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The Three Rs of the Final Payday Rule: Revoke, Repudiate and Rescind

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On July 7, 2020, the CFPB issued its much-anticipated final rule (the "Revocation Rule") on small dollar lending rescinding the mandatory underwriting provisions of its 2017 rule governing payday, vehicle title, and certain high-cost installment loans (the "2017 Rule"). Consistent with its proposal last year, the Revocation Rule rescinds the Mandatory Underwriting Provisions of the 2017 Rule, including those that provide (1) that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loan without reasonably determining that consumers have the ability to repay those loans according to their terms; (2) prescribe mandatory underwriting requirements for making the ability-to-repay determination; (3) exempt certain loans from the mandatory underwriting requirements; and (4) establish related definitions, reporting, recordkeeping, and compliance date requirements. The amendments in the Revocation Rule are based on the Bureau's "re-evaluation of the legal and evidentiary bases for these provisions."

Specifically, the Bureau revoked the 2017 Rule's determination that it is an unfair practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their terms. And, it also rescinded the 2017 Rule's determination that such a practice is abusive, concluding that a lender does not take unreasonable advantage of consumer vulnerabilities when the lender does not consider a borrower's ability to repay.

Consistent with its proposal last year, however, the Revocation Rule does not amend the Payment Provisions of the 2017 Rule, which address certain requirements and limitations with respect to attempts to withdraw payments on the loans from a consumer's account. Rather, with the Revocation Rule, the Bureau issued a ratification of the Payment Provisions in light of the Supreme Court's recent decision in *Seila Law*. And, it noted that although the Payment Provisions are currently stayed by court order, the Bureau will seek to have the provisions go into effect within a reasonable period to permit entities to come into compliance.

It's a difficult task for an agency to reverse course as dramatically as the Bureau did here, and any time it does there is inevitably some risk. The industry will need to be on guard against efforts to exploit any gaps between the original rule and the revocation. The Revocation Rule is effective 90 days after its publication in the Federal Register.

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