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We are pleased to announce the launch of the first volume of Severson & Werson's monthly national legal report on lender liability. This report is based on Scott Hyman's California Personal Property Finance Law Blog in addition to various other means of information that we come across during the scope of our work for you.

***In this Issue*:**

FDCPA

California Court of Appeal held that an "Open Book Account" sounds in contract, but applied out-of-state statute of limitation per choice of law clause in the subscriber agreement.

The appeal in *Professional Collection Consultants v. Lauron*, 2017 WL 634714 (Cal.App. 6 Dist. 2017) arose out of a credit card debt collection action involving two credit cards. PCC, as the assignee of the original creditor, sued the customer for common counts of account stated and open book account. The customer cross-complained against PCC alleging that PCC was attempting to collect on a time-barred debt in violation of the federal FDCPA and California Rosenthal Act. In a motion for summary judgment on both complaints, the customer argued that a Delaware statute of limitations applied to PCC's claims because the underlying credit card agreement (Cardmember Agreement) contained a Delaware choice-of-law provision. She further argued that, under Delaware's applicable three-year limitations period, PCC's claims were untimely. The trial court ruled that the gravamen of PCC's action was that the customer had breached the Cardmember Agreement and that the action was barred by Delaware's three-year statute of limitations governing written contract claims. Accordingly, the court entered summary judgment in the customer's favor on PCC's complaint and her cross-complaint. On appeal, PCC argued the trial court erred in applying Delaware law to its claims, which it argued did not arise under the Cardmember Agreement. It maintained its claims were timely under the applicable California limitations period. The Court of Appeal reversed and remanded the matter to the trial court on the grounds that, with respect to the first credit card, there was no evidence the Cardmember Agreement applied. Nor was there any evidence as to when PCC's claims accrued. Accordingly, the customer failed to establish that PCC's claims seeking to collect on debt incurred on the first card were untimely. As to the second credit card, the Court of Appeal agreed with the customer that Delaware's three-year limitations period applied to PCC's claims. However, the grant of summary judgment was ordered to be reversed because she has not established when PCC's claims accrued.

California District Court held that an attempted collection of discharged debt triggered bankruptcy code, not FDCPA, under the Ninth Circuit's *Walls* decision.

In *Scally v. Ditech Financial, LLC,* 2017 WL 371996 (S.D.Cal. 2017), Judge Hayes dismissed an FDCPA class action arising out of collection of discharged debt. In this case, the first amended complaint alleged that Defendant sent letters to the Plaintiff attempting to collect on a discharged debt which contained various statements "falsely implying that the debt remained viable." The Court concluded that Plaintiff's FDCPA and Rosenthal Act claims were based on violations of the discharge injunction and precluded by the Bankruptcy Code. The Court of Appeals in *Walls* reasoned that a FDCPA claim based on an alleged violation of § 524 would "entail bankruptcy-laden determinations" more appropriate for a bankruptcy court. (*Wall v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002.) In this case, a determination had to be made regarding the underlying § 524 discharge of Plaintiff's alleged debt to resolve Plaintiff's allegations. The Court found that the claims alleged by Plaintiff, including those alleged in Class B and Class C, hinged on the allegation that the debt had been discharged. Plaintiff's claims were not independent of the § 524 discharge injunction and were precluded by the Bankruptcy Code. Plaintiff contended that *Walls* was inapplicable here because Defendant was not the original creditor and was not served with the discharge injunction. The Bankruptcy Appellate Panel of the Ninth Circuit has recognized a broad view of a § 524 discharge injunction. (See *In re Gurrola*, 328 B.R. 158, 175 (B.A.P. 9th Cir. 2005) ["The 524(a) discharge and the discharge injunction are effective against the world to the full extent of their statutory terms, regardless of notice"].) A bankruptcy court can provide a remedy for violations of a discharge injunction through sanctions pursuant to § 105 of the Bankruptcy Code. Sanctions for violation of a discharge injunction are appropriate if the movant "prove[s] that the creditor (1) knew the discharge was applicable and (2) intended the actions which violated the injunction." (*In re Zilog, Inc*., 450 F.3d 996, 1007 (9th Cir. 2006).) The Court concluded that Plaintiff's allegations were dependent on the discharged nature of the debt and were properly addressed under the remedial scheme provided for in the Bankruptcy Code. (See *Walls*, *supra*, 276 F.3d at 511 ["While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtors' protection and remedy remain under the Bankruptcy Code."].)

Illinois District Court held that a car dealer's principal's debt to the floorplan lender was non-dischargeable.

In *In re: Moroni* (*Ford Motor Credit Company v. Moroni*), 2017 WL 436148 (Bkrtcy. N.D.Ill., 2017), Judge Cassling found that a car dealer's principal could not use the bankruptcy laws to discharge his debt to the dealer's floorplan lender. In so holding, the Court specifically noted the split in authority whether a debtor has the necessary fraudulent intent when he or she used money in violation of contractual obligations [but did so] with the intent to keep the company afloat so that it could eventually pay all of its debts. The Court followed the line of cases which hold that a debtor's failure to remit proceeds from the sale of collateral to the secured creditor in an effort to keep the debtor's business afloat is not a valid defense to a claim of embezzlement. Here, the Debtors repeatedly sold vehicles out of trust and did not remit the proceeds to FMCC. The Debtors did this knowingly and without authorization from FMCC. The Debtors were directly involved with the management of the Dealerships, were directly involved in making the out-of-trust sales, and directly involved in efforts to conceal those sales from FMCC. The Debtors were both actively managing the money generated by the Dealerships and made decisions regarding which expenses would be paid and which would not be paid. Thus, Mr. and Ms. Moroni were deemed to be personally liable for damages to FMCC by virtue of the out-of-trust sales because they were both responsible for the day-to-day operations of the Dealerships and are thus liable for the Dealerships' failure to fulfill the obligations under the Wholesale Agreements.

California District Court held a creditor's defense counsel as not subject to FDCPA because it was not collecting on a debt. In dicta, the Court provided that a creditor may not be vicariously liable for the acts of its litigation counsel.

In *Bird v. Real Time Resolutions, Inc.*, 2017 WL 661375 (N.D.Cal. 2017), Judge Davila dismissed claims against a creditor and the creditor's law firm arising under the FDCPA.

Mr. Reyes was an attorney at the law firm Ericksen Arbuthnot, which was retained as defense counsel for Real Time in the lawsuits filed by Plaintiff. Nowhere in the Complaint did Plaintiff allege that Mr. Reyes himself, or the Ericksen firm, sought to collect on Plaintiff's outstanding debt. In her Opposition, Plaintiff highlighted a supporting exhibit to the Complaint that stated "Real Time Resolutions is a debt collector" and "this is an attempt to collect a debt …" in support of her position that "Real Time's agents were engaged in debt collection." However, there was no dispute that Real Time is a debt collector; the focus is on Mr. Reyes. Upon careful review of the facts alleged here, the attached exhibits, and the briefing papers, the Court found nothing to support the claim that Mr. Reyes qualified as a debt collector under the FDCPA. Accordingly, Mr. Reyes' statement was not governed by the requirements of the FDCPA, which in turn meant his statement could not form the basis for an FDCPA cause of action. And, because Mr. Reyes was not personally liable for a violation of the FDCPA, Real Time also could not be held liable.

Judge Davila also suggested in a footnote that a creditor cannot be vicariously liable for the acts of litigation counsel because litigation counsel acts as an independent contractor.

California District Court held that a debt settlement did not transmogrify the debt outside of the Rosenthal Act or eviscerate debtor's attorneys' representation.

In *Munoz v. California Business Bureau, Inc.*, 2016 WL 6517655 (E.D. Cal. 2016), Magistrate Judge McAuliffe found that a debt subject to the Rosenthal Act did not lose its character because it was settled, nor did the settle end the debtor's counsel's representation so as to allow direct communication with the debtor by the debt collector's counsel. First, Judge McAuliffe found once-a-debt, always-a-debt. Second, Judge McAuliffe held that the settlement of the debt does not necessarily permit the debt collector's counsel to "assume" that the debtor no longer was represented by counsel. There is nothing in the FDCPA that even remotely indicates that attorney representation terminates when a hearing related to the debt is vacated. The FDCPA specifically relates attorney representation to the existence of the underlying debt.

California District Court rejected application of

litigation privilege to filing actions seeking recovery on time-barred debts.

In *Petley v. San Diego County Credit Union*, 2017 WL 385742 (S.D. Cal. 2017), Judge Miller rejected the application of California's litigation privilege to Rosenthal Act claims arising out of filing actions on time-barred debts. The Court observed that one of the California Legislature's goals in passing the Rosenthal Act was to prevent the use of improper lawsuits to collect on debts. Thus, even though SDCCU did not subject Plaintiff to unfair practices such as repeated phone calls and harassing behavior, it obligated her to defend an allegedly unwarranted lawsuit, which does not strike the court as much more pleasant. The Court further observed that one of the California Legislature's goals in passing the Rosenthal Act was to prevent the use of improper lawsuits to collect on debts. The Court was "mindful of the ease" with which the goals of the Rosenthal Act could be circumvented if debt collectors were free to harass debtors with obviously time-barred lawsuits and then retreat behind the protection of the privilege.

California Court of Appeal held that a finance lender's license does not prohibit sale of consumer debt to non-licensee.

In *Deaguero v. Mountain Lion Acquisitions, Inc.*, 2016 WL 7030364 (2016), the California Court of Appeal in an unpublished decision held that the CFL does not prohibit the sale of debt to an unlicensed entity. The purpose of section 22340, subdivision (a) of the California Finance Lenders Law was to eliminate the need for licensed finance lenders to obtain a real estate broker's license in order to sell loans secured by real estate on the secondary market. Prior to the enactment of section 22340, subdivision (a), the law regulating finance lenders was silent concerning the authority of finance lenders to sell and service promissory notes, but persons engaged in assigning notes to the public that were secured by real property were required to have a real estate license. "This legislative history makes clear that section 22340 [subdivision] (a) was intended to clarify Business and Professions Code section 10133.1, subdivision (a)(6): the sale of any debt, including debt secured by real estate, by a licensed finance lender to an institutional investor was within the authority of that lender's license. That history also makes clear that the Legislature did not intend the provision to prohibit the sale of debt to non-institutional investors. Instead, the Legislature left the statute silent as to other sales, leaving open the possibility that other statutory schemes could regulate those sales." (See *Montgomery v. GCFS, Inc.* (2015) 237 Cal.App.4th 724, 730.) Thus, CashCall, as a licensed finance lender, did not violate section 22340, subdivision (a), when it sold a non-real-estate-secured loan to Mountain Lion, and Mountain Lion did not violate the statute when it purchased the debt.

California District Court held that debt collector's complaint's citation to only part of statute entitling collector to fees was deceptive, and not barred by *Rooker-Feldman*.

In *Lyudmila Maronyan v. Financial Credit Network Inc.*, 2017 WL 57835 (C.D. Cal. 2017), Judge Wilson allowed a FDCPA claim to proceed based on pleadings in the state court collection action.

FCN's statements regarding its entitlement to attorneys' fees in the state court complaint may in fact be misleading to the least sophisticated debtor. Although one part of FCN's state court complaint requests attorneys' fees in the amount of $800, which is the amount authorized by statute and ultimately granted by the state court, another part represents that FCN was "entitled to attorney fees by an agreement or a statute of 25% of principal indebtedness per [California Civil Code Section] 1717.5. This request came directly after FCN stated the amount of principal indebtedness as $7,241. As 25% of $7,241 is $1,810.25, the least sophisticated debtor may very well believe that FCN was potentially entitled to $1,810.25 worth of attorneys' fees. However, California Civil Code § 1717.5 expressly states that the prevailing party in such an action shall receive

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attorneys' fees of either $800 or 25% of the principal obligation, whichever is lesser. (Cal. Civ. Code § 1717.5(a).) Therefore, a prevailing party would never be entitled to attorneys' fees in an amount greater than $800, yet FCN's complaint arguably represented that it would pursue fees of $ 1,810.25. Although a reading of the civil code would inform the debtor that FCN would be limited to $800 in attorneys' fees, the least sophisticated debtor standard cannot possibly include researching and interpreting certain provisions of the California Civil Code. Thus, the state court complaint filed by FCN and served on the Plaintiff could qualify as a misleading or deceptive communication in violation of the FDCPA, assuming the allegations in the FAC to be true and making all reasonable inferences in favor of the Plaintiff for the purposes of this motion.

The Court found no Rooker-Feldman impediment, either. The *Rooker Feldman* doctrine "applies only when the federal plaintiff both asserts as her injury legal error or errors by the state court and seeks as her remedy relief from the state court judgment." (*Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004).) The Plaintiff did not do so here. Instead, the Plaintiff asserted that FCN appeared to pursue attorneys' fees in excess of the amount allowed by law. The state court in fact granted attorneys' fees in the lower amount, consistent with the California statute. The Plaintiff did not allege any error made by the state court, and did not seek relief from the debt found by the state court. Instead, the Plaintiff claimed that she was injured because she may have approached the case differently were it not for the misrepresentations of FCN regarding the attorneys' fees. This claim was completely independent from the final judgment issued by the state court, and in no way did it require this Court to review or alter the state court's judgment. As a result, the *Rooker Feldman* doctrine did not bar the Plaintiff's claims before this Court.

California District Court held that the Rosenthal Act and FDCPA permit billing statements to be sent to debtor despite attorney representation.

In *Ruvalcaba v. Ocwen Loan Servicing, LLC*, 2016 WL 7178855 (S.D. Cal. 2016), the Court held that billing statements were permitted to be sent to a debtor despite being represented by counsel. Here, Plaintiff alleged that Ocwen violated both 15 U.S.C. § 1692c (incorporated by reference in the California FDCPA by California Civil Code § 1788.17) and California Civil Code § 1788.14(c). These code sections, although similarly worded, have one distinct difference. Section 1692c(2) directs that: [A] debt collector may not communicate with a consumer in connection with the collection of any debt…if the debt collector knows the consumer is represented by an attorney with respect to such debt. Section 1788.14(c) states that: A debt collector shall not initiate communications, other than statements of account, when the debt collector has been previously notified in writing by the debtor's attorney that the debtor is represented by such attorney with respect to the consumer debt[.] Cal. Civ. Code § 1788.14(c) (emphasis added). The former does not provide an exception for "statement of account" or billing statements. This Court adopted the reasoning and conclusion laid out in *Marcotte v. General Elec. Capital Servs, Inc.*, 709 F. Supp. 2d 994 (S.D. Cal. 2010), and held that a statutory obligated "statement of account" or billing statement sent to a represented debtor does not violate either section 1788.14(c) or section 1692c.

California District Court found no conflict between meaningful disclosure of identity and protecting consumers' privacy rights in connection with voicemail messages.

In *Horowitz v. GC Services Limited Partnership*, 2016 WL 7188238 (S.D. Cal. 2016), Judge Anello granted summary judgment to an FDCPA Plaintiff as to left voicemail messages that failed to give *meaningful disclosure*. The Court observed that the Eleventh Circuit as well as other courts have noted in relatively similar circumstances, "even if Niagara's assumption [that leaving required disclosures on voicemails would violate 1692c(b) if heard by third parties] is correct, the answer is that the Act does not guarantee a debt collector the right to leave answering machine messages." (See *Edwards v. Niagara Credit Sols., Inc.*, 584 F.3d 1350, 1354 (11th Cir. 2009).) Thus, Defendant was not required to, nor had a right to, leave a voicemail at the 9515 number. For the foregoing reasons, the Court is unpersuaded that, based on Defendant's rock-and-a-hard-place argument, it must conclude that non-consumers may not allege violations of section 1692d despite that the provision does not explicitly limit liability to consumers, and in fact, provides for liability to "any person."

REES-LEVERING

The California Court of Appeal for the Fourth District held that a tender is not an admission of liability.

In *Tun v. Wells Fargo Dealer Services* (2016) DAR 11140, the Court held a prevailing party defendant under the Rees-Levering Act (Civ. Code 2983.4) is entitled to a fee and cost award if the defendant tenders to plaintiff the full amount to which the plaintiff is entitled and deposits that sum in court -- and the defendant alleges those facts in its answer and the allegation is found to be true.

This decision holds that a "tender" under this section <u>is not</u> an admission of liability but instead only an estimate of the amount to which the plaintiff may be entitled. It also provides that the plaintiff is not entitled to recover the amount of the tender if the plaintiff fails to prove it is entitled to the tendered sum or more. Here, the jury entered verdicts against the Plaintiff and in favor of the Defendant dealer on all claims. The finance company which was only vicariously liable under the Holder Rule was therefore entitled to judgment as a matter of law. So, Plaintiff could not recover the amount tendered, and Defendant was the prevailing party for purposes of the award of costs and fees.

Severson & Werson partner Mark Lonergan tried the case for the Holder, and Jan Chilton briefed and argued the appeal.

California Supreme Court issued Raceway Ford decision on "backdating" of RISCs in spot-delivery situation and on "single document rule."

In Raceway Ford Cases, the California Supreme Court held that a car dealer did not violate the Rees-Levering Motor Vehicle Sales and Finance Act aka the Automobile Sales Finance Act ("ASFA") in backdating a RISC to the date of sale when financing could not be found after a spot-delivery. Here, the Court concluded (1) that Raceway's practice of backdating contracts did not violate ASFA and (2) that Raceway did violate ASFA when it disclosed inaccurate smog fees, but plaintiffs were not entitled to a remedy under ASFA because the violation was due to a bona fide error in computation. (Civ. Code, § 2983, subd. (a).)

California Court of Appeal ruled on the 15 day requirement and defines "last known address" in unpublished decision on ASFA.

In *Baseline Financial Services, Inc. v. Hobbs*, 2016 WL 7243531 (Cal.App. 4 Dist. 2016), the Court of Appeal in an unpublished decision found that an automobile lender complied with the mailing requirements of the ASFA when it mailed the NOI within 15 days of the sale to the customer's last known address. In so holding, the Court observed that the "last known address" is the address on file, not where the vehicle was repossessed.

TILA

North Carolina District Court held that a

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disjointed printing on a RISC did not constitute a TILA violation.

In *Dillard v. Thomasville Auto*, 2016 WL 6471928— F.Supp.3d —- (M.D.N.C. 2016), Judge Schroeder found that disjointed printing on a RISC did not constitute a TILA violation. Here, the Court held that no reasonable consumer would interpret the disclosure form in the manner Dillard argues, and it would not be reasonable and equitable to do so. The construction Plaintiff proposed was that the first nineteen payments were to be made weekly, beginning one month after closing, and that the final "monthly" payment was to be made fifteen months later – was implausible for several reasons: it yielded an outlandish APR, contradicted the form's own terms, and failed to explain why the final payment would be referred to as a "monthly" payment. Plaintiff's proposed interpretation would mean that she was to borrow $3,416.47, pay $4,180.00 in the following nineteen weeks, and then – fifteen months after the final weekly payment – make a final "monthly" payment. This yields an effective APR of 84%, contradicting the APR disclosed on the top of the form, 29%. Plaintiff's reading of the disclosure form would also contradict its other terms, including the finance charge, amount financed, total payment amount, and total sale price. Instead, the only plausible interpretation is that the two lines in question belong in the rows in which the characters' lower halves sit, such that the first nineteen payments are to be made monthly beginning one month after closing and the twentieth payment is to be made one month after the nineteenth payment. This is consistent with the APR, finance charge, and all other figures on the form. Furthermore, the other entries on the form are printed well above the lines on which they belong, such that the reader can easily see that for some reason the form was not fully centered when printed, that all figures appear slightly higher than normal on the page, and that the payment figures therefore should have been printed slightly lower on the page. The Court further held that it was clear that all printed amounts, dates, and payments match each other horizontally. Thus, had the form been printed correctly, the first line would be printed on the "monthly" row and the second line on the row directly below it (which is unlabeled).

Plaintiff's reading would have yielded a wholly unreasonable APR and a strange payment schedule. Accordingly, the Court held that the only plausible interpretation of Plaintiff's copy of the TILA disclosure form is the one Defendant advanced.

UCC

Tennessee Court of Appeals held a delay in repossession of collateral does not run afoul of UCC's commercially reasonable disposition requirement because secured creditor need act commercially reasonably only after it obtains possession.

In *WM Capital Partners, LLC. v. Thornton*, 2016 WL 7477738 (Tenn.Ct.App. 2016), the Tennessee Court of Appeals held that a secured party's delay in securing possession of the collateral — which resulted in a lesser price realized at disposition — was not a defense to the secured party's collection action because the UCC's commercially reasonable disposition requirement is triggered only after the secured party obtains possession. Defendants guaranteed their commercial trucking business' purchase of commercial trucks. The company defaulted, and the Defendants told the bank to come and pick up the trucks. But, the bank had financial troubles of its own and, after it was seized by the FDIC and the notes sold, the note purchaser finally picked up the trucks. The trucks depreciated during the passage of time, which the Defendants said provided them with a defense to the claim. The Court of Appeals disagreed, observing that the Bank's refusal to repossess the collateral standing alone did not render the disposition commercially unreasonable for purposes of Article 9.

FCRA

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California District Court held CCRAA requires furnisher to have known of inaccuracy before furnishing information to CRAs.

In *Herrera v. Allianceone Receivable Management, Inc.*, 2016 WL 7048318 (S.D. Cal. 2016), Judge Moskowitz granted summary judgment to a debt collector on the basis that the debt collector did not know that the information it furnished to a CRA was inaccurate at the time it furnished the information.

District Court (Cal.) held a creditor's bankruptcy reporting was not inaccurate.

In *Keller v. Experian Information Solutions, Inc.*, 2017 WL 130285 (N.D. Cal. 2017), Judge Koh dismissed a FCRA Plaintiff's argument that her creditor's reporting of an account during bankruptcy was inaccurate. Plaintiff's vague assertion that "reporting a past due balance post confirmation does not comport with industry standards," was not enough to overcome this Court's consistent holding that as a matter of law it is not misleading or inaccurate to report a delinquent debt during the pendency of a bankruptcy. Thus, the Court rejected Plaintiff's argument that his credit report was misleading or inaccurate for reporting delinquent debt during the pendency of his Chapter 13 bankruptcy.

Georgia District Court held FCRA furnisher's re-investigation was reasonable.

In *Boyd v. Wells Fargo Bank, N.A.*, 2016 WL 7323293 (S.D.Ga. 2016), Judge Wood found that a Furnisher's reinvestigation of a FCRA dispute was reasonable and that the Plaintiff had suffered no damages. Boyd is a nuclear submarine missile technician, who executed a power of attorney authorizing his then-wife, Siana Boyd, "to borrow money and to execute in [his] name any instrument evidencing indebtedness incurred on [his] behalf." The power remained effective until September 5, 2007. Siana filed for divorce in November 2007.

In October 2007, after Siana's power of attorney expired but before she filed for divorce, someone opened a new credit card in Boyd's name. Boyd did not know about the card until returning home from sea in January 2008. He learned that the bill was 60 days late, disputed the debt. Wells Fargo looked into its records to confirm that the information it had. Based on the documents in its possession, Wells Fargo confirmed Boyd's identity, updated his contact information, and determine that he was liable for the debt. Boyd sued Wells Fargo for improperly investigating and validating the debt. The Court held in favor of Wells Fargo. The FCRA does not force furnishers to endlessly ride the reinvestigation merry-go-round. To stop Wells Fargo from relying on the 2008 investigation, Boyd had to give it either "reason to doubt the veracity of the initial investigation" or "new information that would have prompted [it] to supplement the initial investigation." Instead, Boyd, to his detriment, simply disputed that he was liable for the debt.

EFTA

Tennessee District Court held that an auto finance company's pay-by-phone complied with the Electronic Funds Transfer Act ("EFTA").

In *Blatt v. Capital One Auto Finance, Inc. ("COAF")*, 2017 WL 660677 (M.D.Tenn. 2017), Judge Sharp granted summary judgment to an automobile finance company on a Plaintiff's EFTA claim.

First, the customer claimed that his authorization over the phone did not equate to written authorization as contemplated in the EFTA. The customer acknowledged that the EFTA and the E–SIGN Act in conjunction allow written signatures to be obtained electronically. The customer had also stipulated to facts establishing that his May 6, 2014 phone call created the necessary "electronic signature" under the E–SIGN Act. Furthermore, a 2015 Compliance Bulletin issued by the Consumer Financial Protection Bureau ("CFPB"), the government agency in charge of implementing the EFTA, stated that the EFTA "does not prohibit companies from obtaining signed, written authorizations from consumers over the phone if the E–Sign Act requirements for electronic records and signatures are met." (See Requirements for Consumer Authorizations for Preauthorized Electronic Fund Transfers, CFPB Compliance Bulletin 2015–06, 11232015, 2015 WL 10372389.) Corresponding to this agency interpretation of the EFTA, the legislative history of the E–SIGN Act demonstrates that it was enacted with phone systems in mind: "Today, a system that creates a digital file by means of the use of voice, as opposed to a keyboard, mouse or similar device, is capable of creating an electronic record, despite the fact that it began its existence as an oral communication." (See Regulation E Electronic Signatures in Global and National Commerce Act–Conference Report–Resumed, 146 Cong. Rec. S. 5281, 5284.) Nonetheless, the customer argued that COAF failed to comply with a different portion of the E–SIGN Act, § 7001(c), concerning consumer disclosures. The customer argued that because COAF did not comply with the entire E–SIGN Act, that his electronic signature was invalid for purposes of the EFTA. Under a plain reading of § 7001(c), the E–SIGN Act section in question, COAF was not required to make the consumer disclosures as the customer argued. Section 7001(c) provides that "if a statute … requires that information relating to a transaction… be provided or made available to a consumer in writing, the use of an electronic record to provide or make available … such information satisfies the requirement that such information be in writing" if COAF provided the consumer with certain disclosures. (15 U.S.C. § 7001(c)(1).) This section does not apply to the customer's situation, however, because COAF did not provide any information in electronic form. COAF obtained the customer's signature electronically and then provided a copy of that authorization to the customer in paper form. If COAF had chosen to provide Blatt with a copy of his authorization in the form of an electronic record, it may have been required to comply with this section's consumer disclosure requirements, but that is not the situation in front of the Court. The customer attempted, unsuccessfully, to explain around this reading with a number of conclusory statements. Because § 7001(c) of the E–SIGN Act did not apply to the customer's situation, and the parties had stipulated to facts establishing that the customer's May 6, 2014 phone call created an electronic signature in accordance with the applicable portions of the E–SIGN Act, the Court held that COAF met the written authorization requirement as contemplated in the EFTA.

CFPB

The Ninth Circuit affirmed a district court decision holding that Congress did not expressly exclude tribal lending entities from the CFPB's enforcement authority, compelling three triable entities compliance with CFPB civil investigative demands.

In *Consumer Financial Protection Board v. Great Plains Lending, LLC* (9th Cir. 2017) 2017 DAR 551, three tribal lending entities appealed a district court's decisions to compel their compliance on the ground that they are not subject to the CFPB's jurisdiction because they were created and operated by recognized tribes, and therefore protected by tribal sovereign immunity. The Ninth Circuit held that the the Dodd-Frank Act grants the CFPB authority to regulate for-profit enterprises of Indian tribes that engage in consumer lending operations. Though the act defines "state" to include Indian tribes, it does not otherwise evince any Congressional intent to exclude tribes from the act's scope. The general rule in the Ninth Circuit is that general legislation covers Indian tribes unless they are expressly excluded.

The CFPB trend tool tracks originations for auto loans, among other things, to chart how

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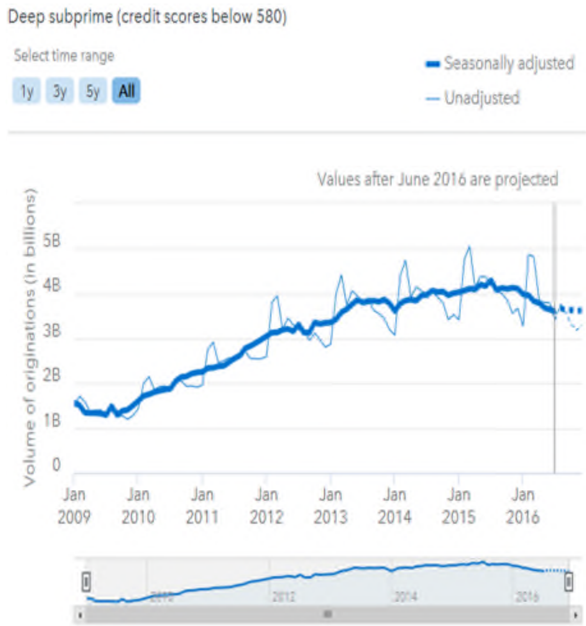
specific groups of consumers are faring in financial markets. By tracking trends over time, the CFPB aims to help warn of potential problems lurking in a given market.[1]

The following summary on automobile loans was last updated on February 21, 2017. The most recent data available is from December 2016.

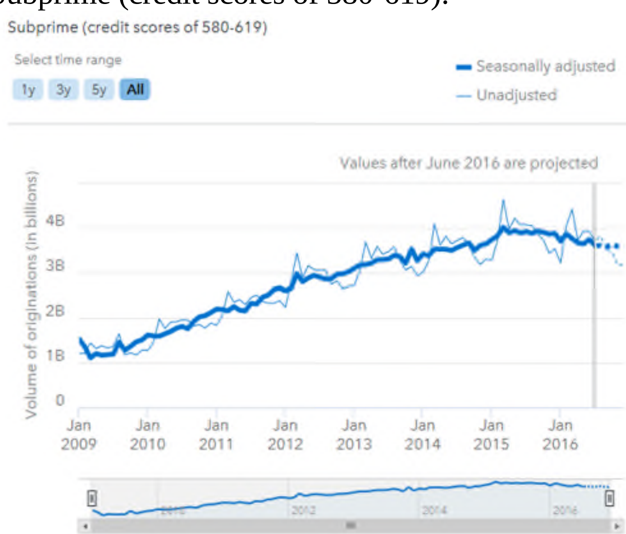
Monitoring developments in overall activity helps the CFPB identify new developments in the markets. The following graphs show the number and aggregate dollar volume of new auto loans opened each month. Aggregated monthly originations are displayed along with a seasonally-adjusted series, which adjust for expected seasonal variation in lending activity.

Borrower Risk Profiles: A consumer's credit score can be an important determinant of their access to credit. The following graphs show how lending activity has changed for borrowers with different credit score profiles.[2]

Deep subprime (credit scores below 580):



Subprime (credit scores of 580-619):



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ear-prime (credit scores of 620-659)

[1] https://www.consumerfinance.gov/data-research/consumer-credit-trends/
[2] https://www.consumerfinance.gov/data-research/consumer-credit-trends/auto-loans/borrower-risk-profiles/

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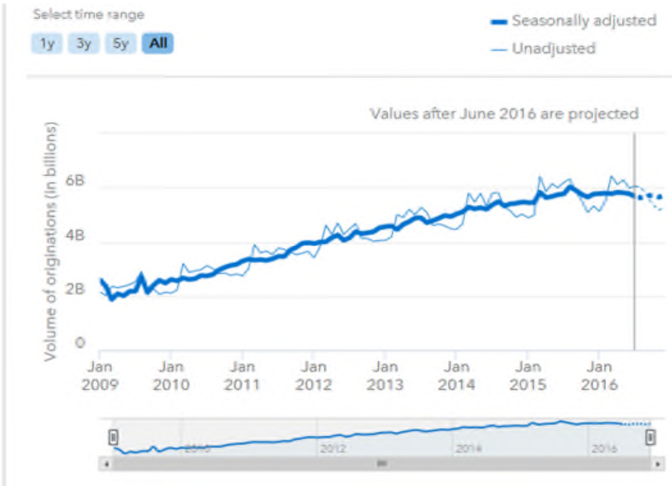
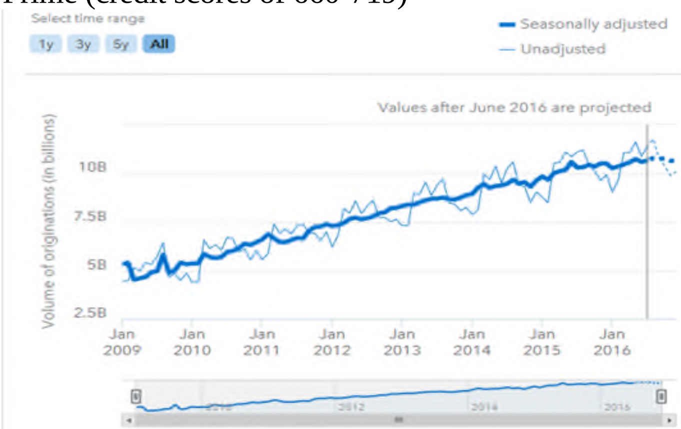
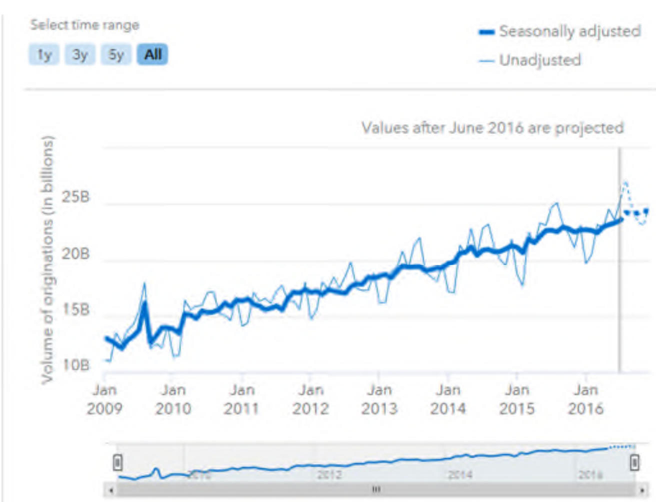


Prime (credit scores of 660-719)

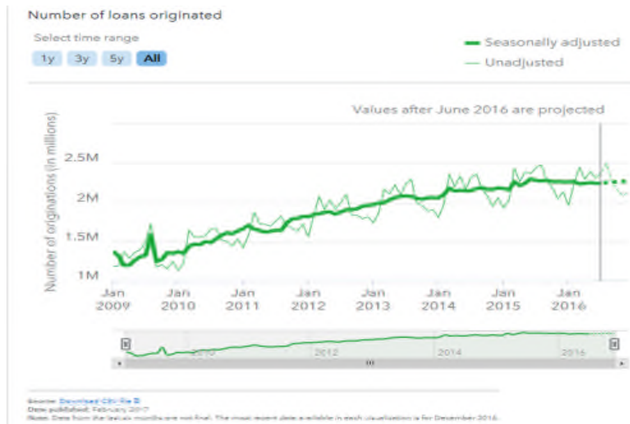


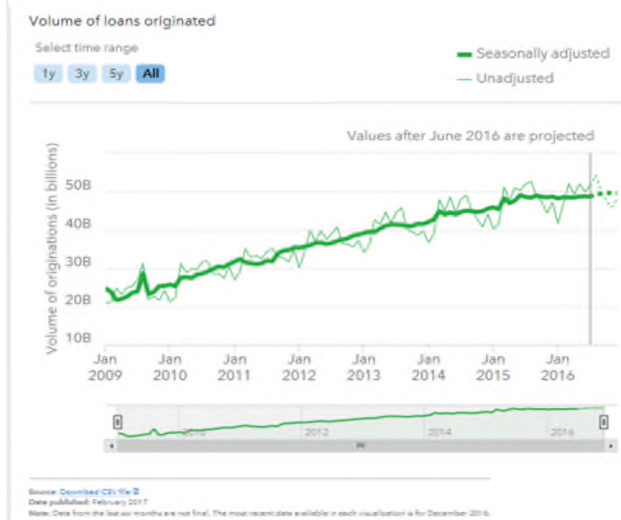
Super-prime (credit scores of 720 or above):



Origination activity: The following graphs depict the number and dollar volume of loans opened each month to purchase (or refinance) new or used autos.[3]

Lending levels The CFPB Monitors developments in overall lending activity to help it identify new developments in the regulated markets. These graphs show the number and aggregate dollar volume of new auto loans opened each month. Aggregated monthly originations are displayed along with a seasonally-adjusted series, which adjust for expected seasonal variation in lending activity.





[3] https://www.consumerfinance.gov/data-research/consumer-credit-trends/auto-loans/origination-activity/#anchor_geographic-changes

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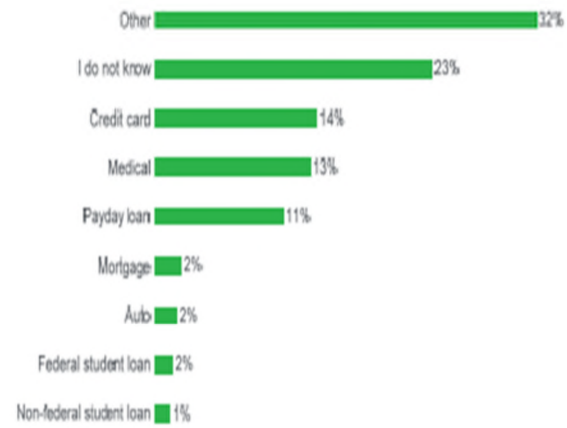
***Product Spotlight -- Debt Collection*:** The CFPB estimates that it has handled approximately 285,800 debt collection complaints since July 21, 2011, making debt collection the most-complained-about product, representing 27 percent of total complaints.

Approximately 129,200 (or 45 percent) of all debt collection complaints handled by the CFPB from July 21, 2011 through November 30, 2016 were sent by the CFPB to companies for review and response. The remaining complaints have been referred to other regulatory agencies (38 percent), found to be incomplete (9 percent), or are pending with the consumer or the CFPB (1 percent and 7 percent, respectively). These complaints include first-party (creditors collecting on their own debts) and third-party collections.

Figures 2 and 3 show the types of debt collection complaints consumers submitted as a percentage of all debt collection complaints handled. The most common issues identified by consumers are problems with continued attempts to collect debt not owed (39 percent) and communication tactics (18 percent).

FIGURE 2: TYPES OF DEBT COLLECTION COMPLAINTS REPORTED BY CONSUMERS

FIGURE 3: TYPES OF DEBT COLLECTION PRODUCTS CONSUMER COMPLAIN ABOUT



Consumers reported being contacted by collectors for debts that were no longer owed and not being provided documentation to verify the debt, even after some of these consumers submitted requests for verification of the purported debts.

Consumers complained that first-party collectors Delaware (-34 percent), Rhode Island (-34 percent), and Idaho (-29 percent) experienced the greatest percentage decrease in debt collection complaints from September - November 2015 to September - November 2016. Of the five most populated states, Texas (34 percent) experienced the greatest percentage increase and California (0.3 percent) experienced the least percentage increase in debt collection complaints from September - November 2015 to September - November 2016.

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TABLE 5: DEBT COLLECTION COMPLAINT VOLUME PERCENT CHANGE BY STATE

	% change	3 month average: Sep - Nov 2015	3 month average: Sep - Nov 2016	Total complaints	Complaints per 100k population
IA	66%	29.3	48.7	1,686	54.0
GA	52%	251.7	383.3	11,127	108.9
AR	48%	27.3	40.3	1,466	49.2
HI	36%	19.7	26.7	969	67.7
TX	34%	656.0	876.7	26,299	103.0
NC	29%	155.0	200.0	7,339	73.1
KY	28%	63.3	81.0	2,897	65.5
KS	25%	40.7	51.0	2,007	68.9
CT	23%	50.3	61.7	2,599	72.4
NY	21%	340.0	411.0	14,615	73.8
NM	17%	39.7	46.3	1,764	84.6
MA	16%	75.0	87.0	3,918	57.7
TN	16%	145.0	168.0	5,919	89.7
FL	15%	585.0	672.7	25,483	125.7
OR	11%	82.7	92.0	3,512	87.2
VA	10%	190.3	208.7	8,605	102.6
WA	9%	133.0	144.3	5,966	83.2
NH	8%	26.3	28.3	1,078	81.0
NJ	6%	198.3	209.7	8,822	98.5
IN	5%	93.3	97.7	3,931	59.4
DC	4%	27.7	28.7	1,431	212.9
ND	4%	9.3	9.7	385	50.9
OH	4%	209.0	216.3	9,616	82.8
MO	3%	100.3	103.7	4,513	74.2
IL	1%	231.7	234.3	9,745	75.8
SC	1%	97.0	98.0	4,368	89.2
PA	0.7%	247.7	249.3	9,888	77.2
CA	0.3%	870.7	873.0	36,261	92.6
WV	0.0%	21.0	21.0	854	46.3
WI	-0.4%	76.3	76.0	3,683	63.8
AZ	-0.7%	180.7	179.3	6,690	98.0
OK	-1%	60.7	60.0	2,831	72.4
NV	-1%	99.3	98.0	3,783	130.9
LA	-2%	87.7	86.3	4,024	86.2
CO	-2%	109.7	107.0	4,840	88.7
AL	-4%	99.7	96.0	3,849	79.2
MD	-4%	194.3	186.7	7,495	124.8
MI	-5%	162.3	154.3	7,084	71.4
UT	-6%	43.3	40.7	2,029	67.7
MT	-10%	19.7	17.7	688	66.6
SD	-13%	12.7	11.0	583	67.9
NE	-14%	36.3	31.3	1,267	66.8
ME	-14%	19.3	16.7	853	64.2
MS	-14%	51.7	44.3	1,878	62.8
MN	-16%	74.3	62.3	3,017	55.0
VT	-26%	9.0	6.7	355	56.7
WY	-27%	11.0	8.0	394	67.2
AK	-29%	11.7	8.3	453	61.3
ID	-29%	39.0	27.7	1,378	83.1
RI	-34%	21.7	14.3	878	83.1
DE	-34%	44.7	29.3	1,502	158.8

Debt collection complaints by company:

TABLE 6: MOST-COMPLAINED-ABOUT COMPANIES FOR DEBT COLLECTION[11]

Company	3 month average: Jul - Sep 2016	% change vs. 3 month period last year	3 month average % untimely: Jul - Sep 2016
Portfolio Recovery Associates, Inc.	124.7	-8%	0%
Encore Capital Group	123.0	-34%	0%
ERC	83.0	-28%	0.4%
Citibank	77.3	12%	0%
Synchrony Financial	73.7	32%	0%
Capital One	69.0	47%	0.5%
JPMorgan Chase	65.0	31%	0.5%
Transworld Systems Inc.	62.0	-12%	0%
Convergent Resources, Inc.	49.3	21%	0%
Diversified Consultants, Inc.	48.7	30%	0.7%
Wells Fargo	42.3	76%	16%
I.C. System, Inc.	40.3	32%	0%
Bank of America	39.7	27%	0%
Navient Solutions, Inc.	39.0	19%	0%
Afni, Inc.	38.3	-8%	0%
Tenet HealthCare Corporation	37.7	122%	20%
Resurgent Capital Services L.P.	33.0	-3%	1%
Southwest Credit Systems, L.P.	32.0	146%	88%
National Credit Systems,Inc.	31.0	19%	5%
Commonwealth Financial Systems, Inc.	30.3	20%	2%

TABLE 7: COMPANIES WITH THE LARGEST PERCENT INCREASE IN DEBT COLLECTION COMPLAINTS

Name	% change vs. 3 month period last year	3 month average: Jul - Sep 2015	3 month average: Jul - Sep 2016
Barclays PLC	618%	3.7	26.3
Southwest Credit Systems, L.P.	146%	13.0	32.0
Tenet HealthCare Corporation	122%	17.0	37.7
Amex	96%	8.3	16.3
Wells Fargo	76%	24.0	42.3

TABLE 8: COMPANIES WITH THE LARGEST PERCENT DECREASE IN DEBT COLLECTION COMPLAINTS

Name	% change vs. 3 month period last year	3 month average: Jul - Sep 2015	3 month average: Jul - Sep 2016
EOS Holdings, Inc.	-40%	27.3	16.3
Encore Capital Group	-34%	186.7	123.0
The CBE Group, Inc.	-34%	24.7	16.3
ERC	-28%	116.0	83.0
Transworld Systems Inc.	-12%	70.3	62.0

Barclays PLC saw the greatest percentage increase in debt collection complaints (618 percent) from July - September 2015 to July - September 2016. EOS Holdings, Inc. saw the greatest percentage decrease in debt collection complaints (-40 percent) during the same period.

Companies with highest rate of untimely responses to debt collection complaints:

TABLE 9: COMPANIES WITH HIGHEST RATE OF UNTIMELY RESPONSES TO DEBT COLLECTION COMPLAINTS

Name	3 month % untimely: Jul - Sep 2016	Debt collection complaints sent to company: Jul - Sep 2016
Southwest Credit Systems, L.P.	88%	96
Tenet HealthCare Corporation	20%	113
Wells Fargo	16%	127
National Credit Systems,Inc.	5%	93
Commonwealth Financial Systems, Inc.	2%	91

TABLE 10: COMPANIES WITH LOWEST RATE OF UNTIMELY RESPONSES TO DEBT COLLECTION COMPLAINTS SORTED BY THE MOST TIMELY RESPONSES

Name	3 month % untimely: Jul - Sep 2016	Debt collection complaints sent to company: Jul - Sep 2016
Portfolio Recovery Associates, Inc.	0%	374
Encore Capital Group	0%	369
Citibank	0%	232
Synchrony Financial	0%	221
Transworld Systems Inc.	0%	188

Southwest Credit Systems, L.P. had the greatest rate of untimely responses (88 percent) during the three month period of July - September 2016. Among companies which had the lowest untimely rate (0 percent), Portfolio Recovery Associates, Inc. had the most timely responses at 374 timely responses.

__Consumer Complaints__: As of December 1, 2016, the CFPB has handled approximately 1,058,100 complaints, including approximately 23,100 complaints in November 2016. Table 1 demonstrates the percentage change in complaint volume by product, comparing September - November 2015 with September -November 2016.

TABLE 1: CHANGE IN COMPLAINT VOLUME

	% change	3 month average: Sep - Nov 2015	3 month average: Sep - Nov 2016
Student loan	120%	546	1,202
Bank account or service	36%	2,046	2,787
Credit card	32%	1,910	2,514
Consumer loan	24%	1,212	1,507
Debt collection	10%	6,589	7,251
Credit reporting	9%	4,281	4,651
Other financial service	2%	166	170
Mortgage	-2%	4,317	4,251
Money transfer	-7%	206	192
Payday loan	-27%	460	334
Prepaid	-59%	444	183
Total	13%	**22,408**	**25,342**

Student loan complaints showed the greatest percentage increase from September - November 2015 (546 complaints) to September - November 2016 (1,202 complaints), representing about a 120 percent increase. Part of this year-to-year increase can be attributed to the CFPB updating its student loan intake form to accept complaints about Federal student loan servicing in February 2016.

Table 2 shows the complaint volume this month by product. The graphic at the end of each row under the heading "Monthly complaints" shows the volume trend from when the CFPB began accepting complaints about that product (green dot) to the current month (blue dot). The monthly average reflects complaints handled per month since we began accepting those complaints.

TABLE 2: MONTHLY PRODUCT TRENDS[a]

Products	Complaints this month	% change vs last month	Monthly average since launch	Total complaints	Monthly complaints
Debt collection	6,730	-13%	6,890	285,754	
Credit reporting	4,138	-21%	3,545	177,489	
Mortgage	3,954	-9%	4,205	256,737	
Bank account or service	2,440	-14%	1,790	105,185	
Credit card	2,213	-16%	1,674	109,328	
Consumer loan	1,384	-14%	810	47,058	
Student loan	1,044	-16%	582	33,713	
Payday loan	335	-0.6%	429	16,348	
Prepaid	183	2%	212	6,399	
Money transfer	180	-5%	166	7,465	
Other financial service	160	-10%	155	4,685	
Total	**23,134**	**-14%**	**16,278**	**1,058,082**	

2013 2016

Product launch month   This month

As this chart illustrates, debt collection complaints represented about 29 percent of complaints submitted in November 2016. Prepaid complaints showed the greatest month-over-month percentage increase (2 percent). Credit reporting complaints showed the greatest month-over-month percentage decrease (-21 percent). Debt collection, credit reporting and mortgages continue to be the top three most complained- about consumer financial products and services, collectively representing about 64 percent of complaints submitted in November 2016.

Table 3 provides the changes in complaint volume by state. As you can see, Iowa (39 percent), Georgia (37 percent), and Alaska (35 percent) experienced the greatest complaint volume percentage increase from September - November 2015 to September - November 2016. Vermont (-23 percent), Rhode Island (-20 percent), and Idaho (-17 percent) experienced the greatest complaint volume percentage decrease from September - November 2015 to September - November 2016. Of the five most populated states, Texas (29 percent) experienced the greatest complaint volume percentage increase and California (8 percent) experienced the least complaints.

1.2 Complaint volume by state

TABLE 3: CHANGE IN COMPLAINT VOLUME BY STATE

	% change	3 month average: Sep - Nov 2015	3 month average: Sep - Nov 2016	Total complaints	Total complaints per 100k population
IA	39%	94	130	5,018	161
GA	37%	962	1,319	45,041	441
AK	35%	27	36	1,383	187
LA	33%	242	321	11,714	251
MT	30%	37	49	1,881	182
MO	29%	296	382	14,522	239
TX	29%	1,762	2,268	84,310	307
CT	25%	223	280	11,836	324
CO	24%	344	428	17,708	325
IL	21%	813	986	37,191	289
KS	21%	110	132	5,787	198
NV	20%	309	372	13,246	458
NY	20%	1,425	1,703	67,708	342
OR	19%	252	301	12,184	302
OK	18%	157	185	7,884	202
NC	18%	614	722	29,053	289
SD	15%	34	39	1,599	186
NJ	14%	801	916	39,799	444
IN	14%	265	303	12,455	188
MA	14%	376	428	19,297	284
AZ	14%	517	588	23,274	341
DC	11%	112	125	6,103	908
FL	11%	[illegible]	[illegible]	[illegible]	504
PA	10%	848	935	37,538	293
UT	10%	127	140	6,112	204
CA	8%	3,083	3,345	145,484	372
NH	8%	79	86	4,625	348
AL	8%	286	308	11,781	243
NM	7%	127	136	5,593	268
TN	7%	388	414	17,335	263
MN	6%	251	267	11,963	218
VA	6%	708	752	32,927	393
MD	6%	677	719	31,898	531
AR	5%	113	119	4,920	165
MS	1%	143	145	5,635	188
OH	1%	704	712	32,308	278
WA	0.9%	505	510	21,456	299
KY	-1%	191	189	8,433	191
MI	-3%	557	541	26,769	270
WV	-4%	74	71	3,002	163
SC	-4%	347	333	14,081	287
NE	-5%	86	82	3,612	190
HI	-5%	78	74	3,749	262
WI	-6%	261	247	12,180	211
ME	-9%	71	64	3,460	260
DE	-10%	121	108	5,380	569
ND	-13%	26	22	1,041	138
WY	-15%	27	23	1,137	194
ID	-17%	95	79	3,912	236
RI	-20%	73	58	3,319	314
VT	-23%	40	31	1,691	270

Figure 1 and Table 4 show the top 10 most-complained-about companies for July -September 2016. Figure 1 also shows which products consumers complained about for each company. The "Other" category includes consumer loans, student loans, money transfers, payday loans, prepaid cards, and other financial service complaints. Complaints sent to these companies account for 51 percent of all complaints sent to companies over this period.

By average monthly complaint volume, Equifax (1,458), Experian (1,247), and TransUnion (1,207) were the most-complained-about companies for July – September 2016. Citibank experienced the greatest percentage increase in average monthly complaint volume (61 percent) from July - September 2015 to July - September 2016. Ocwen experienced the greatest percentage decrease in average monthly complaint volume (-31 percent) from July - September 2015 to July - September 2016.

FIGURE 1: TOP 10 MOST-COMPLAINED-ABOUT COMPANIES

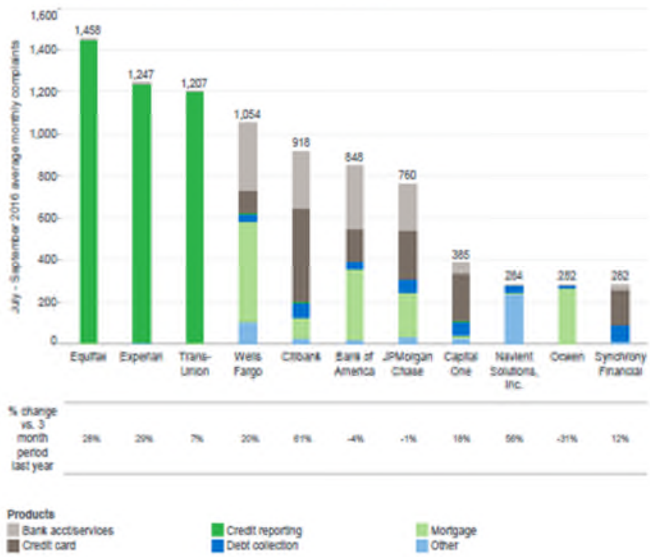

TABLE 4: TOP 10 MOST-COMPLAINED-ABOUT COMPANIES[8]

Company	3 month average: July - September 2016	% change vs. 3 month period last year	Monthly average[9]	Total complaints
Equifax	1,458	28%	825	39,598
Experian	1,247	29%	785	37,658
TransUnion	1,207	7%	661	31,733
Wells Fargo	1,054	20%	813	47,154
Citibank	918	61%	524	30,379
Bank of America	848	-4%	1,044	60,578
JPMorgan Chase	760	-1%	654	37,929
Capital One	385	18%	304	17,608
Navient Solutions, Inc.	284	56%	181	9,831
Ocwen	282	-31%	390	22,619
Synchrony Financial	282	12%	189	10,987

FTC

CarMax and two major used automobile retailers settled their FTC charges that they marketed the extent they inspected their used vehicles; however, failed to adequately disclose that some of the cars were subject to unrepaired safety recalls.

In summary, The FTC's complaint against CarMax cited CarMax's claims about its rigorous used car inspections, including its "125+ Point Inspection" and that its cars undergo, on average, "12 hours of renewing – sandwiched between two meticulous inspections." The FTC alleged that CarMax failed to adequately disclose that some of the cars had open recalls, which included defects that could cause serious injury, including the GM key ignition switch defect, as well as the Takata airbag defect.

The FTC's Complaint against West-Herr Automotive Group cites claims about vehicles backed by the "West-Herr Guarantee" and advertising a "rigorous multi-point inspection with our factory trained technicians." As with CarMax, the FTC's complaint alleged that the company failed to properly disclose that some of the vehicles were subject to recalls for defects that could result in serious injury.

The FTC's Complaint against Asbury Automotive Group ("Coggin Automotive Group") alleged that the company made claims such as: "Every Coggin Certified used car or truck has undergone a 150 point bumper-to-bumper inspection by Certified mechanics. We find and fix problems – from bulbs to brakes – before offering a vehicle for sale." Based on consumer complaints, the FTC alleged that the company marketed multiple certified used vehicles without adequately disclosing that some of the cars were subject to open recalls, including one that could cause fuel to leak and the engine to misfire or stall, and one that could cause a car to move in an unexpected or unintended direction.

Under the proposed consent orders, the companies are prohibited from misrepresenting whether there is or is not an open recall for safety issues for any used motor vehicle, or whether they repair such vehicles, and any other material fact about the safety of the

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used vehicles they advertise for sale. The companies are further prohibited from claiming their used vehicles are safe or have been inspected for safety-related issues.[4]

DATA PRIVACY

New York Department of Financial Services Finalized Cybersecurity Regulation Takes Effect March 1, 2017

The New York Department of Financial Services ("NYDFS") announced the release of its finalized Cybersecurity Requirements for Financial Services Companies on February 16, 2017 following an additional 30-day comment period. The finalized requirements ("Cybersecurity Regulation") will go into effect on March 1, 2017, however, covered entities will have 180 days (until September 1, 2017) to comply with the new regulation. Covered entities will have to submit a certificate of compliance with the NYDFS by February 15, 2018.

The requirements of the final Cybersecurity Regulation are more flexible than the initial regulation proposed in September 2016, however they will still have implications beyond New York and the entities that are directly "covered" and subject to the NYDFS' enforcement authority, as other regulators and enforcement agencies will likely view the requirements as a new baseline for cybersecurity compliance for financial services companies.

First, a "covered entity" under the Cybersecurity Regulation is defined as any person operating under or required to operate under a license, registration, charter, certificate, permit, accreditation or similar authorization under (a) the banking law, (b) the insurance law or (c) the financial services law in New York. The Regulation exempts covered entities with: (1) fewer than 10 employees, including any independent contractors; (2) less than $5 million in gross annual revenue in each of the last three fiscal years (in revenue "from New York business operations"); or (3) less than $10 million in year-end total consolidated assets.

The Cybersecurity Regulation requires:

- *The establishment of a Cybersecurity Program*. Covered entities must establish a cybersecurity program designed to ensure the confidentiality, integrity and availability of information systems. An entities cybersecurity program must be based on the Covered Entity's periodic Risk Assessment.

- *Adoption of a Cybersecurity Policy*. Covered entities must adopt a written cybersecurity policy, setting forth policies and procedures addressing the following:

(a) information security;

(b) data governance and classification;

(c) access controls and identity management;

(d) business continuity and disaster recovery planning and resources;

(e) systems operations and availability concerns;

(f) systems and network security;

(g) systems and network monitoring;

(h) systems and application development and quality assurance;

(i) physical security and environmental controls;

(j) customer data privacy;

(k) vendor and third-party service provider management;

[4] http://www.hudsoncook.com/alerts/alerts_12162016021257_560.pdf

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(l) risk assessment; and

(m) incident response.

- *Designate someone (or an entity) for the role of Chief Information Security Officer ("CISO").* The final Regulation states that so long as a covered entity has designated a qualified individual to perform the functions of a CISO, no individual is required to have the specific title or be dedicated exclusively to CISO activities. Further, the designated individual must provide a written, more narrowly focused, annual cybersecurity report to the board of directors or governing body. A third party service provider may fulfill the role of CISO, but the covered entity will remain responsible for compliance of its cybersecurity program and be required to designate a senior member of the institution's personnel to oversee the service provider.

- *Oversight of third party service providers*. A "Third Party Service Provider" is defined as an entity that (1) is not an Affiliate of the Covered Entity, (2) provides services to the Covered Entity and (3) has access to Nonpublic Information through its provision of services to the Covered Entity. A covered entity must have policies and procedures in place that are designed to ensure the security of information systems and nonpublic information accessible to, or held by, third parties. Periodic assessments must be conducted of third party service providers dependent upon the risk they present (per the covered entities own "Risk Assessment").

- Implement an incident response plan. A covered entity is required to establish a written incident response plan, which must address the following:

(a) the internal processes for responding to a cyber event;

(b) the goals of the incident response plan;

(c) the definition of clear roles, responsibilities and levels of decision-making authority;

(d) external and internal communications and information sharing;

(e) remediation of any identified weaknesses in the institution's systems and controls;

(f) documentation and reporting of a cyber event; and

(g) the evaluation and revision of the incident response plan following a cyber event.

Notification of a "Cybersecurity Event" must be made to the NYDFS superintendent within 72 hours after a determination is made that an event has occurred.

- *Monitoring and testing in accordance with risk assessments*. The final requirements states that if there are not effective continuous monitoring or other systems to detect changes that may indicate vulnerabilities, then the covered entity is required to conduct penetration testing annually and vulnerability assessments quarterly.

- *Maintenance of an audit trail*. Covered entities must maintain systems that, to the extent applicable and based on the Covered Entity's risk assessment, include audit trails designed to detect and respond to Cybersecurity Events that "have a reasonable likelihood of materially harming any material part" of the Covered Entity's normal operations and retain such records for five years.

- *Cybersecurity protections*. If not already in place, covered entities will also be required to adopt specific multi-factor authentication and encryption requirements as well as the conducting of period internal and external cyber risk assessments and audits.

- *Cybersecurity program requirements*. Covered entities must include the following in their cybersecurity programs: (1) periodic cybersecurity training for all personnel (specific to the risks of the institution); (2) annual reviews and updates to written application security procedures, guidelines and standards; (2) periodic risk assessment of the confidentiality, integrity and availability of information systems; adequacy of controls; and mitigation or acceptance of identified risks; (3) hiring and training of cybersecurity personnel; and (4) timely destruction of nonpublic information that is no longer necessary except where required to be retained by law or regulation.

The above stated information does not encompass all of the final Cybersecurity Regulation, however it provides covered entities (and third party vendors of covered entities) with some homework as to the reassessment of their cybersecurity programs and framework. Although many of the requirements are risk assessment dependent, the NYDFS is likely only the first of many regulators to implement such rules and companies would be wise to begin preparing for similar requirements on a nation-wide basis.