

AMERICAN FINANCIAL SERVICES ASSOCIATION LAW COMMITTEE

PAYMENT CARD COMMITTEE REPORT ON RECENT DEVELOPMENTS OCTOBER 22-23, 2018

I. U.S. Supreme Court Upholds Anti-Steering Policies

The U.S. Supreme Court ruled on June 25, 2018, that American Express' anti-steering provisions do not violate federal antitrust law. *Ohio v. American Express Co.*, 585 U.S. ____ (2018). Visa and MasterCard settled similar allegations in 2010 but American Express defended its practice, arguing that its anti-steering policies benefited cardholders because its higher transaction fees helped maintain member services. While the Department of Justice and several states prevailed in district court in 2015 (citing harm to merchants), the U.S. Court of Appeals for the Second Circuit Court had reversed. The Court affirmed the Second Circuit's decision.

<https://www.dtlaw.com/Alerts/US-SUPREME-COURT-HOLDS-ANTISTEERING-PROVISIONS-IN-MERCHANT-CONTRACTS-DO-NOT-VIOLATE-ANTITRUST-LAW.pdf>

https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf

II. Visa/MasterCard Reach Settlement With Merchants

Visa Inc., Mastercard Inc. and a number of banks have agreed in principle to pay up to \$6.2 billion to settle long-standing interchange litigation. *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-md-01720 (E.D.N.Y.). An earlier, potentially larger settlement was rejected on appeal and not revived by the U.S. Supreme Court. After the first unsuccessful settlement, the merchants' claims were divided into two classes: monetary damages (proposed to be settled by this agreement) and business practices (continuing). A number of large retailers opted out of the earlier settlement and will need to decide whether to accept the new settlement or opt out again.

<https://www.paymentcardsettlement.com/en>

III. BFCP Settles With Citibank

The Bureau of Consumer Financial Protection announced a settlement with Citibank, N.A. on June 29, 2018. As previously discussed, Citigroup discovered that it had incorrectly adjusted interest rates for cardholders who resumed timely payments after having had to pay penalty rates for late payments. The Bureau concluded that Citibank violated the Truth in Lending Act by (i) failing to reevaluate and reduce the annual percentage rates (APRs) for approximately 1.75 million consumer credit card accounts as required and (ii) failing to have reasonable written policies and procedures to conduct APR reevaluations consistent with applicable regulations. Citibank is to correct its practices and pay \$335 million in restitution to consumers affected by these practices. The Bureau did not assess civil money penalties based on a number of factors, including the fact that Citibank self-identified and self-reported the violations to the Bureau and self-initiated remediation to affected consumers. We covered a related Senate inquiry letter at the June meeting.

https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcftp_citibank-na_stipulation_2018-06.pdf

https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcftp_citibank-na_consent-order_2018-06.pdf

IV. FTC Settles With NetSpend

The Federal Trade Commission will mail more than 430,000 checks totaling more than \$10 million to NetSpend customers who could not access money deposited to their NetSpend reloadable prepaid debit cards. According to the FTC's complaint, many NetSpend customers were unable to access their funds because NetSpend denied or delayed activation of their card or blocked them from using their card despite NetSpend claims in marketing and on its website that consumers who purchase the NetSpend card can "use it today," that they will have "immediate access," and that their money is "always available" and that they are "guaranteed approval" for a card (when in fact many consumers had trouble completing NetSpend's identity verification process). Among other allegations, the FTC said that consumers who closed their accounts and requested refunds waited several weeks for their money.

https://www.ftc.gov/news-events/press-releases/2018/09/ftc-returns-more-10-million-netspend-customers?utm_source=govdelivery

V. OCC Unauthorized Account Review Update

As reported earlier, the OCC initiated an industrywide review of sales tactics following discover of Wells Fargo employee misconduct. A high level summary of the OCC's findings was obtained by *The American Banker* which indicated that credit card accounts, rather than bank accounts, were the most frequently identified source of new accounts opened potentially without appropriate customer authorization. Major card issuers have revamped their application processes to document consent. The OCC emphasized the need not only to obtain customer authorization but to retain proof of it.

<https://assets.sourcemediacom/99/26/ae75dd304cc0ad6ea47d965ce519/sales-practices-horizontal-review-092418.pdf>

VI. Arizona Supreme Court Rules on Optional Acceleration Clauses

The Arizona Supreme Court has ruled that a cause of action to collect the entire outstanding balance of a credit card debt subject to an optional acceleration clause accrues when the first default occurs, that is, when the debtor first fails to make a full, agreed-to minimum monthly payment, not when the creditor chooses to exercise the acceleration clause. *Mertola, LLC v. Santos*, No. CV-17-0109-PR, 2018 WL 3595915 (Ariz. July 27, 2018). A debtor may cure a default if the creditor accepts a payment of arrearages that brings the account current consistent with the parties' contract, but partial repayment does not cure the default or reset the limitations period. Under Arizona law, a cause of action for credit card debt must be commenced within six years after the action accrues. Ariz. Rev. Stat. § 12-548.

<https://caselaw.findlaw.com/az-court-of-appeals/1851367.html>

VII. FRB Report on Credit Card Profitability

The Fair Credit and Charge Card Disclosure Act of 1988 directs the Federal Reserve Board to transmit annually to the Congress a report about the profitability of credit card operations of depository institutions. The 28th report was issued in July 2018. As of December 31, 2017, 12 banks with assets exceeding \$200 million met the definition of a credit card bank for purposes of the report, two fewer than at the end of 2016. These banks accounted for nearly 50 percent of outstanding credit card balances on the books of depository institutions.

<https://www.federalreserve.gov/publications/files/ccprofit2018.pdf>

VIII. Fintech

A. NYDFS Online Lending Report

On July 11, 2018, the New York Department of Financial Services has issued a report recommending the expansive application of NY consumer protection, usury and licensing laws to loans made to NY consumers and small businesses, including the licensing and supervision of online lenders. The report was based largely on information gathered from licensed and unlicensed lending institutions that received a Marketplace Lending Survey provided by the Department. DFS received responses from 35 of the 48 recipients of the survey, although not all respondents answered all survey questions. The survey included questions relating to (i) the business models and operations of the online lenders, (ii) the quantity of New York consumers and small businesses served by them, specifically including those deemed “unbanked” or “underbanked” (both undefined terms), (iii) specific loan terms, such as types of loans, loan amounts, loan duration, annual percentage rates (APRs), fees and charges, (iv) disclosures, (v) underwriting standards, (vi) delinquencies, (vii) marketing and advertising, (viii) securitization practices, and (ix) complaints and investigations.

<https://www.dfs.ny.gov/about/press/pr1807111.htm>

https://www.dfs.ny.gov/reportpub/online_lending_survey_rpt_07112018.pdf

B. Treasury Report

On July 31, 2018, the U.S. Treasury Department issued its report on financial technology pursuant to Executive Order 13772: *A Financial System That Creates Economic Opportunities Nonbank Financials, Fintech, and Innovation*. The report included over 80 specific recommendations. The Department summarized its recommendations in four categories:

- (1) Adapting regulatory approaches to changes in the aggregation, sharing, and use of consumer financial data, and to support the development of key competitive technologies;
- (2) Aligning the regulatory framework to combat unnecessary regulatory fragmentation, and account for new business models enabled by financial technologies;

- (3) Updating activity-specific regulations across a range of products and services offered by nonbank financial institutions, many of which have become outdated in light of technological advances; and
- (4) Advocating an approach to regulation that enables responsible experimentation in the financial sector, improves regulatory agility, and advances American interests abroad.

Among other things, Treasury specifically recommended that (i) Congress codify the “valid when made” doctrine, (ii) federal banking regulators use their available authorities to address *Madden*, (iii) state regulators build a more unified licensing regime and supervisory process to reduce unnecessary inconsistencies across state laws and regulations to achieve greater harmonization (and if states are unable to achieve meaningful harmonization within three years, that Congress should act to encourage greater uniformity in lending laws), (iv) state and federal regulators provide clarity for the use of new data and credit modeling approaches, (v) state and federal regulators foster the use of regulatory sandboxes and (vi) the Office of the Comptroller of the Currency move forward with a special purpose national bank charter to provide a federal approach to reducing regulatory fragmentation and supporting beneficial business models.

<https://home.treasury.gov/news/press-releases/sm447>

<https://home.treasury.gov/sites/default/files/2018-07/Nonbank%20Financials%20EO%20-%20Fact-Sheet%20FINAL.PDF>

<https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf>

C. OCC

Hours after the U.S. Treasury Department issued its report on financial technology, the Office of the Comptroller of the Currency announced that it would begin accepting applications for special purposes national bank charters from non-depository financial technology companies. With the announcement, the OCC published a licensing manual supplement to provide details on how the OCC will evaluate fintech applications, asserting that it would use the same chartering standards and procedures as for other national banks. Fintechs have not raced to file applications, however.

<https://www.dtlaw.com/Alerts/THE-OCC-IS-ACCEPTING-APPLICATIONS-FOR-SPECIAL-PURPOSE-NATIONAL-BANK-CHARTERS-FROM-FINTECHS.pdf>

<https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-74.html>

<https://www.occ.gov/publications/publications-by-type/other-publications-reports/pub-other-occ-policy-statement-fintech.pdf>

<https://www.occ.gov/publications/publications-by-type/licensing-manuals/file-pub-lm-considering-charter-applications-fintech.pdf>

D. CSBS and NY Renew Challenges

At its August 28, 2018, meeting, the Board of Directors of the Conference of State Bank Supervisors voted to move forward with renewed litigation against the OCC. The case is

to be filed “at a time deemed appropriate”. (A federal court previously had ruled that prior litigation was not yet ripe for consideration.)

On September 14, Maria Vullo, Superintendent of New York’s Department of Financial Services, renewed its lawsuit against the OCC also, claiming that the OCC’s decision is “lawless, ill-conceived, and destabilizing of financial markets” and “puts New York financial consumers—and often the most vulnerable ones—at great risk of exploitation by federally-chartered entities.” *Vullo v. Office of the Comptroller of the Currency*, No. 18-cv-8377 (S.D.N.Y. filed Sept. 14, 2018). Like the CSBS, the NY-DFS had previously (and also prematurely) sued to stop the OCC’s action.

<https://www.dfs.ny.gov/about/statements/st1809181.htm>

<https://www.dfs.ny.gov/about/statements/st1807311.htm>

E. OCC Gives Preliminary Approval to Fintech

Varo Money, Inc. has announced that it has received preliminary approval from the OCC of its application for a *de novo* full-service national bank charter for Varo Bank, N.A., a fintech bank. Varo currently provides a variety of services in a mobile-only environment.

https://www.varomoney.com/press_release/varo-money-granted-preliminary-approval-for-national-bank-charter/

https://www.varomoney.com/press_release/varo-money-banking-startup-with-a-social-mission-makes-history/

IX. Madden/True Creditor/VWM Update

A. *Madden*

On September 4th, Plaintiffs filed a memorandum in support of motion for approval of class notice plan, as well a declaration in support of the memorandum. Opposition to the motion must be filed by September 20, 2018. A reply must be filed by October 5, 2018. An in-person status conference is scheduled for November 2, 2018.

B. Colorado True Creditor Cases Update

[TBD]

C. VWM

Efforts to satisfy consumer advocate concerns regarding payday lending and proceed with a Senate bill to address *Madden* and endorse the valid-when-made doctrine are continuing with industry support. *Cf.* H.R. 3299.

D. Vermont Exempts Fintech Partner From Licensing in Commercial Loan Context

The Vermont Department of Financial Regulation has issued a licensing exemption for loan solicitation companies that partner with federally insured banks to extend commercial loans. The exemption applies to a particular set of facts. Loan solicitation companies that meet all the following conditions are exempt:

- (1) The loan solicitation company has partnered with a federally insured bank;
- (2) The loan solicitation company is soliciting commercial loans;
- (3) The commercial loan is made by the federally insured bank and the bank is clearly identified as the lender in the loan documents;
- (4) The loan solicitation company is subject to ongoing monitoring, training, and compliance programs by the federally insured bank to manage the activities of the loan solicitation company; and
- (5) The loan solicitation company is subject to supervision, oversight, regulation, and examination by the federally insured bank's state regulator (if any) and federal regulator.

<http://www.dfr.vermont.gov/reg-bul-ord/licensing-exemption-loan-solicitation-companies-partner-fdic-insured-banks-extend>