

Hudson Cook Partner Lucy Morris Quoted in Law360 Article on CFPB Contract Rules

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"Curious" CFPB Agenda Item Sparks Buzz Over Contract Rules

By Jon Hill

Below is an excerpt from the article. Subscribers to Law360 can read the full article [here](#).

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A mystery item tucked into the Consumer Financial Protection Bureau's latest regulatory agenda is fueling speculation among attorneys that the agency may soon try to clamp down on some terms and conditions included in lenders' contractual agreements with consumer borrowers.

The semiannual agenda, which was released earlier this month, disclosed for the first time that the CFPB is mulling "whether to issue regulations regarding the inclusion or enforcement of certain provisions in contracts for consumer financial products or services," styling it as a potential "Regulation AA" rulemaking project.

Regulation AA was a set of Federal Reserve rules that for years banned certain aggressive collection provisions in banks' credit contracts with consumers. Although the creation of the CFPB led to the regulation's repeal nearly a decade ago, these provisions are still effectively verboten in other ways.

That's raising questions among financial services attorneys about why the CFPB might want to resurrect Regulation AA and what else the agency might have up its sleeve. The CFPB, for its part, isn't saying more — representatives for the agency declined Law360's requests for further comment.

But whatever its plans are, the CFPB seems to want to move quickly. According to the agenda, it could jump straight to issuing a formal proposal as soon as September, skipping the early outline and outreach stages that often kick off new rulemakings.

"It's curious both from a process perspective and from a substantive perspective," said Mike Silver, a Husch Blackwell LLP partner who was formerly a senior counsel in the CFPB's Office of Regulations. "Framing this as a Regulation AA rule seems very unusual because there is no Regulation AA anymore and the statutory authority to issue such a

regulation is gone."

What Reg AA Was

Several generations ago, consumer finance companies could use customer agreements that offered them arguably harsh, powerful remedies for dealing with delinquent borrowers.

One common contract clause, for example, would let lenders lay claim to borrowers' beds, televisions or other household goods and seize them in the event of default, even if those items weren't purchased with the credit at issue.

Other contract terms might permit lenders to deduct payment directly from a borrower's wages and require borrowers to agree to so-called confessions of judgment, which waive litigation rights so that lenders can obtain automatic court judgments in their favor if payments are missed.

In the 1970s, the Federal Trade Commission began studying whether these and certain other consumer credit practices should be outlawed as unfair. The result was the Credit Practices Rule, which prohibited several types of contract clauses and provided additional protections starting in the mid-1980s.

Although the banking industry wasn't directly subject to this rule, the Federal Reserve soon adopted its own version for banks and other depository institutions, codifying it into Regulation AA.

But when Congress established the CFPB as part of the 2010 Dodd-Frank Act, it reshuffled consumer protection authorities in a way that knocked the statutory foundation out from under Reg AA. Rendered vestigial, the regulation was later repealed by the Fed in 2016.

Despite this repeal, the FTC's Credit Practices Rule remains on the books for payday lenders, buy-now-pay-later providers and other nonbank consumer lenders. Federal banking regulators, meanwhile, have made clear that banks should continue to eschew the contract provisions that Reg AA once addressed.

That's because those provisions, according to decade-old regulatory guidance issued by the Fed and other agencies, can still violate prohibitions on unfair or deceptive acts or practices that the banking agencies and CFPB enforce under the FTC Act and Dodd-Frank Act, respectively.

"The agencies may find that statutory violations exist even in the absence of a specific regulation governing the conduct," the guidance said.

State of Play Today

Fast-forward to 2024, and financial services attorneys say not much has changed. Confessions of judgment, wage assignments and other contract terms that were restricted under Reg AA remain officially off-limits for nonbank consumer lenders, and banks are still steering clear, too.

"It's not like there's been some huge groundswell in the banking industry to take up these practices again that were formerly banned in Reg AA," said Andrew Smith, a Covington & Burling LLP financial services partner who headed up the FTC's Bureau of Consumer Protection from 2018 to 2021.

But as Smith and other attorneys noted, the CFPB has signaled concerns in recent years with a wider range of contract terms and practices not covered by the old Fed or FTC regulations. It's these concerns that the agency may have in mind as it floats a new Regulation AA-style rulemaking.

"The bureau could be using this as a vehicle to write its own new rule that would address the 2024 version of the contract terms [deemed] unconscionable in the old rule," Husch Blackwell's Silver said, describing the potential end goal as something "like a 21st Century credit practices rule."

In that scenario, the CFPB might also seek to bring fintech and other nonbank lenders into the scope of the rule, he added.

Under Director Rohit Chopra, the CFPB has dialed up its scrutiny of the financial industry's contracting practices, with a particular focus on how different terms and conditions might put consumers at a disadvantage when dealing with banks and other financial providers.

The CFPB has warned, for example, that it can be anticompetitive for financial firms to contractually "gag" consumers from leaving negative online reviews. Consumers can also be misled when their financial contracts include boilerplate waivers that may not actually be enforceable, the agency has said.

More significantly, the CFPB has proposed launching a registry to centrally and publicly track how nonbank financial firms under its oversight are leveraging the "fine print" in their consumer contracts.

Final plans for that registry, which are due any day now, could establish requirements for these firms to report on their use of up to eight types of provisions that "seek to waive or limit consumer rights or legal protections," including so-called gag clauses, liability disclaimers, class action waivers and arbitration agreements.

This registry, in particular, could help explain what the CFPB may be up to when it lists Regulation AA on its rulemaking agenda, according to Lucy Morris, a former CFPB and FTC official who is now a partner at Hudson Cook LLP.

"The bureau may want to require covered persons to register contracts with covered terms and conditions at the same time that they declare certain terms and conditions as unfair — as was done with the FTC's Credit Practices Rule many years ago," Morris said in an email to Law360.

"This is guesswork on my part, but the two rulemakings seem to cover similar territory and to be consistent with the bureau's prescriptive approach to the market," Morris added.

Morris isn't alone in that guess. Husch Blackwell's Silver and Covington's Smith likewise described the registry as the possible backdrop to any CFPB plans for a Reg AA revival, with the former generating data that could inform what specific contract terms, if any, the agency might try to restrict under the latter.

Subscribers to Law360 can read the full article [here](#)

About Lucy Morris

Lucy is a partner in the firm's Washington, DC office. Lucy counsels financial institutions and others in complying with federal consumer financial laws and prohibitions against unfair, deceptive, or abusive trade practices. She is an experienced advocate and litigator, representing clients in government investigations, examinations, and enforcement actions before federal and state agencies, including the Consumer Financial Protection Bureau, Federal Trade Commission, U.S. Department of Justice, and state AG offices. Lucy chairs Hudson Cook's Government Investigations, Examinations, and Enforcement Practice Group.

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