [hereinafter AMG Complaint].

50. 15 U.S.C. § 5(a) (2018).

51. AMG Complaint, *supra* note 49, at 15.

52. FTC v. AMG Servs., Inc., No. 2:12-cv-00536-GMN-VCF, 2016 WL 5791416 (D. Nev. Sept. 30, 2016), *aff'd*, 910 F.3d 417 (9th Cir. 2018), *rev'd & remanded*, 141 S. Ct. 1341 (2021).

request for relief under section 13(b) of the FTC Act,[53] which included nearly $1.27 billion in consumer restitution and disgorgement.[54]

On appeal, after observing that the FTC seeks "equitable monetary relief directly in court with great frequency" without prior administrative proceedings and that the FTC itself stated that it does so dozens of times each year,[55] the Supreme Court addressed the question of whether the words "permanent injunction" in section 13(b) authorize the FTC to seek equitable monetary relief such as restitution or disgorgement.[56] The Court observed that section 13(b) was added to the FTC Act in 1973 to allow the FTC to seek injunctive relief in court without having to go through the normal administrative hearing procedure under section 5 first.[57] The FTC started using section 13(b) in the late 1990s to seek monetary relief as well as injunctive relief.[58]

Looking at the language of section 13(b), a unanimous Supreme Court noted that "[a]n 'injunction' is not the same as an award of equitable monetary relief."[59] Furthermore, it found that the language of section 13(b) "focuses upon relief that is prospective, not retrospective," and that "these words reflect that the provision addresses a specific problem, namely, that of stopping seemingly unfair practices while the Commission determines their lawfulness."[60] In addition, the monetary award provisions in sections 5 and 19 of the Act depend on the FTC first issuing a cease and desist order after engaging in administrative proceedings.[61] After rejecting the FTC's arguments in favor of its position, including that it has returned "billions of dollars" to consumers using section 13(b), the Court concluded that "§ 13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief."[62]

Bank partnerships offering small dollar loans were dealt with in two federal district court decisions in past year. In January 2021, the court granted the defendant's motion to dismiss claims against it for unfair acts and practices under the Washington Consumer Protection Act as well as unjust enrichment in *Sanh v. Opportunity Financial, LLC*.[63] The plaintiff alleged, among other things, that Opportunity Financial "rented" co-defendant FinWise Bank's charter to charge interest rates in excess of Washington's usury rate cap.[64] The district court disagreed, finding that the plaintiff failed to allege that Opportunity Financial was the lender in the transaction but instead merely alleged that

53. 15 U.S.C. § 13(a) (2018).
54. *AMG Servs.*, 2016 WL 5791416, at *19–26.
55. *AMG Capital Mgmt.*, 141 S. Ct. at 1347.
56. *Id.*
57. *Id.* at 1346.
58. *Id.*
59. *Id.* at 1347.
60. *Id.* at 1348.
61. *Id.* at 1348–49.
62. *Id.* at 1351–52.
63. No. C20-0310-RSL, 2021 WL 100718, at *5 (W.D. Wash. Jan. 12, 2021).
64. *Id.* at *4.

Opportunity Financial solicited the loans and received compensation from FinWise Bank on a per-loan basis.[65]

In April 2021, the same arrangement between Opportunity Financial and FinWise Bank came under similar scrutiny in the Northern District of California.[66] Among other claims, the plaintiff's principal argument was that Opportunity Financial originated loans without a license in violation of the California Financing Law.[67] As in Washington, Opportunity Financial moved to dismiss the plaintiff's claims and the motion was granted.[68] The court found that FinWise Bank was unquestionably the lender in the transaction, noting that it was listed as the lender on the loan documents.[69] As a result, the court found that FinWise Bank was exempt from the California Financial Code as a state-chartered bank as was its loan, regardless of what type of entity to which the loan was assigned after it was made.[70]

State Legislative Activity

The Illinois Predatory Loan Prevention Act ("PLPA") passed this year, limiting rates on loans to 36 percent APR and requiring creditors to calculate the APR using the broad "all in" approach used for the military APR calculation required under federal law.[71] The law defines "loan" to mean "money or credit provided to a consumer in exchange for the consumer's agreement to a certain set of terms, including, but not limited to, any finance charges, interest, or other conditions."[72] The term "loan" is defined under the PLPA to include all forms of closed-end and open-end credit, retail installment sales contracts, and motor vehicle retail installment sales contracts, not just loans of money.[73]

The PLPA applies to any person who holds, acquires, or maintains, directly or indirectly, the predominant economic interest in the loan.[74] The law also applies to any person or entity who markets, brokers, arranges, or facilitates the loan and holds the right, requirement, or first right of refusal to purchase loans, receivables, or interests in the loans.[75] Finally, the law applies to any person or entity where the totality of the circumstances indicate that the person or entity is the lender and the transaction is structured to evade the requirements of the law.[76] Given the law's broad applicability, small dollar

65. *Id.*
66. Sims v. Opportunity Fin., LLC, No. 20-cv-04730-PJH, 2021 WL 1391565 (N.D. Cal. Apr. 13, 2021).
67. *Id.* at *2.
68. *Id.* at *1.
69. *Id.* at *4.
70. *Id.* at *4–5.
71. 815 Ill. Comp. Stat. Ann. 123/15-5-5 (2021). *See* 10 U.S.C. § 987 (2018).
72. 815 Ill. Comp. Stat. Ann. 123/15-1-10 (2021).
73. *Id.*
74. *Id.* 123/15-5-15(b).
75. *Id.*
76. *Id.*

lenders should expect heightened regulatory scrutiny on bank partnership programs.

Likewise, North Dakota passed Senate Bill 2103 limiting the finance charge a licensed money broker may charge to not more than 36 percent APR, including all charges and fees necessary for the extension of credit incurred at origination.[77] The statute also imposes restrictions on small loans of $2,000 or less, including requiring repayment in equal installments, imposing a maximum term limit, and prohibiting balloon payments.[78]

77. S.B. 2013, 2021 Leg. Assemb., 67th Sess. (N.D. 2021) (to be codified as N.D. Cent. Code § 13-04.1-09.3(1)).

78. N.D. Cent. Code §§ 13-04.1-09.3(2), 13-04.1-09.3(3) (2021).