***CONSUMER FINANCE PODCAST:* CFPB'S SUPERVISORY HIGHLIGHTS ON AUTO-FINANCE AND AUTO-SERVICING**
HOSTS: CHRIS WILLIS, BROOKE CONKLE, AND CHRIS CAPURSO
GUEST: STEFANIE JACKMAN
DATE AIRED: NOVEMBER 7, 2024

Chris Willis: Welcome to this special joint edition of *The Consumer Finance Podcast* and *Moving the Metal*. I'm Chris Willis, the Co-Leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. Today, I and the hosts of the *Moving the Metal* Podcast are going to bring you a special episode on the CFPB's recent supervisory highlights about auto-finance and auto-servicing.

Before we jump into that, let me remind you to visit and subscribe to our blogs, troutmanpepperfinancialservices.com and consumerfinancialserviceslawmonitor.com. Don't forget about all of our other podcasts. We have the *FCRA Focus*, all about credit reporting, *The Crypto Exchange*, which is about everything crypto, we have *Unauthorized Access*, our privacy and data security podcast, and finally, *Payments Pros*, which is all about the payments industry. Those podcasts are available on all popular podcast platforms.

Speaking of those platforms, if you like this podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing. If you enjoy reading our blogs and listening to our podcasts, the best way to do it is through our handy mobile app. It's available for both iOS and Android. Just go to your app store and search for Troutman Pepper and check it out. It's a great way to access our thought leadership content.

Now, as I said, today, we're going to be talking about a recent edition of supervisory highlights from the CFPB in which the Bureau highlighted a number of areas of interest, or concern with respect to the servicing of auto-finance transactions. I'm joined today to have that discussion, as I mentioned before, by Brooke Conkle and Chris Capurso, who are the hosts of our *Moving the Metal* Podcast. Brooke, Chris, welcome to the podcast. Thanks for doing this jointly with me.

Brooke Conkle: Hi, Chris. Absolutely.

Chris Capurso: Thanks for having us, Chris.

Chris Willis: In addition to Brooke and Chris, we also have our partner, Stefanie Jackman, who does a lot of work in the auto-finance area and is a very high-level expert on all things relating to servicing and collections. Stefanie, glad you're here, too. Thanks for being here.

Stefanie Jackman: Thank you for the invitation. Hey, everybody.

Chris Willis: Okay. So, let's just jump right into it, Brooke. The CFPB came out with this recent edition of supervisory highlights all about auto-finance. What does it cover and where did the information from it come from?

Brooke Conkle: Yeah. Chris, as you mentioned, it's really interesting to take a dive into the highlights. One note that this is from select exams that the Bureau undertook between November 1st, 2023 and August 30th, 2024. This information is, as we mentioned, from exams, it's not coming from the auto-finance data pilot that we talked about in previous episodes. The Bureau really highlighted five specific areas, really covering the lifespan of a loan.

First, starting with originations, issues with how APRs are marketed and allegations about APRs that were advertised as low as certain rates, even though targeted consumers may not have been able to qualify for those rates. Also, potential violations of TILA with the disclosures regarding prepayment penalties. Additionally, add-ons, the way that add-ons are marketed and disclosed, and as we all know, this has been a major target area for both the Bureau and the FTC for a number of years now, making sure that consumers understand what they're signing up for, who's the company who's actually providing coverage for the add-ons, and then at the end of that add-on contract, issues with the ability to cancel, the accurate amount of a refund, and whether or not that refund is timely.

Then, specifically turning to the meat of the loan, the life of the loan, servicing practices. Whether payments are properly allocated, and then delays in providing a title once a vehicle has been paid off. Also, furnishing deficiencies, FCRA issues, and credit reporting. Then finally, at the end of a lifespan of a loan, repossession activities. Here, the Bureau specifically called out the tension between auto-finance companies and their vendors. As we know, in repossessions, the overwhelming majority of the time, auto-finance companies are using third parties to effectuate the repossessions. The Bureau's notes really highlighted the fact that it sees any violations of law by a vendor as attributable to the auto finance company itself.

Chris Willis: Okay, Brooke, thanks for that overview of what's in the supervisory highlights. Let's unpack that a little bit and talk about some of the specific findings that the Bureau related in this edition. Chris, let me start with you and go in reverse order, at least to begin with and talk about repossessions. What were some of the specific areas that the Bureau highlighted as being problematic with respect to repossessions? Because this is an issue the Bureau's been talking about publicly for years.

Chris Capurso: Yeah. Before even getting into the specific examples, the CFPB noted, the Bureau made sure to emphasize that holders and servicers are responsible for not only their own repo practices, but the practices of their service providers. As if anybody out there was curious how the Bureau felt about service providers, there we are. You're responsible for your own practices and the service providers.

Chris Willis: Oh, well, I was on the edge of my seat about that, Chris.

Chris Capurso: I figured. I mean, we were waiting for that sentence to appear and nobody saw it coming.

Chris Willis: Right.

Chris Capurso: The first example is related to wrongful repossession. The CFPB highlighted two specific examples. The first would be failing to cancel repo orders when payment is made, or an extension is obtained. There could be some loss of communication, or something where the payment is made, extension obtained, but that message doesn't get out to the repo vendor. Car is repossessed, even though there's been a payment or an extension. The second example they highlighted, and it's a bunch of running commas, it would be repossessing when the consumer had requested, or the servicer had approved a COVID related deferment, or modifications. We're probably seeing a little bit more of that now that we're unbelievably almost five years on from the beginning of COVID, where the consumer had otherwise made timely payments, or where the consumer had made arrangements to pay enough to cancel the repo.

Again, going off of that idea of there could be a wrongful repossession, where the consumer has either made the payment, or found some way to extend, defer whatever the agreement, so that the repossession technically shouldn't happen. That's what the CFPB is citing as an unfair act or practice related to wrongful repossession.

Chris Willis: That sounds pretty familiar in terms of the stuff the Bureau has identified in the past. There was a bulletin on this and this seems reminiscent of that.

Chris Capurso: Yeah. It just seemed, like I said, being, I don’t know, with car deals being longer and longer, we're seeing longer and longer financing contracts. Now coming up on five years out, we're probably going to be seeing even more of this as we come towards the end of some of these longer-term contracts.

The second is related to where the lender, or creditor does not have a recorded lien. This is also what they identified as an unfair act or practice. This is specifically about servicers not verifying where they had a valid lien. What does that mean? Really, what it's about is this idea of lien loss, where through some practice that the title gets cleansed, somebody goes out of town to get a new title and then sells the car and then all of a sudden, there's a brand-new bonafide purchaser who had no idea that any title cleansing happened, or just some purpose, nefarious or not, where the lien has been lost along the way in the chain of title, and the servicer is not checking to verify that. That's a tough thing to do, especially when you're talking about thousands upon thousands of contracts.

This is also an interesting one, because when you think about it, it's harm not on the original consumer, but it's harm on a consumer with whom the servicer doesn't really have a relationship and they're not the ones who originally bought the car that's the subject of the financing agreement. It's the purchaser later on who bought it from the “nefarious actor,” or whoever cleansed the title. It's an interesting issue where the CFPB will be looking out for all consumers, not just the original consumer. I mean, I thought that was very interesting. The fact that it's a finding keyed in on not the finance consumer, but the one later on down the road.

Chris Willis: It's interesting for sure. My belief is this is the first time the CFPB has ever publicly said anything about this issue, which I refer to as lien loss repossessions.

Chris Capurso: Yeah. Even though as we discussed, it's a greatest hits item where the CFPB likes to talk about repossession quite a bit. They managed to sneak something new in. It's like, when you get greatest hits and then the person puts on one or two brand-new songs to actually get you to buy it.

Chris Willis: That's right. On the B side, of course.

Chris Capurso: That's right. That's right.

Chris Willis: Okay. Well, thanks for that, Chris. Stefanie, let me turn to you now. In this edition of supervisory highlights, as usual, there were some servicing practices at issue, too. Brooke mentioned them at the top of the show. Can you walk the listeners through what's going on there?

Stefanie Jackman: Yeah, I'm happy to. The CFPB identified in the highlights two servicing practices among all the other things that Chris and Brooke have been talking about, which can also be considered servicing practices with repossessions and different topics that we'll get into later in the podcast. The first was an improper payment allocation issue, where examiners said that they found some servicers were applying payments to post-maturity auto loans in a different order than disclosed on their website, and in a manner that resulted in consumers having late fees as a result, that the CFPB thought had the payments been applied in the order disclosed on the website, which stated the payments would be applied to the current payment due, including both interest and principal before outstanding late charges.

In practice, when it came to post maturity loans, it was instead being applied to the most recent payment due, then to other charges such as late fees, then to other payments due. In my read of this is that what the disclosure on the website was talking about wasn't contemplating this context. I don't necessarily think this was inconsistent with the website, but the CFPB thought it was, have some disclosure that this payment waterfall did not apply in the context of a post-maturity loan.

The CFPB said that the representation on the website was likely to mislead consumers, therefore, making it deceptive, because there was no disclosure and "consumers may reasonably take websites at face value, regarding the payment application order." In my mind, I read this to have the CFPB saying, "You can't give just generally, this is how we'll apply. If it's not going to be that waterfall in all contexts." It was interesting to see this flat. The CFPB has paid attention to payment application in the past.

Generally, I don't recall, Chris, if I've seen this particular flavor of that come up in the past, but payment application and allocation to accounts is something we've been talking about for over a decade, right? Whether it's in auto, or in other industries, there's been chatter about a desire by the CFPB that payments be applied in the way that it's the most advantageous for the consumer. I know you and I have talked to customers or clients, excuse me, about how to figure that out.

This seemed to be the CFPB cherry picking an example, where they thought you didn't give as complete a disclosure as possible. Then as a result of the choices made in applying the payments, consumers got late fees, and we all know that the CFPB is just absolutely on a crusade against late fees and many other fees right now.

Chris Willis: Yeah, of course. I think, Stefanie, when we've seen this in the past, as in this instance, it's never been a situation where the CFPB said, "Under UDAP, you must apply payments in this order." It's always been the result of a mismatch between the language on the back of the statement, or the language on a website and then the actual practice of how payments were applied. It sounded like, this one was just the new flavor of that being for post-maturity, or post-default loans.

Stefanie Jackman: Yeah. We want consumers to understand, I guess, on a website disclosure that there can be different contexts in which the payments will be applied differently if you're paying, not paying, or depending on the age of your loan, which to me is going to overcomplicate things, but that is what I took from it. You're correct, Chris, that we don't get necessarily guidance on this is how the Bureau would think is the most appropriate way to apply payments. We are told when they think we didn't achieve it, and this is an example of that.

The other servicing issue they found were, and the CFPB also found that the payment application in addition to being unfair was also deceptive, putting those together, which they have been doing, even though previous CFPB administration said they would not be duplicating unfair, versus deceptive, versus abusive findings. We see that a lot now in exams and also in enforcement matters.

The other servicing issue that was flagged was an excessive delay in providing titles on paid off accounts. The CFPB is wanting to see a timely delivery of titles to vehicles. Now, they did not tell me, or any of us what they thought was timely and what wasn't. We don't have a lot of context. But they did say the examiners found instances where servicers' policies said they would generally provide title documentation within two business days for paid off loans, or leases. But there were instances of significantly exceeding this timeline. The CFPB found it to be problematic for consumers to not have possession of the vehicle title and causing them harm, such as the inability to legally sell a vehicle, incurring additional insurance expenses, and the threat of having vehicles towed if the proof of payoff and having title was necessary to avoid that outcome. The CFPB directed servicers to update policies and procedures to avoid both of these issues moving forward.

Chris Willis: Thanks, Stefanie. Chris, Brooke mentioned optional products in introducing the topics that were in the supervisory highlights. We know that's been an area of significant interest for the Bureau for years. Where did they take it in this particular supervisory highlights on that issue?

Chris Capurso: Yeah, that's funny. Offline, we were talking about repeating ourselves and bringing up similar concepts over and over again. This is a running joke on *Moving the Metal* that we talk about add-on products every time, even if it doesn't seem like it's going there, that's what we're going to cover. The CFPB really laid out almost a top 10 list of the things that they see going wrong related to add-on products. They identified some abusive practices, they identified some unfair practices, but I'll just go down that laundry list and describe a little bit about each one.

The first item the Bureau highlighted was collecting and retaining amounts for add-on products consumers did not agree to purchase. Now, in the report, the supervisory highlights, the specific example given was rolling add-on products into a refinance agreement. I think the general tenor of this is that the Bureau finds it to be an abusive practice to collect, or retain any amounts for an add-on product that the consumer did not agree to purchase, regardless of what the agreement is.

The second practice is financing void add-on products, like, for example, guaranteed asset protection on salvaged vehicles, because the car has a title brand on it, that's a salvage. As a result, the add-on product is void, because it's not really useful.

The third is actually a Reg Z finding, not identifying the payee of an add-on product in the itemization of an amount financed. This is one of those things we always describe as the low-hanging fruit, where there's a disclosure violation. Reg Z requires that you identify not only the amounts for the add-on product, but also the payee of the add-on product. CFPB highlighting that as a finding.

Next, onerous requirements to cancel the add-on products. They provided some interesting examples, in some cases requiring folks to go to the dealership, or somewhere else in person to cancel the add-on product. This is shades. We talk about the war on fees and seeing fees everywhere. This is shades of what we saw recently with the FTC and the click to cancel rule, just anything that's going to be onerous for somebody to get out of a product, in that case of subscription, in this case, an add-on product. Just making it more difficult to get out of it than it was to get into it.

The next finding was denying contractual cancellation rights, so gap waivers. In some states, actually most states will have a free look period where it has to be cancelable. Some states require that it be cancelable even after that. Some states give the administrator the option to make it cancelable, or not cancel, well, after that free look period. CFPB highlighted that in some cases. Administrators weren't necessarily following those guidelines that they put out in the contract and not canceling where the consumer actually did have a right under the contract to cancel the gap waiver. That's one that treads on state law a little bit, but it's an interesting finding.

The next one is inaccurate refund amounts. We hear a lot about gap refunds. That's the greatest tip that seems to permeate through all of these types of things. The next couple findings I cover will be related to refunds. Unsurprisingly, they have a very heavy focus on it. The next couple relate to just the idea of refunds in general. This is one of those issues that permeates through numerous regulatory pronouncements from on high. The first one is just the general failing to ensure refunds if there are what they call unearned premiums. That's the idea of prepayment of the contract, a total loss on the vehicle, a repossession.

In one instance, the contract is gone so you don't necessarily need a gap waiver anymore, because there's no financed amount to cover. Or in the other instance where there's a total loss or a repo, you no longer have the car anymore, so there's no need to have the gap waiver in place to be able to cover those amounts in between. The CFPB highlighted failing to issue refunds in those situations.

Next, the CFPB highlighted inaccurate refund amounts. The example specifically cited was using the date that a notice of deficiency following repo sale, or post repo sale was issued as opposed to the date of the actual repossession. The next practice was a delay in timely applying the refunds. Finally, continuing to collect payments when consumers are covered by gap and failing to refund such payments. In this instance, the consumer is getting the benefit of their gap, but still making payments to the Finco, the servicer, or whoever it is. And that Finco, that servicer not refunding those payments, even though the person was actually covered by their gap waiver. That's a quick run through what was the list of nine things that they identified by gap or in-gap examinations, but it's a pretty significant portion of the highlight. It tends to indicate that the CFPB continues to keep a very close eye on this.

Chris Willis: Sure. That's yeah, abundantly evident. But it's not just the CFPB. You mentioned this yourself, Chris, that some of this has shades of what's going on with the FTC, with its auto dealer rulemaking and the click to cancel rulemaking. Brooke, can you address the interplay here between what the Bureau is talking about on optional products and what we're seeing from the Federal Trade Commission?

Brooke Conkle: Absolutely. As any listener of the *Moving the Metal* Podcast knows, we cannot go an episode without talking about the CARS Rule. As Chris and Stefanie are describing the supervisory highlights, we obviously hear the shades of the CARS Rule and the areas that are major initiatives for both the Bureau and the FTC. We see federal regulators singing in harmony here on a lot of these issues.

The first issue that we highlighted really were issues that the Bureau noticed regarding financing disclosures and how the price, or the financing of a vehicle is advertised. We know that that is a major portion of the CARS Rule, the offering price. The FTC, once the price advertised as really an all-in price, excluding only certain required government fees. We see shades of that here in the supervisory highlights.

Then second, as Chris mentioned, we have add-on products. This is another major point in the CARS Rule that the advertising and disclosures related to add-on products must be clear and conspicuous. The consent for those add-on products must be expressed. Really, delving into making sure that the consumer, one, understands what they're buying and two, is making a clear choice to purchase an add-on product. When we see and we hear the regulators singing in harmony here, this is a major initiative for both the CFPB and the FTC.

Chris Willis: Thanks. They may be singing in harmony, but that doesn't mean I have to like the song, Brooke. Stefanie, I also feel like, despite the fact that optional products are a major source of interest here, we can't leave this conversation without talking about credit reporting and the

FCRA issues that the Bureau identified with auto-finance companies who are furnishing to credit bureaus. Can you tell the audience what the Bureau highlighted in that regard?

Stefanie Jackman: Speaking of things that we keep talking about, I don't think a day goes by where I don't talk about the CFPB and furnishing are the FCRA in some context together and their expectations in that area. In my view, there was nothing new. It's a lot more of the same. Spoiler alert, they still really care about accuracy and integrity of information. That has translated into some observations and findings in the supervisory highlights about inaccurate reporting and failing to timely update and correct information.

On the inaccurate reporting piece, examiners found that companies were reporting inaccurate information to consumer reporting agencies, including incorrect amounts passed due, an outdated payment ratings based on had they reconciled it with the system, their system of record, they would have seen these things, and they were charged with knowing it. What was a little bit interesting, I don't want to say – I said there was nothing new, but a little bit of a new-ish spin. The CFPB said that the entities that were examined did provide an address for consumers to use to submit disputes, but it was just a general address. The CFPB made noise about thinking that it would have been better to have provided an address that was more specific to the issues being raised. The relevant address internally for notices relating to inaccurate information was actually what the CFPB's had needed to have been specified.

To me, I can understand why the CFPB might take that position, because you can have very big entities that have a general address and then it's in the mailroom and it's getting sorted and why not just have it come directly to the specific mailbox for that particular department. The reality is that's not always feasible. It's certainly not what I understand to be a requirement under the FCRA and it's implementing Reg Z. You just need to provide the address that can be used. By not giving what the CFPB called the relevant address and instead, just giving this general address, furnishers were being held to have had, or should have known level knowledge of those disputes, including disputes that came through other channels beyond the general address that was provided and if the CFPB didn't think was specific enough.

That was an interesting little take on the ability to funnel and channel your disputes and the CFPB's view on if you're going to do that, we would prefer, as I read it, to have it be the actual address, or email address, or both for the department that will handle disputes and have it come directly there.

The second finding, and I don't know if this was the same group of supervised entities, or a different group, was a failure to promptly update and correct information. The CFPB was finding that as a result of internal audits and other compliance activities, companies either knew, or should have known that they were furnishing inaccurate information, but yet, took several months and in a few instances, a year up to a year and a half to update that information. I could think of lots of different contexts where that could happen. Perhaps, these were accounts that we thought we were suppressing and not updating that way, but keeping accurate records internally. I don't know. I don't have that context from the supervisory highlights. But to me, it really illustrates a common refrain that we've heard, and Chris, you and I talked to clients about this all the time. You have to conduct oversight, right? You can't not conduct oversight. You have to be doing audits, you have to ensure compliance that applies in your furnishing activities. Then when you get things that suggest there are problems, you need to promptly fix them.

There's always a risk that in conducting your oversight, if you don't do anything with it, you checked off one box from a compliance perspective, but you're still going to have CMS failures and not acting to remediate, and then go one step further and make sure whatever remediation you did stuck. To me, that's not a new finding, but it also illustrates that there continue to be expectations of monitoring and promptly correcting upon notice, inaccurate information that's been furnished.

In some exams, not this one, but Chris, you and I know from prior exams, sometimes there is an expectation that also be retroactively updated going back for sometimes very significant periods of time. That can be a challenge in and of itself, which again, underscores the importance of prompt remediation of identified errors, or inaccuracies?

Chris Willis: Yeah. Let me just underscore that a little bit, Stefanie, because I feel like this theme of you discovered the problem, but didn't fix it fast enough, I think this is the fourth time we've seen that from the CFPB in the last about year and a half, because there's two enforcement cases, two consent orders, one of which is with an auto-finance company that dealt with this issue. There was the April 2024 supervisory highlights that was devoted just to credit reporting, which also raised this issue. Now, here it is in this one about auto finance.

I think what it reflects is that the maturity of furnishers, compliance management systems has advanced a lot in terms of their ability to monitor and detect credit reporting issues. What hasn't kept up is the ability to then push issues through to completion in terms of fixing the system of record, which is a big deal. Adjusting your system of record is a big deal. And so, sometimes that takes some additional time. Then of course, we also have to consider the fact that in auto-finance, as in other areas of consumer finance, many companies outsource the system of record to a third-party provider. There may be instances where that third-party provider doesn't rapidly make an update to fix a credit reporting problem that may be discovered.

It's that mismatch, though, between detection and correction that I think is causing so much grief to furnishers of all kinds right now, not just auto finance companies. Of course, here, the Bureau has raised it specifically as an auto finance issue.

Stefanie Jackman: Of course, there's two other considerations there, Chris. Changing your system of record can have unintended impacts elsewhere.

Chris Willis: No kidding.

Stefanie Jackman: You can create problems that you didn't have before. Your point is exactly right. If we're not keeping up between identification and remediation, we're also risking roadmaps for enforcement down the road.

Chris Willis: Right. There were two enforcement cases on this exact issue in the last two years. I think that's a great way to end the show in terms of a warning about that mismatch, because I think that represents a very significant threat to the whole financial services industry, not just auto finance companies. Stefanie, thank you for your insight on that and the other issues. Chris and Brooke, thank you very much for co-hosting this episode with me. I always enjoy doing stuff together with *Moving the Metal*. Thank you for doing that. Of course, thanks to our audience for listening in today as well.

Don't forget to visit and subscribe to our blogs, troutmanpepperfinancialservices.com and consumerfinancialserviceslawmonitor.com. While you're at it, why not visit us on the web at troutman.com and add yourself to our Consumer Financial Services email list? That way, we can add you to the distribution list for the alerts and advisories that we send out from time to time, as well as the invitations for our industry-only webinars that we occasionally put on. Of course, as I said at the top of the show, don't forget to check out our handy mobile app. Just search for Troutman Pepper in your App Store, download it, and give it a try. Watch your podcast feed for great new episodes of the Consumer Finance Podcast and Moving the Metal, both coming soon. Thank you all for listening.