THE
NATIONAL LAW REVIEW

House Financial Services Committee schedules Oct. 11 mark-up of "Madden fix" bill

Monday, October 9, 2017

Among the more than 20 bills that the House Financial Services Committee is scheduled to mark-up this Wednesday, October 11, is a bill to provide a "Madden fix" as well as several others relevant to consumer financial services providers.

Ballard Spahr LLP

Article By Ballard Spahr LLP
Barbara S. Mishkin
Consumer Finance Monitor

Consumer Protection
Financial Institutions & Banking
All Federal

These bills are the following:

- H.R. 3299, "Protecting Consumers' Access to Credit Act of 2017. In *Madden*, the Second Circuit ruled that a nonbank that purchases loans from a national bank could not charge the same rate of interest on the loan that Section 85 of the National Bank Act allows the national bank to charge. The bill would add the following language to Section 85 of the National Bank Act: "A loan that is valid when made as to its maximum rate of interest in accordance with this section shall remain valid with respect to such rate regardless of whether the loan is subsequently sold, assigned, or otherwise transferred to a third party, and may be enforced by such third party notwithstanding any State law to the contrary."
  This language is identical to language in a bill introduced in July 2017 by Democratic Senator Mark Warner as well as language in the Financial CHOICE Act and the Appropriations Bill that is also intended to override *Madden*. Like those bills, H.R. 3299 would add the same language (with the word "section" changed to "subsection" when appropriate) to the provisions in the Home Owners' Loan Act, the Federal Credit Union Act, and the Federal Deposit Insurance Act that provide rate exportation authority to, respectively, federal savings associations, federal credit unions, and state-chartered banks. In the view of Isaac Boltansky of Compass Point, the bill is likely to be enacted in this Congress.

- H.R. 2706, "Financial Institution Consumer Protection Act of 2017." This bill is intended to prevent a recurrence of "Operation Chokepoint," the federal enforcement initiative involving various agencies, including the DOJ, the FDIC, and the Fed. Initiated in 2012, Operation Chokepoint targeted banks serving online payday lenders and other companies that have raised regulatory or "reputational" concerns. The bill includes provisions that (1) prohibit a federal banking agency from (i) requesting or ordering a depository institution to terminate a specific customer account or group of customer accounts, or (ii) attempting to otherwise restrict or discourage a depository institution from entering into or maintaining a banking relationship with a specific customer or group of customers. unless the agency has a material reason for doing so and such reason is not based solely on reputation risk, and (2) require a federal banking agency that requests or orders termination of specific customer account or group of customer accounts to provide written notice to the institution and customer(s) that includes the agency's justification for the termination. (In August 2017, the DOJ sent a letter to the chairman of the House Judiciary Committee in which it confirmed the termination of Operation Chokepoint. Acting Comptroller Noreika in remarks last month, in which he also voiced support for "Madden fix" legislation, indicated that the OCC had denounced Operation Choke Point.)

- H.R. 3072, "Bureau of Consumer Financial Protection Examination and Reporting Threshold Act of 2017." The bill would raise the asset threshold for banks subject to CFPB supervision from total assets of more than $10 billion to total assets of more than $50 billion.

- H.R. 1116, "Taking Account of Institutions with Low Operation Risk Act of 2017." The bill includes a

requirement that for any "regulatory action," the CFPB, and federal banking agencies must consider the risk profile and business models of each type of institution or class of institutions that would be subject to the regulatory action and tailor the action in a manner that limits the regulatory compliance and other burdens based on the risk profile and business model of the institution or class of institutions involved. The bill also includes a look-back provision that would require the agencies to apply the bill's requirements to all regulations adopted within the last seven years and revise any regulations accordingly within 3 years. A "regulatory action" would be defined as "any proposed, interim, or final rule or regulation, guidance, or published interpretation."

- H.R. 2954, "Home Mortgage Disclosure Adjustment Act." The bill would amend the Home Mortgage Disclosure Act to create exemptions from HMDA's data collection and disclosure requirements for depository institutions (1) with respect to closed-end mortgage loans, if the institution originated fewer than 1,000 such loans in each of the two preceding years, and (2) with respect to open-end lines of credit, if the institution originated fewer than 2,000 such lines of credit in each of the two preceding years. (An amendment in the nature of a substitute would lower these thresholds to fewer than 500 closed-end mortgage loans and fewer than 500 open-end lines of credit.)

- H.R. 1699, "Preserving Access to Manufactured Housing Act of 2017." The bill would amend the Truth in Lending Act and the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act) to generally exempt a retailer of manufactured housing from TILA's "mortgage originator" definition and the SAFE Act's "loan originator" definition. It would also increase TILA's "high-cost mortgage" triggers for manufactured housing financing.

- H.R. 2396, "Privacy Notification Technical Clarification Act." This bill would amend the Gramm-Leach-Bliley Act's requirements for providing an annual privacy notice. (An amendment in the nature of a substitute is expected to be offered.)