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Military and Veteran Consumer Protection Act of 2022

California SB 1311 (the Military and Veteran Consumer Protection Act of 2022) adds a number of additional protections for servicemembers and veterans as of January 1, 2023. Most notably, SB 1311 voids any security interest in a motor vehicle if the underlying loan is exempt from the federal Military Lending Act and the loan finances credit insurance products or credit-related ancillary products (seeking to close any potential loopholes in the interpretation of the MLA's vehicle purchase money loan exemption at the federal level). This reverts California law to a problematic "interpretive" position from the Department of Defense, and effectively prohibits credit insurance sales to MLA Covered Persons. SB 1311 also limits the ability of lenders to collect payments on mortgage obligations that have been deferred pursuant to California's Military and Veterans Code by providing that such deferred payments may only be collected at the occurrence of specific events that would permit the lender to accelerate the loan under the loan documents. Additionally, the new law adds a civil penalty of up to $2,500 for violations of California's unfair competition law committed against servicemembers and veterans (on top of existing statutory civil penalties of up to $2,500).

OCC Agreement with Bank Regarding Fintechs

Blue Ridge Bank and the OCC entered into an agreement on August 29, 2022, wherein the OCC identified sources of concern related to Blue Ridge Bank's partnerships fintechs. As part of the agreement, Blue Ridge Bank was required to change its fintech policies, practices, and procedures related to the following general areas of compliance concerns: lack of board involvement with compliance efforts, third-party risk management, Bank Secrecy Act/Anti-Money Laundering risk management, suspicious activity reporting, and information technology control and risk management.

Although the agreement did not provide many details about the specific conduct that led to the OCC's issues with Blue Ridge Bank's compliance practices, the OCC made it clear that it did not approve of how Blue Ridge Bank was operating its partnerships with fintechs. To that end, the OCC outlined various practice changes that Blue Ridge Bank was required to implement as a way to manage the various risks associated with partnering with fintechs. For example, the agreement required Blue Ridge Bank to develop a third-party risk management program that addressed ongoing monitoring of fintechs activities and performance, and contingency plans for terminating such relationships.

Importantly, the agreement essentially provided a roadmap of the specific areas that financial institutions should address in their risk management programs and assessment of fintechs. Based on the foregoing, and whether or not the OCC serves as the primary regulator, financial institutions should consider implementing robust compliance policies and procedures related to conducting business with fintechs that are in line with the agreement. This is especially true since the use of fintechs are under scrutiny by regulators, and as such, financial institutions should tread carefully. Financial institutions should also be on the lookout for further regulatory guidance regarding the use of fintechs as this area continues to evolve.

CCPA's Employee and B2B Data Exemptions Expiring

Since the CCPA went into effect in 2020, employee and business to business data were exempt from certain obligations imposed by the CCPA. However, the California legislature adjourned on August 31, 2022 without extending the temporary exemptions for employee and business to business data under the CCPA (as amended by the CPRA). Thus, the limited exemptions will expire on **January 1, 2023**. The employee exemption under CCPA applies to certain personal information collected by a business about a job applicant, current and former employee as well as an owner, director, officer, medical staff member, or independent contractor of a business. The business-to-business exemption applies to personal information of a business contact collected by the business in connection with aiding in providing or receiving a product or service to and from another business.

This means that as of **January 1, 2023**, covered businesses will need to expand their CCPA compliance efforts to include such data. Covered businesses will need to undertake several tasks to address the application of CCPA's strict requirements. With the January 1, 2023, date quickly approaching, SW&M is available to assist financial institutions in preparing for compliance.

GAP Waivers

AB 2311 implements new regulations concerning the offer, sale, provision, or administration of a guaranteed asset protection waiver (GAP waiver) in connection with a conditional sales contract. For reference, a GAP waiver is defined as an optional contractual obligation in which a seller agrees, for additional consideration, to cancel or waive all or part of amounts due on the buyer's conditional sale contract (subject to existing law in the event of a total loss or unrecovered theft of the motor vehicle specified in the conditional sale contract). Specifically, AB 2311 prohibits: (a) conditioning the extension of credit, the term of credit, or the

terms of a conditional sale contract upon the purchase of a GAP waiver; (b) charging more than four percent (4%) of the amount the buyer finances under the contract for a GAP waiver; and (c) the sale of a GAP waiver where the conditional sale contract's loan-to-value ratio exceeds any provision in the contract that specifies a maximum loan-to-value ratio covered by the GAP waiver (unless such terms are disclosed and the buyer is informed in writing of such limitation)

Additionally, AB 2311 requires: (1) a separate GAP waiver disclosure that must be separately signed by the buyer; (2) creditors to automatically refund the unearned portion of a GAP waiver if a consumer pays off or otherwise terminates their auto loan early; and (3) the cancellation of the GAP waiver at any time by the buyer without penalty.

If a seller or holder violates AB 2311, a buyer can recover up to three times the amount of any GAP charges paid. AB 2311 takes effect on **January 1, 2023**.

Overdraft Fees Can Constitute an Unfair Act or Practice?

In Circular 2022-06, the CFPB has taken the position that the assessment of overdraft fees can constitute an unfair act or practice under Section 1036 of the Consumer Financial Protection Act of 2010 (the "CFPA") even if the entity assessing the overdraft fees complies with the Truth-in-Lending Act and Regulation Z; and the Electronic Fund Transfer Act of 1978 and Regulation E with respect to the fees.

The CFPB Circular focuses on overdraft fees that a consumer would not reasonably anticipate as "likely" being unfair. As an example of a situation in which the consumer would not reasonably anticipate the fees being assessed, the Circular described authorize positive, settle negative ("APSN") transactions, in which the transaction incurs a fee even though the account had a sufficient available balance at the time the transaction was authorized. Further, the Circular states that even comprehensive disclosures accurately describing the mechanics of overdraft fee imposition are not sufficient to make such a fee one the consumer would reasonably anticipate, as "these processes are extraordinarily complex, and evidence strongly suggests that, despite such disclosures, consumers face significant uncertainty about when transactions will be posted to their account and whether or not they will incur overdraft fees." As overdraft practices increasingly are coming under regulatory (and other legal) disfavor, review of these areas of operations (not just disclosure) for risk reduction becomes important.

USPTO Implements New Deadlines to Respond to Office Actions for Applications and Registrations

Beginning on December 3, 2022, instead of the current six-month period, trademark applicants will have three months to respond to an office action issued during the examination of a trademark application at the USPTO. This change only applies to office actions issued on or after December 3, 2022. Applicants can request a three-month extension for a $125 fee, provided that a response has not been filed and the request for extension is filed before the three-month deadline.

This new response period will **not** apply to post-registration office actions on December 3, 2022. Changes to the post-registration response period will take effect on October 7, 2023.

Financial institutions planning on filing trademark applications soon should be aware of this new rule as the failure to timely respond will cause an application to be abandoned.

California Expands Employer Obligations for Pay Equity

California recently passed SB 1162, which imposes additional obligations on businesses in an effort to promote pay equity across race, sex, and ethnicity. The new law becomes effective on January 1, 2023 and covered employers will be expected to comply with new requirements.

One of the major requirements under the new law involves transparency with pay scales. Employers are already required to provide the pay scale for a position to an applicant upon reasonable request. Beginning in 2023, employees will also have the right to request the pay scale for the positions in which they are currently employed. Employers must comply with such employee requests. The new law provides no exceptions. Further, for employers with 15 or more employees, all job postings, even those advertised through third parties, must provide the pay scale for the advertised position.

Another requirement under the new law involves pay data reporting. Beginning in 2023, private employers with 100 or more employees must continue to submit a pay data report, but in addition, employers must report the median and mean hourly rate for each race, each ethnicity, and each sex within each category. Prior to SB 1162, employers only reported the number of employees by race, ethnicity, and sex for each job category. Now, employers will need to collect and report more details annually.

Finally, SB 1162 instituted penalties for violations of these requirements. The department can file suit against an employer who fails to submit the required report. In addition to the court's power to order compliance, a court may now impose civil penalties on the employer as well. The maximum penalties can be up to $200 per employee for an employer's second failure to file the required report. Further, employees and applicants now have the right to file a complaint to the Labor Commissioner for failing to provide the pay scales in a job posting or upon request by an employee. The Labor Commissioner must investigate the complaint and can impose civil penalties against the employer up to $10,000 per violation. Employees and applicants also have the right to bring a civil action for injunctive relief and "any other relief that the court deems appropriate," which could be limitless.