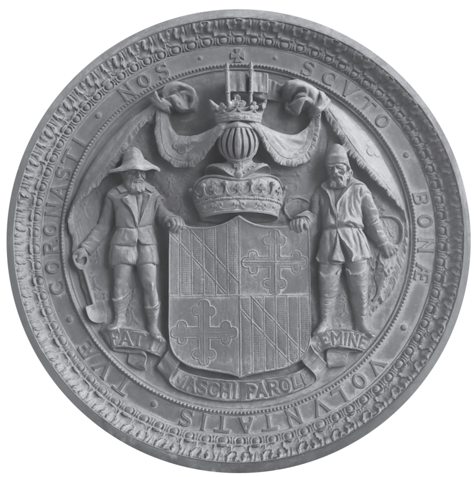
Maryland Financial Consumer Protection Commission

2018 FINAL REPORT



Annapolis, Maryland
January 2019

Maryland Financial Consumer Protection Commission

Department of Legislative Services
Office of Policy Analysis
Annapolis, Maryland

January 2019

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The following link provides information related to the commission's activities during 2017 and 2018: http://dls.maryland.gov/policy-areas/maryland-financial-consumer-protection-commission

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THE MARYLAND GENERAL ASSEMBLY
ANNAPOLIS, MARYLAND 21401

Maryland Financial Consumer Protection Commission

January 1, 2019

The Honorable Thomas V. Mike Miller, Jr., President of the Senate
The Honorable Michael E. Busch, Speaker of the House of Delegates
Members of the Maryland General Assembly

Ladies and Gentlemen:

Pursuant to Chapters 18 (Senate Bill 884) and 781 (House Bill 1134) of 2017, the Maryland Financial Consumer Protection Commission is responsible for (1) assessing the impact of potential changes to federal financial industry laws and regulations, budgets, and policies; and (2) issuing recommendations for federal and State actions that are intended to protect residents of the State when conducting financial transactions and receiving financial services.

While Maryland's laws and regulations generally provide strong consumer protections, Maryland can act to fill new gaps in financial consumer protection, especially in light of changes in technology and consumer finance. This report makes recommendations on regulation of cryptocurrencies and currency exchanges; requirements on cybersecurity and data breaches; standards for indirect automobile lending; and affordability protections when lenders or servicers offer loan modifications. This report also studies topics the General Assembly requested, including the adoption of a fiduciary duty standard, registration requirements for student loan servicers, the financing of manufactured homes, and the adoption of an arbitration rule.

This 2018 final report, like the commission's 2017 interim report, is unanimously supported by commission members. I wish to thank each of them for their diligence and attention to the work of the commission. The commission met four times during 2018. On behalf of the commission, I wish to thank members of the public who submitted testimony as well as the Department of Legislative Services' staff who generously gave their time to support the work of the commission and produce this report.

The commission stands ready to continue to assist the Governor, the General Assembly, and the Maryland Congressional Delegation in their ongoing efforts to protect Maryland consumers.

Sincerely,

Gary Gensler
Commission Chair

GG/TDB/ero

cc: Maryland Congressional Delegation

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Maryland Financial Consumer Protection Commission Membership Roster

Gary Gensler, Chair
Senior Advisor to the Director, MIT Media Lab, and Senior Lecturer, MIT Sloan School of Management
Former Chairman of the U.S. Commodity Futures Trading Commission, Undersecretary of the U.S. Treasury for Domestic Finance, and Assistant Secretary of the Treasury

Brian E. Frosh
Attorney General of Maryland

Senator James Rosapepe
District 21, Prince George's and Anne Arundel counties

Senator Joanne C. Benson
District 24, Prince George's County

Delegate C. William Frick
District 16, Montgomery County

Delegate Susan L. M. Aumann
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Antonio P. "Tony" Salazar
Maryland Commissioner of Financial Regulation

Anne Balcer
Executive Vice President of Congressional Bank
Former Maryland Deputy Commissioner of Financial Regulation

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Director, Montgomery County, Office of Consumer Protection

Mark Kaufman
President of City First Enterprises/Executive Vice President of City First Bank
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Contents

Abbreviations

AARP	American Association of Retired Persons
AML	anti-money laundering
APR	annual percentage rate
CFA	Consumer Federation of America
CFPB	Consumer Financial Protection Bureau
CFTC	U.S. Commodity Futures Trading Commission
CRA	Congressional Review Act
CRL	Center for Responsible Lending
CRS	Customer Relationship Summary
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
ECOA	Equal Credit Opportunity Act
ERISA	Employee Retirement Income Security Act of 1974
FAA	Federal Arbitration Act
FDLP	Federal Direct Loan Program
FFELP	Federal Family Education Loan Program
FinCEN	U.S. Treasury’s Financial Crime Enforcement Network
FINRA	Financial Industry Regulatory Authority
Fintech	financial technology
FSI	Financial Services Institute
GDP	gross domestic product
HUD	Department of Housing and Urban Development
ICO	initial coin offering
I’M HOME	Innovations in Manufactured Homes Network
IRA	Individual Retirement Account
KYC	know your customer
MBA	Maryland Bankers Association
MCRC	Maryland Consumer Rights Coalition
MFECC	Maryland Financial Education and Capability Commission
MHI	Manufactured Housing Institute
Model State Act	Model State Consumer and Employee Justice Enforcement Act by the National Consumer Law Center

MPIPA	Maryland Personal Information Protection Act
MVA	Motor Vehicle Administration
NADA	National Automobile Dealers Association
NAIC	National Association of Insurance Commissioners
NASAA	The North American Securities Administration Association
NCCUSL	National Conference of Commissioners on Uniform State Law
NCLC	National Consumer Law Center
OAG	Office of the Attorney General
OCFR	Office of the Commissioner of Financial Regulation
PIABA	Public Investors Arbitration Bar Association
PII	personally identifiable information
Reg BI	Regulation Best Interest
SEC	U.S. Securities and Exchange Commission
SIFMA	Securities Industry and Financial Markets Association
TILA	Truth in Lending Act
Uniform Model Act	Uniform Regulation of Virtual Currency Businesses Act of 2017 by the National Conference of Commissioners on Uniform State Law
U.S. Treasury	U.S. Department of the Treasury

Executive Summary

This is the 2018 final report of the Maryland Financial Consumer Protection Commission. The commission issued a 2017 interim report in January 2018. The commission was established in 2017 to ensure that everyday Marylanders continue to receive strong consumer and financial protections. The commission's mission is to monitor changes on Wall Street and in Washington and make recommendations for action to the Governor, the General Assembly, and the Maryland Congressional Delegation as necessary to safeguard Maryland consumers. During 2018, the commission has benefited from four public hearings with testimony from 25 witnesses, and significant staff research. Based on broad input from a wide variety of experts, including commission members and the public, the General Assembly adopted measures in 2018 to protect consumers. This report provides additional consumer protections that the commission recommends the General Assembly consider during the 2019 session.

Background and History

As more fully described in the commission's 2017 interim report, the 2008 crisis was years in the making. When it erupted, it exposed the deficiencies in prior public policies and regulatory structures. The crisis clearly showed that policies and practices that fostered, and in some cases, encouraged, excessive risk-taking were detrimental to the economy in general and particularly to the American consumers who were, in many cases, victimized by bad financial practices. The 111th Congress (2009-2011) and President Barack Obama, recalling the lessons of earlier financial crises, came together to update the rules of the road for consumer protection and the financial markets. As appropriate, this included vigorous debate on how best to readjust the balance between promoting innovation and investment within the free market financial system while better protecting the public and the economy at large.

The result of these public debates culminated in the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), along with implementing regulations adopted by the federal financial and consumer regulatory agencies.

Eight years since the passage of major reforms, along with significant monetary policy easing and fiscal stimulus, credit is flowing, and the economy has significantly recovered. Through Dodd-Frank and related reforms, much progress in strengthening the financial system and consumer protection has been made.

Further, Maryland's existing financial consumer protection legal framework is quite comprehensive, including many protections provided as well by federal law. The Office of the Commissioner of Financial Regulation (OCFR) and Office of the Attorney General (OAG) are very active in enforcing Maryland laws and taking action to protect Maryland's consumers.

New Challenges

Markets and financial technology are ever changing. The decade since the financial crisis has exposed new issues and potential gaps in financial consumer protection.

In particular, the commission reviewed the ever-increasing numbers of consumer accounts being compromised through data breaches. The commission reviewed the new and highly volatile markets for cryptocurrencies.

The U.S. economy expansion, now the second longest expansion on record, if it continues will be the longest on record as of July 2019.[1] No expansion goes on forever, though, and there are some general economic risks on the horizon. According to a December 11, 2018 article in *The Guardian*, the total value of global debt, both public and private, has risen 60%; an increase in borrowing costs would create difficulties for businesses and governments. Trade conflicts with other nations could have significant impacts on the U.S. economy. Federal budget deficits continue to be significant in relation to gross domestic product. The U.S. stock market has gone through a period of uncertainty and volatility in 2018. Further, according to a December 7, 2018 article in *The New York Times*, "The U.S. is now experiencing one of the greatest housing booms, though there are some signs of weakness which may result in a fall in housing prices."

This year, the commission also heard from members of the public about gaps in consumer protection related to indirect auto lending and the possibility that mortgage servicing practices still need to improve as loan modification activity by lenders and servicers are not subject to the ability to repay standards that are required for loan originations.

Federal Efforts to Roll Back Financial Consumer Protection

Federal actions to roll back certain financial consumer protections continued in 2018 and may prove detrimental to Marylanders. The Trump Administration, through regulation and working with the U.S. Congress, has made efforts to loosen a variety of the post-crisis reforms. As more fully discussed in the commission's 2017 interim report, these efforts can be summarized along four principal pathways: through personnel appointments; through use of the Congressional Review Act (CRA); through Congress's legislative efforts; and through regulatory and administrative actions. The U.S. Department of the Treasury (U.S. Treasury) has now issued its four required reports with recommendations of which the majority can be implemented without congressional actions.

Recommendations from the Commission's 2017 Interim Report and Legislative Actions During the 2018 Session

The 2017 interim report provided numerous recommendations regarding strengthening financial consumer protection laws for Marylanders. These included recommendations for Maryland's

[1]https://www.bloomberg.com/news/articles/2018-05-01/as-u-s-expansion-hits-endurance-milestone-here-s-what-s-next.

Congressional Delegation, OAG and OCFR, and State legislative actions to backfill where federal protections stepped back. The General Assembly passed several bills related to the commission recommendations, including strengthening consumer laws, enforcement, and penalties; requiring OCFR to designate a student loan ombudsman; and expanding regulation of consumer reporting agencies. **Appendix 1** describes in more detail the recommendations of the commission, as well as the legislative actions of the General Assembly during the 2018 session.

Topics the Commission Reviewed During 2018

The topics that the commission reviewed during 2018 are described in more detail in Chapters 1 through 8 of this report. Additional threats to the financial security of Marylanders have arisen since the 2008 financial crisis. There has been recent evidence that debt and equity markets are weakening and there has been accelerated dismantling of the federal Consumer Financial Protection Bureau (CFPB).

The commission heard from witnesses regarding the rise of *cryptocurrencies, initial coin offerings, and cryptocurrency exchanges*. Regardless of whether Bitcoin and other cryptocurrencies yet adequately exhibit the three roles of money – a store of value, a medium of exchange, and a unit of account – they have led to a new and volatile market in which Marylanders have participated. Crypto finance's $135 billion market cap, though modest in comparison to global debt and equity markets of over $300 trillion, has also drawn attention from financial-sector incumbents due to its volatility, wide margins and public interest. In the crypto finance markets, as with any other part of finance, the State must guard against illicit activities, such as tax evasion, money laundering, terrorist financing, and avoiding sanctions. The State must also promote fair and open competition while ensuring the operation of stable markets. And the State must protect investors and consumers.

The commission heard concerns relating to the *data breaches* such as recently at Marriott, Under Armour, Facebook, and Equifax. Overall vulnerability of consumers' private information now seems all too common, whether it relates to tougher adversaries or from lax cybersecurity and lack of transparency at entities and institutions trusted to hold consumer information. Gemalto estimates that 2.6 billion data records were compromised in 2017, with approximately 7.1 million records being lost or stolen each day. Data breaches also result in significant cost impacts to credit card processors and financial institutions.

The commission heard that, in an effort to protect investors while preserving the ability to offer advisory services, the U.S. Department of Labor (DOL) finalized its *Fiduciary Duty Rule* in April 2016, modernizing rules affecting retirement savings to protect consumers against conflicts of interest among broker-dealers, insurance agents, and other financial advisors. The DOL rule, though, was vacated in March 2018 by the U.S. Fifth Circuit Court of Appeals. Separately, in July 2018, the U.S. Securities and Exchange Commission (SEC) began soliciting input from the public on Regulation Best Interest (Reg BI), which numerous investor advocates have said fails to adequately address the broker-dealer standard of conduct when providing investment advice.

The commission heard that the U.S. student loan debt totaled $1.56 trillion by late September 2018, with 44.2 million borrowers nationwide. Student loan debt continues to rise and is now the second largest total debt balance after mortgage debt. Student loan debt has more than doubled since 2008. The growth in outstanding student loan debt has also been accompanied by a marked increase in student loan delinquency. The Federal Reserve reported in 2017 that 10.3% of borrowers are behind on their payments, and 38% of their loans are in deferment.

The commission heard about a new provision of federal law specifying that retailers of manufactured houses meeting certain requirements are not considered mortgage loan originators for purposes of the Truth in Lending laws. Absent further action, certain purchasers of manufactured housing will not have key protections when taking out loans to buy their homes.

The commission heard that, in acknowledging the harm of forced arbitration clauses that prohibit class action suits, CFPB issued the *Arbitrations Agreements Rule*, which allowed consumers to bring class actions challenging abuses in the financial services sector. On November 1, 2017, however, President Trump signed a joint resolution passed by Congress repealing the Arbitration Agreements Rule under CRA.

The commission understands that Dodd-Frank adopted a requirement on lenders to assess consumers' *ability to repay* loans in the origination of virtually all closed-end residential mortgage loans. The implementing rule describes the minimum standards that must be used to determine that borrowers have the ability to repay the mortgages they are extended. The commission heard testimony raising concerns that lenders and servicers may not be sufficiently evaluating the affordability of a loan modification offered to consumers.

The commission learned that an auto dealer may provide *indirect auto financing* to car purchasers, wherein dealers significantly markup consumers' interest rates as compared to the "buy rate" offered by the lender. The Center for Responsible Lending found that buyers with weaker credit scores may be targeted for higher markups because they have fewer alternative financing options. Consumers are often unaware that the available rate and terms communicated to them by the dealer may be higher than the "buy rate" set by a given lender because the dealer has an incentive to generate revenues by increasing the rate that is offered to the borrower.

Recommendations

In light of the ever-changing markets and technology along with further retrenchment on the federal level, the commission recommends that Maryland take steps to further protect consumers and investors. While some safeguards can only be addressed in Washington, as Maryland did this past year, it can take further actions to fill new gaps in financial consumer protection. The recommendations this year are focused on preparing to help Maryland prevent and withstand current and future threats to Maryland's financial health, not to just respond to recent federal efforts to roll back the Dodd-Frank reforms enacted a decade ago.

Thus, the commission recommends <u>continued advocacy and opposition, when appropriate, by Maryland's Congressional</u>

Delegation, to legislative and regulatory efforts to reduce consumer and financial protections.

The commission recommends continued vigorous enforcement by OAG and OCFR, enhanced by additional dedicated enforcement and investigative funding and higher penalties that may be imposed. These agencies were provided with additional authorized funding in the 2018 legislation. The commission continues to believe that a unit within OAG's Consumer Protection Division should be dedicated to consumer financial enforcement.

Further, the commission recommends that the General Assembly consider continuing the Maryland Financial Consumer Protection Commission for an additional two years. Given the experience and knowledge of the members of the commission, the commission has the capacity to highlight and recommend significant areas of financial consumer protections that the State may want to adopt. During the 2018 session, the General Assembly adopted many of the commission's recommendations. An alternative to continuing the commission would be to have the Governor or OAG appoint an equivalent commission to focus on high level, integrated reviews of the financial consumer protection challenges.

And the commission recommends that the General Assembly adopt additional new consumer protection laws to address new developments which have revealed new risks and to backfill where federal regulators have stepped back. Recommendations are grouped in three topic categories. Specifically, two topics relate to consumer protections for technology activities, two topics relate to consumer protections for financial products, and four topics relate to studies the General Assembly requested.

1. Topics Relating to Consumer Protections for Technology Activities

a. Cryptocurrencies, Initial Coin Offerings, Cryptocurrency Exchanges, and Blockchain Technology (see Chapter 1): Under Maryland law, a person may not engage in the business of money transmission if that person, or the person with whom that person engages in the business of money transmission, is located in the State unless that person is licensed by OCFR. While implicit, the Act does not explicitly address the supervision of virtual currencies, the exchange of virtual currencies, or other new technologically-advanced money service businesses. Further, based on a comparison of the National Conference of State Commissioners on Uniform State Laws' (NCCUSL) Uniform Regulation of Virtual Currency Businesses Act in 2017 (Uniform Model Act) with State law, there may be gaps in consumer protection provisions that are in the Uniform Model Act but not in current State law. Further, other states may have adopted consumer protection standards that the General Assembly may wish to consider adopting.

OCFR considers virtual currencies to be covered by the Maryland Money Transmission Act. To be proactive as the cryptocurrency markets continue to develop, the commission recommends the General Assembly pass legislation that makes explicit what is implicit in the applicability of the State's money transmission law as it applies to activity based on new technologically advanced money service businesses, such as the advent of virtual currencies. Further, the commission recommends explicitly stating the licensing requirement for fiat currency and virtual currency exchanges. To further modernize State law, the commission recommends that the General Assembly consider adopting consumer protections that are included in the Uniform Model Act but not currently in State law.

b. Data Breaches (see Chapter 2): According to the U.S. Treasury, 13 states have imposed data security standards on nonbanks for protection of consumer financial data. To address the evolution of personal information, the commission recommends expanding the definition of "personal information" under the Maryland Personal Information Protection Act (MPIPA) to include genetic information of an individual and activity tracking data collected on an individual.

The commission recommends legislation to strengthen the notice requirements in MPIPA. Businesses subject to a data breach should provide notification of the breach to a consumer directly and through substitute means. Businesses should not be able to choose the way they provide notification. In addition, the required notice should (1) specify the number of affected Marylanders; (2) describe the breach, including how it occurred and any vulnerabilities that were exploited; (3) include any steps the business has taken or plans to take in response to the breach; and (4) include a sample form notice that the business will send to consumers.

The commission recommends updating the statute so that it is coordinated with the requirements of federal law and requires business entities to implement and maintain reasonable security procedures and practices that are appropriate to protect account information from unauthorized access, use, modification, or disclosure, including requiring businesses to destroy certain account information after 48 hours.

The General Assembly may also wish to consider establishing liability standards after a data breach has occurred such that the business that experienced the breach is required to reimburse financial institutions for the costs associated with reissuance of a payment card, notification of a consumer, and opening and closing financial accounts. Depending on the circumstances of the breach, the reimbursement could be required from the business or a vendor that supplied the business with software or equipment designed to process, store, or transmit store account information for the business. Any such liability should also be limited to situations in which the negligence of the vendor or a failure of a business to maintain reasonable security was the proximate cause of the breach.

2. Topics Relating to Consumer Protections for Financial Products

a. Indirect Automobile Lending (see Chapter 3): The commission recommends bringing greater transparency in this process and imposing reasonable limitations on the means by which auto dealers are compensated for their role in the indirect auto lending process by lenders. The commission recommends licensing and oversight of the dealerships offering credit to Maryland consumers, capping back-end compensation in order to restrain abusive automobile financing practices, and providing additional disclosures to consumers relating to the financing charge.

Specifically, the commission recommends legislation that (1) caps the total amount of additional finance charge that a dealer may be paid in consideration for its role in originating the contract and assigning it to the lender at an amount equal to no more than an annual percentage rate of 2% for a contract having an original scheduled term of up to 60 monthly payments or no more than 1.5% for a contract having an original scheduled term of more than 60 monthly payments; (2) requires dealers to present a consumer with all financing offers for which they have been approved, presenting the consumer with the annual percentage rate and term of the loan on each such offer; and (3) requires, prior to execution of the financing agreement, the dealer to provide the consumer, and obtain the consumer's signature on, a written disclosure in a document separate from the financing agreement that sets forth: (a) the total amount of compensation that will be paid to the dealer; (b) the spread; (c) the amount of dealer compensation attributable to the spread; and (d) the total amount the consumer will pay over the life of the loan attributable to the dealer compensation and spread.

b. Ability to Repay Standard (see Chapter 4): The commission recommends requiring nonbank mortgage loan servicers to comply with affordability protections with regard to loss mitigation activity, specifically when lenders or servicers offer loan modifications. Loan modifications are not subject to the ability to repay standards that apply to loan originations; however, a requirement that they adhere to affordability standards may assist consumers in retaining their property. Further, since servicers generally tend to utilize significant OCFR resources, the commission recommends allowing OCFR to modify its regulations to set applicant and annual renewal fees for a mortgage lender license by the type of conduct (broker, lender, or servicer) and based on the volume of loans the licensee brokered, extended credit, or serviced in the State.

3. Topics Relating to Studies the General Assembly Requested

a. Fiduciary Duty Standard (see Chapter 5): The SEC Commissioners were split when they released for comments a proposed Reg BI to address the broker-dealer standard of conduct issue. Since SEC and the state insurance regulators have proposed standards that largely preserve the status quo, individual states may need to provide greater protections that investors expect from financial professionals who provide investment advice. Therefore, the commission suggests that State action is worthy.

The commission recommends that the General Assembly pass legislation that provides that broker-dealers, broker-dealer agents, insurance producers, investment advisers, or investment adviser representatives who offer advisory services or hold themselves out as advisors, consultants, or as providing advice, would be held to a fiduciary duty to act in the best interest of the customer without regard to the financial or other interest of the person or firm providing the advice. In addition to broadening the fiduciary duty standard in Maryland to broker-dealers and insurance agents, the fiduciary duty standard currently imposed on investment advisers in Maryland needs to be strengthened, as it is currently weaker than the national fiduciary duty standard. Broker-dealers or insurance agents who do not engage in providing advice or hold themselves out as doing so could continue to operate under a suitability standard. To comply with federal preemption laws, the statutory language should specify that State law does not impose on any broker-dealer any books and records requirement that is not imposed under federal law.

b. Student Loan Servicers (see Chapter 6): With the recent naming of the first student loan ombudsman, the State will have the benefit of learning about the areas that need additional education, regulation, and enforcement.

The commission continues to believe that Marylanders would benefit by standards being set for student loan servicers and by a bill of rights being established for student borrowers. In light of the recent District Court opinion with regard to a similar law in the District of Columbia, the commission discussed whether to require student loan servicers to register with OCFR or to comply with a set of statutory standards, instead of being licensed (which would set strict eligibility requirements as recommended last year). As an example of registration, during the 2018 session, the General Assembly expanded State authority over consumer reporting agencies by codifying an existing regulatory requirement that consumer reporting agencies must register with OCFR; establishing a process for receiving and investigating complaints about consumer reporting agencies; and increasing civil monetary penalties for violations.

The commission recommends that the General Assembly adopt legislation that requires student loan servicers to be registered with OCFR (or, at a minimum, comply with a set of statutory standards) through the Nationwide Multi-state Licensing System. Primarily, the legislation would provide OCFR with investigative and enforcement powers over student loan servicers. The commission also recommends, as it did last year, that a bill of rights be established for student borrowers.

c. Retailers of Manufactured Homes (see Chapter 7): The commission recommends that the General Assembly adopt legislation that includes four provisions, which are reflective of the recommendations of the manufactured housing workgroup.

First, the commission recommends that if a retailer of a manufactured home provides information regarding financing the purchase of the home, the retailer (1) must do so in a fair and honest manner and (2) may not otherwise steer a consumer to products offering less favorable terms to increase their compensation. In addition, the retailer must provide a statement, in plain English, describing any financial relationship or affiliation between the retailer and the lender about whose products the retailer provides information. Second, the commission recommends amending the definition of dwelling under Maryland law to ensure that manufactured home brokers, lenders, and originators are permanently subject to the mortgage lending laws in Maryland. Third, the commission recommends that retailers of manufactured homes who provide information to consumers regarding financing options also must provide a written disclosure to consumers on a form prescribed by the commissioner at the time the retailer provides financing information. The disclosure must include information regarding borrower rights and the procedure for filing a complaint with OCFR if a consumer is harmed or has been steered to an inappropriate product. Fourth, the commission recommends increasing the notice requirement for an action of replevin or action to repossess a manufactured home to 45 days from 10 days. The 45-day period should not apply to an action associated with a manufactured home that is surrendered or vacant. Finally, the commission recommends expansion of the Maryland Mortgage

Program to include purchasers of manufactured homes.

d. Arbitration Rule (see Chapter 8): The commission discussed whether to recommend that the State adopt the National Consumer Law Center's (NCLC) Model State Consumer and Employee Justice Enforcement Act (Model State Act) and in particular, Title I, allowing whistleblowers to bring *qui tam* actions on behalf of the state. The commission believes that forced arbitration clauses lessen consumer protection. Also, the commission believes that the issue of forced arbitration warrants further study to identify remedies which may serve to establish increased fairness for consumers. In light of the broad array of consumer contracts that it might affect, the commission recommends that OAG and OCFR advise the General Assembly on ramifications of adopting Title I of NCLC's Model State Act.

Chapter 1. Cryptocurrencies, Initial Coin Offerings, Cryptocurrency Exchanges, and Blockchain Technology

Background

The commission held a hearing about cryptocurrencies, initial coin offerings (ICOs), and cryptocurrency exchanges. Cryptocurrencies and ICOs are based upon blockchain technology, which provides for peer-to-peer means of payment on a secure verifiable distributed ledger with no central intermediary such as a central or commercial bank. The digital representation of value has been referred to as a cryptocurrency, as blockchain technology relies upon cryptography for its security. Such currencies also are referred to as virtual currencies, as they are represented by data stored on computers rather than physical cash issued by a central authority. Blockchain technology is now also being explored for many applications, both within finance (such as for payment processing, trade financing, and securities clearing) and outside of finance (such as for health records, identity systems, and music publishing rights).

Money is but a social and economic construct built upon consensus having taken on many forms and technologies over the millennia. Early forms of money included cowrie shells used in Africa, and on the island of Yap, large disks known as Rai stones. Paper money was an innovation representing a store of value in a central repository. This led to privately issued bank notes and fiat currencies issued by governments. Today the principal methods of payments and most money are electronic representations of such fiat currency digitally stored as bank deposits.

Regardless of whether Bitcoin and other cryptocurrencies yet adequately exhibit the three roles of money – a store of value, a medium of exchange, and a unit of account – they have led to a new and volatile market in which Marylanders have participated. Crypto finance's $135 billion market cap, though modest in comparison to global debt and equity markets of over $300 trillion, has also drawn attention from financial-sector incumbents due to its volatility, wide margins, and public interest.

Public Policy Frameworks

In the crypto finance markets, as with any other part of finance, the State must guard against illicit activities, such as tax evasion, money laundering, terrorist financing, and avoiding sanctions. The State must also promote fair and open competition while ensuring the operation of financial stable markets. Additionally, the State must protect investors and consumers.

While criminals exploit the existing financial system for money laundering, cryptocurrencies have given bad actors new ways to conduct old crimes. Dark markets conduct sales of illegal drugs and other contraband using cryptocurrencies. Countries such as Iran, Russia, and Venezuela have used crypto finance to undermine U.S. policies. Additionally, cryptocurrencies add new challenges to tax compliance.

The first line of defense has been through money transmission laws and bank secrecy laws requiring compliance with anti-money laundering (AML), combatting financing of terrorism, and know your customer (KYC) laws. The U.S. Treasury's Financial Crime Enforcement Network (FinCEN) put out guidance in this regard starting in 2013[1] and in a 2018 letter to Congress.[2]

Both the U.S. Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission have released numerous public advisories, notices, and enforcement actions. While progress is being made, the investor protection that does exist in crypto markets has been little more than an effort by issuers and exchanges to stay ahead of law enforcement's and regulators' attention.

Crypto Exchanges

There are over 200 cryptocurrency exchanges operating around the globe. Most of these crypto exchanges are unregistered, manipulative behavior goes unchecked, and billions of dollars in customers' tokens have been stolen. Compared to traditional financial exchanges, they lack intermediation through regulated broker-dealers. Further, according to CryptoCompare's October Exchange Review, only 47% of exchanges impose strict KYC requirements.

Crypto exchanges have had significant problems protecting customers' funds held in custody, usually in digital wallets rather than at a bank, broker-dealer, or future commission merchants. Numerous hacks have led to billions of dollars in stolen customer funds.

Safeguards to date – treating crypto exchanges and digital wallet providers through money transmission laws in the same manner as Western Union or MoneyGram – are unsatisfactory. Crypto exchanges are trading venues and need be treated as such, with mandated investor protections in place. Front running and other manipulative behavior need to be banned. At the State level, Maryland can play its part by ensuring that exchanges with Maryland customers fully comply with AML laws and uphold their custodial functions.

Initial Coin Offerings

Through a new form of crowdfunding, thousands of ICOs have been issued, raising over $20 billion and counting.

Of the thousands of ICOs to date, many have failed, and investors have lost billions. A recent Ernst and Young study reported that through the third quarter of 2018, 86% of the top ICOs of 2017 were trading below their listing price and only 13% actually have a working product. Filecoin, for instance, raised over $250 million in October 2017 but is not due to go live until

[1]FIN-2013-G001; Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies; Department of Treasury (March 18, 2013) https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf.

[2]Letter to Senator Ron Wyden, FinCEN (February 13, 2018) https://coincenter.org/files/2018-03/fincen-ico-letter-march-2018-coin-center.pdf

mid-2019. Unfortunately, one thing is clear from academic and market studies – the ICO market is rife with scams and frauds.

Debates have raged around the globe about how cryptocurrencies, and particularly ICOs, fit within existing securities, commodities, and derivatives laws. Many contend that so-called "utility tokens" sold for future consumption are not investment contracts – but this seems like a false distinction.

By their very design, ICOs mix economic attributes of both consumption and investment. Marketing documents describe utility-like qualities for the token's stated future purpose on a decentralized network, but there is always a strong investment component to token sales as they fund development of underlying software and a network. Thus, ICOs are quite different from tokens for a neighborhood laundromat, tickets to the theatre, or donation-based crowdfunding platforms such as Kickstarter or GoFundMe.

ICO investors bear economic risk related to the success or failure of the network in which the token is to potentially circulate. Development and support of the network, though often open-sourced, tends to be largely concentrated around the issuing company or foundation and other closely aligned developers. Investors lose if the network is not completed or falls short of hoped-for public adoption, but they may gain if the network widely succeeds. ICOs are typically marketed online with the release of a whitepaper prior to the launch of a new blockchain-based decentralized application. ICO tokens are structured with attributes to promote marketability and potential appreciation. They are often listed on crypto exchanges, boosting marketability and transferability.

In the United States, nearly all ICOs would meet the Supreme Court's "Howey Test" defining an investment contract under securities laws. The "Howey Test" states that: "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 299 (1946). At a Congressional hearing on April 26, 2018, SEC Chair Jay Clayton said: "Then there are tokens, which are used to finance projects. I've been on the record saying there are very few, there's none that I've seen, tokens that aren't securities." He added, "To the extent something is a security, we should regulate it as a security, and our securities regulations are disclosure-based, and people should follow those and provide the information that we require."

ICO tokens' realities – their risks, expectation of profits, reliance on the efforts of others, manner of marketing, exchange trading, limited supply, and capital formation – are attributes of investment offerings. While regulators and the courts will bring added clarity to the market through increased numbers of enforcement cases and related private litigation, Marylanders should have the full benefit of investor protection laws if purchasing or participating in ICOs.

Uniform Law Commission: Uniform Regulation of Virtual Currency Act

In 2017, the National Conference of Commissioners on Uniform State Law (NCCUSL) developed a draft model act called the Uniform Regulation of Virtual Currency Businesses Act of 2017 (Uniform Model Act) for state adoption regulating those businesses that engage in the exchange, transfer, and storage of virtual currency, with the goal of creating a prudential, narrowly-focused regulation. This Uniform Model Act does not apply where other law and regulation is deemed adequate to provide protections. Banks are exempt, as wells as persons transacting in virtual currency for their own use, or for academic purposes or below a de minimis amount ($5,000) annually. Prior to the development of the Uniform Model Act, in 2000, NCCUSL had approved the Uniform Money Services Act to create a framework that connects all types of money services businesses.

The Uniform Model Act provides a licensing and regulatory framework for businesses whose products and services include the exchange of virtual currencies; the transfer of virtual currencies from one person to another; or certain custodial or fiduciary services in which the property or asset under the custodian's control are considered virtual currency. The Uniform Model Act requires the business to maintain enough virtual currency to satisfy the entitlements of its users; ensures that the property interests of customers are pro rata in the event of a shortfall; provides that the virtual currency of customers is not the property of the virtual currency business or reachable by its creditors; requires covered virtual currency businesses to register with the designate State authority, provide evidence of adequate capital, and report on a regular basis; provides an "on-ramp" of graduated levels of regulation as businesses grow; and provides for reciprocity among states.

Maryland Actions

Maryland Money Transmission Act

Maryland law requires the licensing of virtual currency companies whose activities are covered by the Maryland Money Transmission Act, an Act passed well before virtual currencies were even conceived.[3] Further, the Office of the Commissioner of Financial Regulation (OCFR) published an advisory to consumers and investors regarding virtual currencies in April 2014.[4]

Under State law (Maryland Money Transmission Act, Title 12, Subtitle 4 of the Financial Institutions Article), "monetary value" means a medium of exchange whether or not

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[3] "Maryland Money Transmitter License," National Mortgage Licensing System, https://nationwidelicensingsystem.org/slr/PublishedStateDocuments/MD-Money-Transmitter-Company-New-App-Checklist.pdf.

[4] "Virtual Currencies: Risks for Buying, Selling, Transacting, and Investing – Advisory Notice 14-01 – ATTENTION MARYLAND RESIDENTS," Office of the Commissioner of Financial Regulation, Maryland Department of Labor, Licensing, and Regulation, http://www.dllr.state.md.us/finance/advisories/advisoryvirtual.shtml.

redeemable in money. "Money transmission" means the business of selling or issuing payment instruments or stored value devices, or receiving money or monetary value, for transmission to a location within or outside the United States by any means, including electronically or through the Internet. "Money transmission" includes: a bill payer service; an accelerated mortgage payment service; and any informal money transfer system engaged in as a business for, or network of persons who engage as a business in, facilitating the transfer of money outside the conventional financial institutions system to a location within or outside the United States.

A person may not engage in the business of money transmission if that person, or the person with whom that person engages in the business of money transmission, is located in the State, unless that person is licensed by OCFR. The Act does not apply to financial institutions. The Act sets qualification requirements for licensees. A licensee is required to provide each agent through which it engages in the business of money transmission, training materials, and an annual report with OCFR. A licensee is required to comply with all federal and State laws and regulations concerning the business of money transmission, money laundering, and abandoned property. A licensee is subject to examinations.

While implicit, the Act does not explicitly address the supervision of virtual currencies, the exchange of virtual currencies, or other new technologically advanced money service businesses. Further, based on a comparison of the Uniform Model Act with State law, there may be gaps in consumer protection provisions that are in the Uniform Model Act but not in current State law.

Maryland's Check Cashing Law

Under the State's check cashing law (Title 12, Subtitle 1 of the Financial Institutions Article), a person may not provide check cashing services unless the person is licensed or exempt from licensure. "Provide check cashing services" means to accept or cash, for compensation, a payment instrument regardless of the date of the payment instrument.

Maryland Financial Consumer Protection Commission 2017 Interim Report

The commission recommended that the General Assembly should, upon further study, consider updating current Maryland law, including provisions for licensing dealers in cryptocurrencies by OCFR; the protections for investors and merchants transacting in cryptocurrencies, such as Bitcoin; and related enforcement authority. In addition, the commission recommended companies that deal in virtual currencies should be required to comply with regulations for money transmitters.

Other States' Actions

At the state level, many states have been considering how to update consumer and investor protection laws for these new developments. In 2015, the New York State Department of Financial Services was one of the first state regulators to establish a new licensing and registration regime for virtual currency activities within its state.[5] Though the licensing regime has been challenged in New York state courts, three Bitcoin licenses have been granted to date.

The North American Securities Administration Association (NASAA) issued a media alert on January 4, 2018, to remind investors to approach cryptocurrencies and related ICOs with caution. In the alert, they reference a NASAA survey of their members which showed that "94% believe there is a 'high risk of fraud' involving cryptocurrencies," and that they are "unanimous in their view that more regulation is needed for cryptocurrencies to provide greater investor protection."[6]

According to the National Conference of State Legislatures, during 2018, legislation relating to cryptocurrency was introduced in the following 21 states and the District of Columbia: Alaska, Arizona, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Kentucky, Michigan, Nebraska, New Jersey, New York, North Carolina, Oregon, Vermont, Virginia, Washington, West Virginia, and Wyoming. Starting December 3, 2018, Ohio will be the first state to allow businesses to pay their taxes in Bitcoin, through a payment service provider BitPay.

Summary of Testimony at Maryland Financial Consumer Protection Commission June 5, 2018 Meeting

Opening Remarks

Currently, Chair Gary Gensler teaches several blockchain technology and crypto finance courses at the Massachusetts Institute of Technology and gave the commission an overview of the commercial and public policy challenges of blockchain technology, cryptocurrencies, ICOs, and crypto exchanges. He indicated that, though there are many technical and commercial challenges yet to overcome, blockchain technology has the potential to lower costs, risks, and economic rents in the financial system. However, to reach its potential, blockchain technology and the world of crypto finance it has birthed must come fully within public policy frameworks.

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[5] "Regulations of the Superintendent of Financial Services, Virtual Currencies," New York State Department of Financial Services, http://www.dfs.ny.gov/legal/regulations/adoptions/dfsp200t.pdf.

[6] "NASAA Reminds Investors to Approach Cryptocurrencies, Initial Coin Offerings and Other Cryptocurrency-Related Investment Products with Caution," North American Securities Administrators Association, http://www.nasaa.org/44073/nasaa-reminds-investors-approach-cryptocurrencies-initial-coin-offerings-cryptocurrency-related-investment-products-caution/.

Speakers

The following speakers provided comments on recommendations to regulate cryptocurrencies, initial coin offerings, cryptocurrency exchanges, and blockchain technology:

- Melanie Lubin, Securities Commissioner, Office of the Attorney General;
- Jerry Brito, Executive Director of Coin Center, a nonprofit research and advocacy center focused on the public policy issues facing cryptocurrency and decentralized computing technologies;
- John Collins, Affiliate Berkman Klein Center for Internet and Society at Harvard University, where he focuses on emerging public policy issues surrounding financial technology with a specific focus on digital currencies and blockchain technology (previously Head of Policy for Coinbase, and former Senior Advisor to the U.S. Senate Homeland Security and Governmental Affairs Committee);
- Jonah Crane, Regulator in Residence at the FinTech Innovation Lab in New York, advisor to several FinTech companies, and Executive Director of the FinTech Lab in Washington, DC (previously served as the Deputy Assistant Secretary for the Financial Stability Oversight Council at the U.S. Treasury Department); and
- Andrew Wichmann, Associate at Gordon Feinblatt, LLC in Baltimore, where his practice focuses on technology law, intellectual property, and privacy and data security (previously worked as an associate for an intellectual property specialty boutique in Washington, DC and served as corporate counsel for a federal contractor in the biometrics and identity management industry).

According to Ms. Lubin's testimony, ICOs have the attributes of investment contracts. She described the summary order to cease and desist and order to show cause in the matter of Browsers Lab, LLC, dated May 21, 2018 (an enforcement Act by the Securities Division as part of an international crackdown on fraudulent ICOs and cryptocurrency-related investment products). Under its authority provided under the Maryland Securities Act, the Securities Division initiated an investigation into the securities-related activities of Browsers Lab related to violations of registration and antifraud provisions of the Act. Browsers maintains a website to promote its business and to disseminate information to potential investors regarding investment opportunities it offers, including an ICO (BAL crypto-token). She said that the company should be registered with the division as a broker-dealer, securities agent, investment adviser, or investment adviser representative.

According to Mr. Brito's testimony, as stated in his Coin Center Report,[7] states have been looking at how virtual currencies businesses interact with money transmission licensing law and consumer protection policy. One state (New York) promulgated a rule that creates a separate licensing regime (BitLicense). Several states (Connecticut, New Hampshire, and Georgia) enacted legislation to add virtual currency explicitly to the definition of money but left several substantive policy questions to the regulator. One state (North Carolina) broadened its guidance explaining that businesses having control over virtual currency on behalf of customers are money transmitters. Yet several other states (Kansas, Tennessee, and Texas) narrowed their guidance explaining that only virtual currency businesses who also deal in traditional currencies are money transmitters. He suggested that, without clarifying actions, some state money transmission statutes may be vague and possibly include virtual currency companies with customers as a money transmitter under existing laws.

According to Mr. Collins' testimony, financial technology (fintech), is providing greater access to capital for consumers, lower transaction costs, and greater entrepreneurship, and it is creating new products and behaviors. One of cryptocurrencies' primary uses, enabled by blockchain technology, is as a censorship-resistant digital cash providing a new platform for open, permissionless innovation driven from the margins. The types of individuals involved in this new and unique industry include early adopters, hobbyists, speculators, traders, and illicit actors. Cryptocurrency exchanges function as brokerages or as pure spot exchanges. Most states have interpreted current money transmission statutes to apply to cryptocurrency businesses without modification. One exception is New York, which developed a license specific to digital currency businesses. He stated that it is unclear whether state money transmission statutes are adequate to regulate these exchanges to prevent market manipulation and other concerns, but it is clear that the states have a significant role to play as primary regulators of these markets. He further noted that ICOs are likely to be interpreted as securities and, therefore, subject to relevant securities law.

According to Mr. Crane's testimony, states generally regulate financial activities (payments, lending, insurance, and securities) rather than particular technologies. This functional approach, when applied to blockchain technology, would look at which activity is being facilitated by the technology, and seek to apply the existing rules to the extent possible. Regulators should prioritize investor and consumer protection using all available tools under existing authorities and interpretations. He recommends that Maryland regulators and policymakers focus on five areas. First, State regulators should enforce existing State laws in cases where they clearly apply and examine the need to adapt State-level regulation in light of technological changes. In the case of cryptocurrencies, State money transmission laws provide important protections to consumers transferring money outside the regulated banking system. Second, State-level enforcement can be an effective supplement to federal efforts. Third, State consumer protection laws, including prohibitions against unfair and deceptive acts and general anti-fraud laws can be used to protect consumers. Fourth, State regulators may need to fill gaps in data privacy impacted by blockchain technology. Last, State regulators should explore the potential to participate in a multi-state regulatory sandbox to facilitate live pilot testing of products. In each area, coordination among

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[7] Peter Van Volkenburgh and Jerry Brito, "State Digital Currency Principles and Framework, Version 2.0," March 2017.

the State-level authorities, other states' regulators, and federal authorities will be the key to effectiveness.

According to Mr. Wichmann's testimony, one area of confusion relates to the application of Maryland's Money Transmission Act to the operation of virtual currency exchanges. He has encountered questions concerning whether a person operating a virtual currency exchange is required to obtain a money transmitter license, as well as whether an existing money transmission business can incorporate a virtual currency exchange under an existing license. He stated that clear answers are important since the unauthorized operation of a money transmission business can subject the operator to fines and imprisonment. The licensing requirements under the Act appear to be broad enough to cover virtual currency exchanges as well as other types of virtual currency operations. He recommends the State take action to clarify the applicability of Maryland's money transmission licensing requirement for virtual currency operations without unduly regulating the underlying blockchain technologies that do not put consumers at significant risks.

Recommendations

Under Maryland law, a person may not engage in the business of money transmission if that person, or the person with whom that person engages in the business of money transmission, is located in the State, unless that person is licensed by OCFR. While it maybe implicit, the Act does not explicitly address the supervision of virtual currencies, the exchange of virtual currencies, or other new technologically advanced money service businesses. Further, based on a comparison of the Uniform Model Act with State law, there may be gaps in consumer protection provisions that are in the Uniform Model Act but not in current State law.

OCFR considers virtual currencies to be covered by the Maryland Money Transmission Act. To be proactive as the cryptocurrency markets continue to develop, the commission recommends the General Assembly pass legislation that makes explicit what is implicit in the applicability of the State's money transmission law as it applies to activity based on new technologically advanced money service businesses, such as the advent of virtual currencies. Further, the commission recommends explicitly stating the licensing requirement for fiat currency and virtual currency exchanges. To further modernize State law, the commission recommends that the General Assembly consider adopting consumer protections that are included in the Uniform Model Act but not currently in State law. Further, other states may have adopted consumer protection standards that the General Assembly may wish to consider adopting.

Chapter 2. Data Breaches

Background

As consumers become ever more dependent upon digital commerce and large Internet platforms, there has been an ever-present trade off of data security. Data breaches have increased in frequency and size over the last decade, affecting the security and finances of consumers and businesses alike. Unfortunately, 2018 was no exception, yet again bringing numerous reported data breaches with millions of consumer personally identifiable information (PII) being compromised. Though a comprehensive list of 2018 data breaches would be far too long for a report such as this, amongst the largest were Marriott (500 million people's records compromised), Under Armour (150 million), Quora (100 million), and Facebook (50 million).

These breaches occurred even after the high profile 2017 breach of 147.9 million consumers' sensitive personal information was exposed at Equifax, one of the main consumer reporting agencies in the United States. The Federal Trade Commission reports that "hackers accessed people's names, Social Security numbers, birth dates, addresses and, in some instances, driver's license numbers. They also stole credit card numbers for about 209,000 people and dispute documents with personal identifying information for about 182,000." Gemalto estimates that 2.6 billion data records were compromised in 2017, with approximately 7.1 million records being lost or stolen each day. According to the U.S. Treasury, 13 states have imposed data security standards on nonbanks for protection of consumer financial data. For instance, Florida requires a business to take "reasonable measures" to protect and secure personal information data that is stored in "electronic form." Utah does so for personal information stored electronically or on paper.[1]

In 2017, the Office of the Attorney General (OAG) received 1,084 notices of a data breach in accordance with the State law that requires a business to notify the office if a Maryland resident's information was compromised. The consequences of data breaches are far-reaching, affecting consumers, financial institutions, entities involved in the investigation and enforcement of fraud and identity theft, and businesses in a variety of manners.

State Actions

Maryland Personal Information Protection Act (MPIPA)

MPIPA governs data breaches and the actions a business must take after learning that it has been subject to a data breach.

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[1]https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf (page 40).

When a business is destroying a customer, employee, or former employee's records that contain PII, the business must take reasonable steps to protect against unauthorized access to or use of PII, taking specified considerations into account.

To protect personal information from unauthorized access, use, modification, or disclosure, a business that owns or licenses personal information of a Maryland resident must implement and maintain reasonable and appropriate security procedures and practices. A business that uses a nonaffiliated third party as a service provider and discloses personal information about a Maryland resident under a written contract with the third party must require, by contract, that the third party implement and maintain reasonable security procedures and practices that are (1) appropriate to the nature of the disclosed information and (2) reasonably designed to help protect the information from unauthorized access, use, modification, disclosure, or destruction. This provision applies to a written contract that is entered into on or after January 1, 2009.

A business that owns or licenses computerized data that includes personal information of a Maryland resident, upon the discovery or notification of a breach of the security of a system, must conduct an investigation. The investigation must be in good faith and reasonable and prompt to determine the likelihood that personal information has been or will be misused as a result of the breach. If, after the investigation, the business determines that the breach creates a likelihood that personal information has been or will be misused, the business must notify the individual of the breach. Generally, the notice must be given to an affected individual as soon as practicable, but not later than 45 days after the business concludes its investigation. If the business determines that notification is not required, the business must maintain the records related to the determination for three years.

A business that maintains computerized data that includes personal information of a Maryland resident that it does not own or license must notify the owner or licensee of the personal information of a breach and share information relevant to the breach if it is likely that the breach has resulted or will result in the misuse of personal information of a Maryland resident. Generally, the notice must be given as soon as reasonably practicable but not later than 45 days after the business discovers or is notified of the breach.

The notification may be delayed (1) if a law enforcement agency determines that it will impede a criminal investigation or jeopardize homeland or national security or (2) to determine the scope of the breach, identify the individuals affected, or restore the system's integrity.

In the case of a breach of the security of a system involving an individual's email account – but no other specified personal information – the business may comply with the required notification in electronic or other form. The notification must direct the individual whose personal information has been breached to promptly (1) change the individual's password and security question or answer, as applicable, or (2) take other appropriate steps to protect the email account, as well as all other online accounts for which the individual uses the same user name or email and password (or security question or answer).

Consumer notification must include a description of categories of information acquired by the unauthorized user, the business' contact information, and contact information for the major consumer reporting agencies and specified government agencies. The notification may be given by mail or telephone; electronic mail or other forms of notice may be used if specified conditions are met. Prior to consumer notification, a business must notify OAG of the breach after it discovers or is notified of the breach.

A waiver of the notification requirements is void and unenforceable. Compliance with the notification requirements does not relieve a business from a duty to comply with any federal legal requirements relating to the protection and privacy of personal information. MPIPA is exclusive and preempts any provision of local law.

If a business is required to give notice of a breach to 1,000 or more individuals, the business must also notify, without unreasonable delay, specified consumer reporting agencies of the timing, distribution, and content of the notices. However, the business is not required to include the names of or other personal information about the notice recipients.

Businesses that comply with the requirements for notification procedures; the protection or security of personal information; or the destruction of personal information under the rules, regulations, procedures, or guidelines established by their primary or functional federal or State regulators are deemed in compliance with MPIPA. Likewise, businesses or their affiliates that comply with specified federal acts and regulations governing the protection of information are also deemed in compliance with MPIPA.

Maryland Financial Consumer Protection Commission and Maryland General Assembly

Commission's 2017 Interim Report: Recommendations

During the 2017 interim hearings, the commission heard concerns relating to the data breaches at Equifax and Uber and overall challenges relating to cybersecurity. In light of the increasing challenges of cybersecurity and data breaches such as at Equifax and Uber, the commission recommended prohibiting consumer reporting agencies from charging for the placement, temporary lift, or removal of a security freeze, as these are often an important remedy for identity theft. The commission further recommended the State strengthen, as appropriate, statutory procedures for correcting inaccurate information contained within a consumer report and require consumer reporting agencies to notify the public promptly (or within 30 days) after a breach is discovered. The commission also said it was worth considering requiring other businesses handling consumer financial data to report breaches within 30 days.

2018 Legislation Considered and Passed by the Maryland General Assembly

Legislation prohibiting a consumer reporting agency from charging a fee for the placement, removal, or temporary lift of a security freeze, however, was enacted. Senate Bill 1068 and Senate Bill 202/House Bill 710 prohibited a consumer reporting agency from charging a fee for a security freeze. Though the passed legislation did not include these provisions, as introduced, Senate Bill 1068/House Bill 1634 would have required a consumer reporting agency to provide notice of a breach of the security of a system to a Maryland resident subject to the breach. The notice would have been no later than 30 days after the consumer reporting agency discovered or was notified of the breach. All three bills were enacted, although the federal government has since asserted preemption over state laws regarding security freezes.

Summary of Testimony at Maryland Financial Consumer Protection Commission September 12, 2018 Meeting

The following speakers provided comments on the impact to financial institutions and its consumers from data breaches on merchants and processors:

- Mr. John Bratsakis, President and CEO, Maryland DC Credit Union Association;
- Ms. Lisa Martin, Vice President Compliance and Chief Compliance Officer, APG Federal Credit Union; and
- Mr. Richard Trumka, Jr., Assistant Attorney General, Consumer Protection Division of OAG.

Mr. Bratsakis and Ms. Martin provided extensive background information on data breach occurrences and trends. They noted the increase in the number of breaches and reviewed fraud trends, such as card not present fraud, wire transfer fraud, and synthetic fraud (using piecemeal data to create a new, fictitious identity). Ms. Bratsakis requested that the commission focus on financial liability for those that are responsible for a breach, both from a notification standpoint, and also on other costs of a breach, such as reissuance of payment cards costs.

Mr. Trumka commented that OAG does not think that consumers are getting adequate notice of a data breach. He noted that direct notice sent to the consumer, rather than substitute notice (*e.g.*, a notice is posted on a website), is more effective at reaching the consumer. Therefore, OAG recommends repealing the option of providing substitute or direct notice, and instead requiring both forms of notice. Mr. Trumka also suggested that the notice that a business must submit to OAG under MPIPA after a data breach be changed in three ways: (1) to specify the number of affected Marylanders; (2) to have some description of the breach; and (3) to include sample consumer notice letters. Each of these changes will enable OAG to better answer questions it receives from consumers after being notified that they are subject to the breach.

Mr. Trumka also recommended a reduction in the time in which a business must notify a consumer of a data breach. Some businesses may wait until the end of the 45-day time period specified in MPIPA, despite the statute requiring the business to provide notice as soon as reasonably practical, which is often before the 45-day maximum. He noted that any business that is doing business in the European Union will have to comply with the new 72-hour data breach notice requirement.

Mr. Trumka also pointed out limitations in the free credit monitoring services that a company provides after a data breach and discussed the impact of payment card breaches on a consumer. He discussed the potential impact of the following types of breaches on consumers: Social Security number data breaches; genetic information data breaches; and personal health information and activity tracking data. Because of the uniqueness of and the potential impact that compromised genetic information and personal health information and activity tracking data may have on a consumer, Mr. Trumka recommended amending the definition of "personal information" under MPIPA to include genetic information and personal health information or activity tracking data.

Finally, Mr. Trumka discussed what actions consumers can take to protect themselves; the new federal security freeze law, including the preemption of the State's recently passed changes to the State security freeze law; and a loophole in MPIPA. Currently, a paper or "hard copy" data breach is not treated the same as a computerized data breach under MPIPA; notification requirements, for example, are not triggered in paper data breaches. Mr. Trumka recommended repealing the requirement that the data breach involves the unauthorized access of "computerized" data.

Recommendations

Changing technology has created new types of personal information, as well as changes in the prevalence and availability of certain types of personal information. **To address the evolution of personal information, the commission recommends expanding the definition of "personal information" under MPIPA to include genetic information of an individual and activity tracking data collected on an individual.**

As data breaches have increased in frequency and size, more Maryland consumers have been subject to the negative consequences of breaches. Some of these consequences, such as identity or credit card fraud, may be mitigated using tools like security freezes. Consumers, however, are not able to take actions to protect themselves if they are not aware that they have been the subject of a data breach. **The commission recommends legislation to strengthen the notice requirements in MPIPA. Businesses subject to a data breach should provide notification of the breach to a consumer directly and through substitute means. Businesses should not be able to choose the way they provide notification. In addition, the required notice should (1) specify the number of affected Marylanders; (2) describe the breach, including how it occurred and any vulnerabilities that were exploited; (3) include any steps**

the business has taken or plans to take in response to the breach; and (4) include a sample form notice that the business will send to consumers.

Establishing an environment of accountability will carry Maryland forward as it works to combat the impact of data breaches, particularly on consumers. **The commission recommends updating the statute to require business entities to implement and maintain reasonable security procedures and practices that are appropriate to protect account information from unauthorized access, use, modification, or disclosure, including requiring businesses to destroy certain account information after 48 hours.**

Addressing the financial liability after a data breach occurs is also critical to managing the impact of data breaches. **The General Assembly may also wish to consider establishing liability standards after a data breach has occurred such that the business that experienced the breach is required to reimburse financial institutions for the costs associated with reissuance of a payment card, notification of a consumer, and opening and closing financial accounts. Depending on the circumstances of the breach, the reimbursement could be required from the business or a vendor that supplied the business with software or equipment designed to process, store, or transmit stored account information for the business. Any such liability should be limited to situations in which the negligence of the vendor or a failure of a business to maintain reasonable security was the proximate cause of the breach.**

Chapter 3. Indirect Automobile Lending

Background

The majority of all car purchases are financed. The Center for Responsible Lending (CRL) states that 80% of cars are financed through dealers and just under 80% of auto loan volume is through indirect lending, which often includes hidden interest rates and markups.[1] Maryland has the second highest percentage of delinquent auto loan balances more than 30 days past due, second only to Mississippi.[2]

An auto dealer may provide financing directly or it may facilitate indirect financing by a third party (*i.e.*, a bank, a nonbank affiliate of a bank, an independent nonbank, or a "captive" nonbank). In indirect auto financing, the dealer collects basic information about an applicant and provides that information to prospective indirect auto lenders. When an indirect auto lender is interested in purchasing a retail installment sales contract executed by the consumer with the dealer, the lender provides the dealer with a risk-based "buy rate" that establishes a minimum interest rate.

The indirect auto lender often allows the dealer to mark up the interest rate above the "buy rate." For instance, a "buy rate" may be 4.0% and a dealer marks up the rate by 2.0%, making the real rate 6.0%. This markup is not mentioned in any documents signed by the consumer. Dealers claim the practice is justified to cover the cost of arranging customers' financing. Manufacturers' captive finance companies seemed to have settled on a limit of up to 2.5% markup, according to testimony at the commission's November 16, 2018 meeting. The National Automobile Dealers Association (NADA) explained to the commission that it is customary for lenders to cap the spread. Based on information available to the Office of the Attorney General (OAG), it appears that major lenders are capping spreads at 2% or less.

In its 2011 study of auto loan markups, CRL found that buyers with weaker credit scores may be targeted for markups because they have fewer alternative financing options.[3] Consumers are often unaware that the available rate and terms communicated to them by the dealer may be higher than the "buy rate" set by a given lender because the dealer has a perverse incentive to generate higher compensation by increasing the rate that is offered to the borrower. In certain cases, the dealer "markup" may be several percentage points higher than the interest rate available to a consumer, resulting in substantial dealer compensation to the detriment of the Maryland consumer.

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[1]See https://www.responsiblelending.org/issues/auto-financing-practices-avoid, last visited 11/27/18.

[2]2018 data: Melinda Zabritski, Experian, State of the Automotive Finance Market: A look at loans and leases in Q2 2018, slide 7. Accessed at https://www.experian.com/content/dam/marketing/na/automotive/quarterlywebinars/q2-2018-state-auto-finance-markets.pdf.

[3]Davis, Delvin and Joshua M. Frank, "Under the Hood: Auto Loan Interest Rate Hikes Inflate Consumer Costs and Loan Losses," Center for Responsible Lending, April 2011.

Federal Actions

Consumer Financial Protection Bureau (CFPB)

The CFPB Bulletin 2013-02 (rescinded by Congress in August 2018) provided guidance about compliance with the fair lending requirements of the Equal Credit Opportunity Act (ECOA) and implementation of Regulation B for indirect auto lenders that permit dealers to increase consumer interest rates and compensate dealers with a share of increased interest revenue. As CFPB does not have direct authority over auto dealers, CFPB issued the guidance holding lenders responsible for pricing policies on indirect auto loans that violated ECOA.

Under ECOA, it is illegal for a "creditor" to discriminate in any aspect of a credit transaction because of race, color, religion, national origin, sex, marital status, age, receipt of income from any public assistance program, or the exercise, in good faith, of a right under the Consumer Credit Protection Act. Regulation B provides that an assignee is considered a "creditor" when the assignee participates in the credit decision.

The guidance suggested that indirect auto lenders should take steps to ensure that they are operating in compliance with ECOA and Regulation B as applied to dealer markup and compensation policies. The guidance further suggested that another important tool for limiting fair lending risk in indirect auto lending is developing a robust fair lending compliance management program. Further, additional compliance-management components may be necessary to address significant fair lending risks.

Maryland Law

In addition to the basic regulation of a car sale for cash, when a car dealer finances (directly or indirectly) a car sale, the credit side of the transaction is subject to the credit regulations. The general requirements of the Uniform Commercial Code on the sale of goods, remedies, and enforcing security interests need to be followed.

Under Maryland law, auto dealers are licensed by the Motor Vehicle Administration (MVA). Credit regulation provisions are under Title 12 of the Commercial Law Article. The Maryland Credit Services Business Act (§ 14-1901 of the Commercial Law Article) defines a credit services business, under the jurisdiction of the Office of the Commissioner of Financial Regulation (OCFR), to include:

> *"[A]ny person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that such person can or will sell, provide, or perform… in return for the payment of money or other valuable consideration … [o]btaining an extension of credit for a consumer."*

OAG has broad powers over illegal actions, but OCFR is limited when an action relates to dealers who are not licensed. Despite negotiating credit terms with consumers on auto loans, overlapping oversight with MVA has resulted in exclusive regulatory jurisdiction of car dealerships falling to MVA despite credit services being performed onsite at car dealerships.

Industry Practices

Dealer Markups: Options for Dealer Compensation

Broadly, there are two options for dealer compensation: a flat fee payment or a dealer markup method. The rate the dealer provides the borrower is called the contract rate. Under the markup method, the dealer is permitted to keep most of the difference between the buy rate and the contract rate. A dealer may also receive a flat rate in addition to its earnings on the spread.

As compared to a flat fee, the dealer markup model creates perverse incentives to increase the financing cost that consumers incur. Allowing a dealer's compensation to be tied to increasing the interest rate has been tied to discrimination in lending and could result in an increase in finance charges that ignores a borrower's ability to repay. Eliminating dealer discretion in setting rates and moving to a flat fee compensation structure would remove the incentive for dealers to ratchet up interest rates and reduce the likelihood of discrimination against borrowers. OAG recommends considering long-term solutions that reduce, if not eliminate, dealer discretion in increasing interest rates.

Information about the annual percentage rate (APR) for which the consumer qualified and the increase in that APR to compensate the dealer is material information for a consumer seeking to finance a vehicle. In *Green v. H&R Block, Inc.*, 355 Md. 488 (1999), the Maryland Court of Appeals held that consumers properly alleged that H&R Block violated the Consumer Protection Act by withholding information about its receipt of funds from lenders providing refund anticipation loans. The Court explained: "H&R Block customers may consider important the knowledge that the 'finance' cost of the loan is inflated by virtue of the various ways H&R Block stands to benefit." Id. at 524. An additional disclosure about APR would ensure that automobile buyers have that information when financing a vehicle at the dealership.

Other States' Actions

At least two states limit dealer markups. Louisiana Law (§ 32:1261(2)(k)) limits markups to 3% and requires disclosure to the consumer that the dealer may be participating in finance charges associated with the sale. California has capped dealer compensation by law (Cal. Civ. Code § 2982.10(a)). When it did so in 2006, it capped compensation at 2.5% for loans at or under 60 months, and 2% for loans over 60 months.

New York's financial regulator (Department of Financial Services) issued a bulletin released August 23, 2018, stating that the institutions that the department supervises are subject to the state's fair lending law when they offer car and truck loans through dealerships rather than directly to consumers purchasing a vehicle. The bulletin enumerated a list of actions that lenders should take to develop a fair lending compliance program for indirect automobile lending. The bulletin indicated that the department would be on the lookout for dealer markups that appear to discriminate based on race, gender, ethnicity, or other factors.

Summary of Testimony at Maryland Financial Consumer Protection Commission November 16, 2018 Meeting

Delegate Marc Korman brought the issue of indirect automobile lending to the commission's attention and the commission heard testimony from interested parties at its November 16 meeting. The representatives of the lenders and the dealers do not suggest any legislative changes, claiming that the statistics do not prove that there is discriminatory practice and that the dealers have made adjustments in their practices through the Fair Credit Compliance Policy and Program. The representative of consumers suggests that a hands-on study take place to determine the bad actors so that they may be punished for violating the laws.

The following speakers provided comments on recommendations relating to indirect automobile lending:

- Mr. Christopher J. Willis, Practice Group Leader, Consumer Financial Services Litigation, Ballard Spahr LLP;
- Mr. Paul Metrey, Vice President, Regulatory Affairs; Chief Regulatory Counsel, Financial Services, Privacy, and Tax; NADA; and
- Mr. Tom Domonske, Attorney, Consumer Litigation Associates.

In Mr. Willis' testimony, he discussed the statistics used in determining whether there were disparate impacts from auto dealers' ability to negotiate retail lending rates with customers. His firm explored legitimate, nondiscriminatory explanations for the results of those transactions. He claims that CFPB's approach, looking at an auto finance company's portfolio as a whole, is flawed since it is based only on a portion of each dealer's transactions that are assigned to a particular finance source. A dealer-level analysis would show that dealers have not engaged in discrimination. There are legitimate reasons why a dealer may vary the margin between the buy rate and the retail rate. His testimony concluded that "the premise that there is a problem of disparate impact that needs to be addressed is, quite simply, false." He recommends that the commission and the General Assembly not take any action on this issue.

According to Mr. Metrey's testimony, in January 2014 NADA and the National Association of Minority Automobile Dealers issued to their members the Fair Credit Compliance

Policy and Program. The program was in response to 2007 Department of Justice consent orders with two dealerships to resolve allegations of disparate impact discrimination. Under the program, the dealership establishes a pre-set Standard Dealer Participation Rate which they then uniformly add to the buy rate for each transaction. The dealership only deviates from that APR if an allowable business reason (*i.e.,* a good faith, pro-competitive reason unrelated to the customer's background) exists to include a lower amount of dealer participation in the offer of credit to the customer. Currently, there is a cap on how high the dealer can raise the interest rate over the "buy rate," generally two percentage points. He recommends that the commission and the General Assembly not take any action on this issue.

After the meeting, the National Independent Automobile Dealers Association (Shaun K. Peterson) and the Maryland Division of the Mid-Atlantic Regional Automobile Dealers Association (Reginald Evans), representing the used motor vehicle industry, submitted written testimony urging the commission not to recommend any legislative changes to the General Assembly. The letter indicates that they stand tall for their members who subscribe to a strict Code of Ethics of duty, honor, and integrity and who believe in the advancement of small business in support of the free market system. They stressed that their organizations are adamantly opposed to any form of discrimination based on prohibited factors in State and federal law.

According to Mr. Domonoske's testimony, he represents consumers that have been taken advantage of when the sale of a car was financed by the dealer or a related finance company. He mentioned several incidences in 2013, 2015, and 2016 where CFPB and the U.S. Department of Justice (DOJ) ordered lenders to pay damages to harmed African American, Hispanic, Asian, and Pacific Islander borrowers and penalties for charging borrowers higher interest rates for their auto loans through a discriminatory pricing system. Discretionary markups permitted onsite by the dealers led to these disparities. As part of DOJ orders, the lenders were required to change their pricing and compensation system to substantially reduce dealer discretion and accompanying financial incentives to mark up interest rates. Consumers may sign a document, thinking they have purchased a car only to find out they have to return to the dealership when told their financing fell through; suddenly, the interest rate on the financing significantly increases. Mr. Domonoske recommends that testers need to be sent to the dealerships incognito to find out what the consumers are being told and determine if dealers are following the laws. He said that there are a number of existing laws in place prohibiting predatory and discriminatory conduct that are largely unenforced in Maryland and nationwide.

There was also discussion by the commission about allowing (1) the imposition of a cap on the amount that a dealer could increase the "buy rate" as California and Louisiana do or (2) a flat fee amount to be in addition to the "buy rate." Further discussion related to requiring a disclosure that shows the dealer margin for both indirect sales, as well as for direct sales.

Subsequent to the hearings, OAG suggested that the General Assembly should pass caps in spreads lower than California to reflect the rise of consumer abuse in subprime auto lending in the intervening 12 years and where spreads stand today. OAG believes that spread is commonly lower than that cap. OAG supports California's concept of allowing a higher rate of compensation for loans 60 months and under than for loans over 60 months.

Recommendations

While MVA is the proper party to oversee the regulation of car dealerships in the State, the commission recommends that the services relating to the negotiating of credit terms and offering financing to Maryland consumers conducted onsite at such dealers properly falls under the jurisdiction of OCFR. The existing Credit Services Business Act licensing and regulatory requirements vested with OCFR should apply to dealerships that offer, as defined by statute, credit to Maryland consumers purchasing an automobile from a dealer in the State. In doing so, OCFR will have the ability to conduct examinations and investigate allegations of abusive practices. Further, OCFR may determine whether additional regulation, including disclosure and consideration of the borrower's ability to repay the loan, and that income or other key underwriting information is verified, is warranted. One commissioner suggests that further input from the stakeholders about the specific details, in particular to the capping of finance charges, of any recommendations would be appropriate as the General Assembly considers such recommendations.

The commission recommends bringing greater transparency in this process and imposing reasonable limitations on the means by which automobile dealerships are compensated for their role in the indirect auto lending process by lenders. The commission recommends licensing and oversight of the dealerships offering credit to Maryland consumers, capping back-end compensation in order to restrain abusive automobile financing practices, and providing additional disclosures to consumers relating to the financing charge.

Specifically, the commission recommends legislation that (1) caps the total amount of additional finance charge that a dealer may be paid in compensation for its role in originating the contract and assigning it to the lender at an amount equal to no more than an APR of 2% for a contract having an original scheduled term of up to 60 monthly payments or no more than 1.5% for a contract having an original scheduled term of more than 60 monthly payments; (2) requires dealers to present a consumer with all financing offers for which they have been approved, presenting the consumer with the APR and terms of the loan on each such offer; and (3) requires, prior to execution of the financing agreement, the dealer to provide the consumer, and obtain the consumer's signature on, a written disclosure in a document separate from the financing agreement that sets forth (a) the total amount of compensation that will be paid to the dealer; (b) the spread; (c) the amount of dealer compensation attributable to the spread; and (d) the total amount the consumer will pay over the life of the loan attributable to the dealer compensation and spread.

Chapter 4. Ability to Repay Standard

Background

Dodd-Frank adopted a requirement on lenders to assess consumers' ability to repay loans for virtually all closed-end residential mortgage loans. In 2013, the Consumer Financial Protection Bureau adopted a rule that implemented the ability to repay rule under Dodd-Frank. The rule describes the minimum standards that must be used to determine that borrowers have the ability to repay the mortgages they are extended. A lender must make a reasonable, good-faith determination before or when a mortgage loan is being consummated that a borrower has a reasonable ability to repay. Eight factors that must be considered include: verifications of income or assets relied on; employment relied on; monthly mortgage payment for the loan; monthly payment on a simultaneous loan security by the same property; monthly payments for property taxes and insurance that the lender requires the borrower to buy and other costs related to the property; debts, alimony, and child-support obligations; monthly debt-to-income ratio or residual income; and review of credit history. The Truth in Lending Act (TILA) applies to a loan modification only if it is considered a refinancing under Regulation Z. If a loan modification is not subject to TILA, it is not subject to the ability to repay rule. Regulation Z specifies when a loan workout is a modification or a refinance. According to a recent multi-state settlement (described below) an affordability standard must be used, along with other loan modification requirements, in determining the suitability of a modification of a mortgage loan.

State Actions

To strengthen State consumer protections, the General Assembly passed an ability to repay rule in 2008.[1] Under § 12-127 (interest and usury) of the Commercial Law Article,[2] a lender may not make a mortgage loan without giving due regard to the borrower's ability to repay the mortgage loan. Due regard to a borrower's ability to repay a mortgage loan must include (1) consideration of the borrower's debt-to-income ratio, including existing debts and other obligations and (2) verification of the borrower's gross monthly income and assets by review of third-party written documentation reasonably believed by the lender to be accurate and complete. This provision does not apply to a mortgage loan (1) approved for government guaranty by the Federal Housing Administration, the Veterans Administration, the U.S. Department of Agriculture, the Maryland Department of Housing and Community Development, or the Community Development Administration or (2) that refinances an existing mortgage loan if the refinance mortgage loan is offered under the federal Homeowner Affordability and Stability Plan and made available by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

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[1] Chapters 7 and 8 of 2008, and modified under Chapters 114 and 115 of 2009.

[2] Also, under §§ 12-311 (credit provisions for consumer loans), 12-409.1 (credit provisions for secondary mortgage loans), 12-925 (credit grantor revolving credit provision), and 12-1029 (credit grantor closed-end credit provisions).

The Office of the Commissioner of Financial Regulation (OCFR), on its own and in coordination with other state regulators, regularly examines mortgage lenders and mortgage servicers. When violations of Maryland law are discovered, they are addressed with the company through the examination process or through an enforcement action. In fiscal 2018, OCFR's examination unit increased its staff by two examiners and OCFR timely commenced 100% of the total examinations that came due during the fiscal year. OCFR completed examinations of 192 business entities, representing a total of 436 licensees.

The Office of the Attorney General (OAG), on its own and in coordination with other state attorneys general, has also been active in holding mortgage lenders and mortgage servicers accountable for failure to comply with Maryland law. Jointly, OCFR and OAG have actively held the largest and most risky mortgage servicers accountable for their servicing activity in the State, resulting in orders rectifying past harm through restitution and by imposing standards to ensure stable operations that minimize risk to Maryland consumers.

For example, OCFR and OAG entered into a $45 million multi-state settlement with New Jersey-based mortgage lender and servicer PHH Mortgage Corporation (announced in January 2018). The settlement resolved allegations that PHH, the nation's ninth largest nonbank residential mortgage servicer, improperly serviced mortgage loans from January 1, 2009, through December 31, 2012. The agreement also requires PHH to adhere to comprehensive mortgage servicing standards, conduct audits, and provide audit results to a committee of states. The settlement does not release PHH from liability for conduct that occurred beginning in 2013. The $45 million settlement includes payments to Maryland borrowers who lost their homes to foreclosure or who faced foreclosure. Approximately 831 borrowers in Maryland are eligible for a payment. In addition to Maryland, 48 other state attorneys general, the District of Columbia, and over 45 state mortgage regulators participated in the settlement.

The loss mitigation provision of the settlement includes loan modification requirements that are intended to apply to both government-sponsored and proprietary loss mitigation programs and to subservicers performing loss mitigation services on a servicer's behalf. Under the requirements, the servicer shall (1) offer and facilitate loan modifications or other loss mitigation options which meet agency and investor guidelines to borrowers, rather than initiating and pursuing foreclosure actions; (2) make specified information available on a publically accessible website, including the information on its qualification process for a loan modification, required documentation for a loan modification, information necessary for a complete loan modification application, key eligibility factors for loan modifications, loan modification waterfalls, and loan modification terms; (3) offer loan modifications intended to produce sustainable modifications according to investor guidelines and previous results; (4) offer loan modifications that provide affordable payments for borrowers needing longer term or permanent assistance; (5) only include bona fide and reasonable fees and costs when capitalizing arrearages in order to evaluate a borrower for a loan modification; (6) track outcomes and maintain records regarding characteristics and performance of loan modifications; (7) not charge any application or processing fees for loan modifications; and (8) not demand a lump sum payment as a prerequisite to evaluation for, or the granting of, a loan modification.

Summary of Testimony at Maryland Financial Consumer Protection Commission November 16, 2018 Meeting

The following speakers provided comments on recommendations relating to the ability to repay standard:

- Ms. Odette Ramos, Executive Director, Community Development Network of Maryland;
- Mr. Philip Robinson, Attorney, Consumer Law Center;
- Ms. Kathleen Murphy, President and CEO, Maryland Bankers Association; and
- Mr. Bob Enten, Attorney, Maryland Bankers Association.

The commission heard testimony raising concerns that consumers taking out loans or entering into loan modifications with nonbank lenders or servicers may not be afforded the protections of ability to repay requirements.

Ms. Ramos' testimony recommended that, on the mortgage origination side, the ability to repay standard in Maryland law be expanded to apply to all Maryland licensed and regulated lenders to ensure that borrowers can afford their mortgages. For mortgage servicing, she recommended that the requirements that were under the U.S. Treasury Home Affordable Modification Program's be added to Maryland law so that they apply to all Maryland licensed and regulated mortgage servicers. These requirements include publishing criteria as to how the servicers make decisions on loan modifications; ensuring a single point of contact that counselors can use who has decision-making authority on modifying loans; clearly explaining why modifications are denied; including the ability to repay standard in decision making for loan modifications; and including that all servicers must make an effort to modify loans.

According to Mr. Robinson's testimony, problems result from nonbank servicers who argue that they are not regulated under the Maryland ability to repay standard provisions. TILA applies to creditors but does not apply to an assigned institution. The problems do not involve Maryland banks, but instead are from situations where a loan is assigned to a nonbank. Maryland law does not apply to national banks.

According to Ms. Murphy and Mr. Enten's testimony, they were not aware of the concerns Ms. Ramos described, and they were glad that the banks are not causing the concerns. The purpose of a loan modification is to keep a borrower in the home. They would support a level playing field in that banks and nonbanks should both be subject to the ability to repay standard.

Recommendations

The commission recommends requiring nonbank mortgage loan servicers to comply with affordability protections with regard to loss mitigation activity, specifically when lenders or servicers offer loan modifications. Loan modifications are not subject to the ability to repay standards that apply to loan originations; however, a requirement that they adhere to affordability standards may assist consumers in retaining their property. Further, since servicers generally tend to utilize significant OCFR resources, the commission recommends allowing OCFR to modify its regulations to set applicant and annual renewal fees for a mortgage lender license by the type of conduct (broker, lender, or servicer) and based on the volume of loans the licensee brokered, extended credit, or serviced in the State.

Chapter 5. Fiduciary Duty Standard

Background

Investment advisers are subject to a fiduciary duty under Section 206 of the Investment Advisers Act of 1940, as interpreted by the U.S. Supreme Court in *SEC v. Capital Gains Research Bureau*. A fiduciary is a person in whom another has placed the utmost trust and confidence to manage and protect property or money. A fiduciary duty is an obligation (both a duty of care to act with prudence and a duty of loyalty to refrain from self-dealing) created by an undertaking, to act for another's benefit in matters connected with the undertaking. The fiduciary duty also requires one to subordinate one's personal interests to that of the person to whom the duty is owed. Under the Employee Retirement Income Security Act of 1974 (ERISA), for example, the obligation is to act "solely" for the other's benefit.

Broker-dealers, however, are subject to a different duty, the suitability standard, by which the Financial Industry Regulatory Authority (FINRA) Rule 2111 requires a broker-dealer to "have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the [firm] or associated person to ascertain the customer's investment profile." FINRA has interpreted that suitability standard as requiring brokers to "make only those recommendations that are consistent with the customer's best interests" and as prohibiting a broker "from placing his or her interests ahead of the customer's interests."[1]

Americans often rely upon broker-dealers, insurance agents, and other financial advisors, though, for investment advice. According to studies by the Consumer Federation of America (CFA) and Americans for Financial Reform,[2] and the Public Investors Arbitration Bar Association (PIABA),[3] major brokerage firms and insurance companies may mislead investors as trustworthy financial advisors but will deny this role and represent that they are merely salespeople when confronted in court.

In an effort to protect investors while preserving the ability to offer advisory services, the U.S. Department of Labor (DOL) finalized its Fiduciary Duty Rule in April 2016, modernizing rules affecting retirement savings to protect consumers against conflicts of interest among broker-dealers, insurance agents, and other financial advisors. The DOL rule was vacated in March 2018 by the U.S. Fifth Circuit Court of Appeals which held that DOL exceeded its authority in promulgating the rule. Separately, in July 2018, the U.S. Securities and Exchange Commission (SEC) began soliciting input from the public on Regulation Best Interest (Reg BI) designed to

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[1] FINRA Rule 2111 (Suitability) FAQ, https://bit.ly/2Ktkix1.

[2] "Financial Advisor or Investment Salesperson: Brokers and Insurers Want to Have it Both Ways," Consumer Federation of America and Americans for Financial Reform, http://bit.ly/2AyIyuy.

[3] "PIABA: Federal action needed to stop U.S. Brokerage firms misleading investors about role as fiduciaries, which firms deny to block arbitration claims," https://piaba.org/sites/default/files/newsroom/2015-03/PIABA%20Fiduciary%20Study%20News%20Release.pdf.

address, among other things, the broker-dealer standard of conduct. There are conflicts of interest in broker-dealers offering investment advice that do not align with that of the fiduciary duty of investment advisors.

Federal Actions

U.S. Department of Labor

Developed over six years, the DOL Fiduciary Duty Rule addressed loopholes in the definition of fiduciary investment advice. Furthermore, those advisors – broker-dealers, insurance agents, and other financial advisors – who wished to continue receiving inherently conflicted forms of compensation, such as commissions, would have been required to act in the best interests of their clients, "without regard to" their own interests or the interests of their firm, and comply with other requirements, including disclosure obligations. With respect to Individual Retirement Account (IRA) owners, advisors were to enter into an enforceable contract with those clients that set forth these duties.[4]

The rule recognized several important marketplace developments over the past 40 years – the growth of self-directed retirement accounts, such as IRA and 401(k) accounts (alongside the sharp reduction in company sponsored pension plans), as well as the transition of traditional broker-dealers and insurance agents into the financial advisory role of client accounts. The DOL rule defined who is a fiduciary by virtue of rendering advice about retirement assets, and it would have replaced an outdated rule originating in 1975 under ERISA.

Consistent with ERISA's "sole interest" fiduciary standard, DOL was concerned with ensuring that retirement savers obtained investment advice that truly serves their best interest, and that such advice not be tainted by conflicts of interest. The DOL rule did that by requiring firms to eliminate practices that would reasonably be expected to result in recommendations that were not in retirement savers' best interests.

The DOL rule was vacated in March 2018 by the U.S. Fifth Circuit Court of Appeals. The Fifth Circuit Court overturned a decision by a Dallas federal court that had upheld the DOL rule. The court criticized a key provision of the DOL rule, the best-interest-contract exemption, which would have allowed brokers to receive variable compensation for investment products they recommended, creating a potential conflict, as long as they sign a legally binding agreement to act in a client's best interest.

[4]"Definition of the Term 'Fiduciary'; Conflict of Interest Rule-Retirement Investment Advice," Federal Register, https://www.federalregister.gov/documents/2016/04/08/2016-07924/definition-of-the-term-fiduciary-conflict-of-interest-rule-retirement-investment-advice.

U.S. Securities and Exchange Commission

Under the securities laws, SEC has long had the authority to require broker-dealers to act as fiduciaries under the Investment Advisers Act when they offer investment advice that is more than "solely incidental" to their primary function of effecting transactions in securities. In Section 913 of Dodd-Frank, Congress further authorized SEC through rulemaking (after first issuing a report) to align the standard of care for broker-dealers with that of the fiduciary duty of investment advisors.[5] It specified that the standard should be "to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice."[6] Although SEC issued the required report[7] in 2011 advocating rulemaking and recommended that SEC "establish a uniform fiduciary standard for investment advisers and broker-dealers when providing investment advice about securities to retail customers that is consistent with the standard that currently applies to investment advisers," SEC did not act on these recommendations.

Soon after the DOL's rule was vacated, SEC proposed a three-part rule that was designed to address the broker-dealer standard of conduct, known as Reg BI. Reg BI proposes a "best interest" standard for brokers using language similar to FINRA's interpretation of the existing suitability standard. SEC in its proposal has made clear that, like FINRA suitability, Reg BI does not require brokers to recommend those investments that they reasonably believe represent the best of the options for the investor from among those they have available to recommend. Moreover, SEC specifies in the rule release that Reg BI is not intended to be a fiduciary standard, although SEC officials have said it is based on "fiduciary principles." As a result, it is not clear that the new standard would impose significant new obligations on brokers not already required under FINRA's suitability standard.

The disclosure proposal in Reg BI requires customer disclosure designed to clarify the difference between a broker and an investment adviser through Form Customer Relationship Summary (CRS), while prohibiting the use of the term "adviser" or "advisor" by anyone who is not an investment adviser or investment adviser representative registrant. As a result, standalone brokers would be prohibited from using the "advisor" title, but dual registrants would not, even when acting solely in a brokerage capacity. And the rule places no restrictions on even standalone brokers' ability to market their services as advisory. The third part of the proposal provides a summary of the existing standards of conduct for investment advisers. The SEC Commissioners were split when they voted to release the proposal for comment.

The Maryland Attorney General along with the Attorneys General of California, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, Minnesota, New Mexico,

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[5]Morrison Foerster, "A Fiduciary Duty for Broker Dealers? How Dodd-Frank May Change the Way Broker Dealers Conduct Business," http://media.mofo.com/files/uploads/Images/100719DoddFrank.pdf.

[6]Dodd-Frank Act, 913(g)(2) (see p. 454-455 of https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf).

[7]"Study on Investment Advisers and Broker-Dealers As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act," Staff of the U.S. Securities and Exchange Commission, https://www.sec.gov/news/studies/2011/913studyfinal.pdf.

New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Washington, DC wrote an August 7, 2018 letter to SEC expressing concerns with respect to the proposed Reg BI. The attorneys general described four key respects where the proposed rule falls short: (1) it does not impose the standard of conduct that SEC itself concluded was appropriate and that investors expect; (2) it fails to adequately address conflicts, instead largely leaving the issue to broker-dealer discretion; (3) while disclosure is a critical component of a regulatory scheme, it places far too great an emphasis and reliance on disclosure; and (4) it contains significant ambiguity that is likely to lead to marketplace confusion that negatively impacts both investors and the securities industry.

The attorneys general recommended in their letter the following modifications to Reg BI: (1) it must be modified to impose a uniform fiduciary standard of care requirement applicable to both investment advisers and broker-dealers; (2) it must be modified to include conflicts of interest requirements by (i) eliminating certain conflicted compensation incentives that cannot be sufficiently mitigated and by basing any differential compensation to individuals on neutral factors; (ii) requiring clear and easily understood disclosure of material conflicts of interest in principal trading for broker-dealers, akin to that which is currently required of investment advisers; (iii) requiring the identification, disclosure, and mitigation, or, alternatively, elimination, of all other material conflicts of interest; and (iv) mandating strict enforcement of the conflict of interest rules beyond the existing SEC and self-regulatory organization supervisory regulations; (3) it must be modified to require disclosures to be in plain language and easily understood by investors and to require investors' written contracts to include language affirming the investor rights guaranteed by the rule; and (4) it must be modified to clearly define all key terms to promote clarity and uniformity.

Other organizations, including the American Association of Retired Persons (AARP); CFA; and the North American Securities Administrator Association, Inc. suggested changes to the Proposed Rule.

National Association of Insurance Commissioners

The National Association of Insurance Commissioners' (NAIC) website indicates that "For 2018, the NAIC will continue monitoring DOL and SEC activities. Insurance regulators will need to interact with those entities where we have overlapping jurisdictions. It is not believed the Fifth Circuit ruling will affect the work being done by the NAIC in updating the Annuity Suitability Model (#275). The NAIC model regulation goes into much detail about what constitutes suitability information and what factors must be considered when determining product suitability. Insurance producers are held accountable to the suitability standard when selling a new or replacement annuity. The Annuity Suitability Working Group began drafting amendments to model #275 in November 2017." During an interim meeting in June 2018, the working group decided to shift from defining "best interest," to setting criteria requiring insurers and producers to ensure products are suitable and consumer's interests are placed ahead of their own.

A broad coalition of consumer groups have expressed concerns about NAIC's draft standard.[8] Barbara Roper, Director of Investor Protection at the Consumer Federation of America, wrote to NAIC in opposition of their proposal, indicating that it (1) does not impose a best interest standard on annuities recommendations, leaving high-cost products sold to investors to be subject to a suitability standard and (2) leaves conflict of interest, including product-specific sales contests, entirely unchecked, preserving incentives that encourage recommendation of products that pay the insurance agent the most, rather than those that are most appropriate for the investor.

Maryland Actions

Maryland Securities Law

Although Maryland law provides some protections for consumers who rely on the advice of securities professionals, it does not explicitly extend fiduciary duty to broker-dealers or their agents.

Under Regulation 02.02.05.03 Investment Adviser Regulations of the Division of Securities of the Office of the Attorney General (Sections 11-101, 11-203, and 11-302 of the Corporations and Associations Article), an investment adviser is a fiduciary and has a duty to act primarily for the benefit of its clients. Investment adviser includes a person that holds out as an investment adviser in any way, including indicating by advertisement, card, or letterhead, or in any other manner indicates that the person is a financial or investment "planner," "counselor," "consultant," or any other similar type of adviser or consultant.

In addition, under Chapters 837 and 838 of 2017 (Section 11-306 of the Corporations and Associations Article), a person who engages in the business of effecting transactions in securities for the account of others or for the person's own account, or who acts as a broker-dealer or agent, may not engage in dishonest or unethical practices in the securities or investment advisory business.

These Maryland standards taken together, though, may provide less investor protection than the standard set forth in Dodd-Frank Section 913(g) and used by DOL in its rule which reads: "shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment advisor providing the advice."

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[8]"Joint Letter: AFR, consumer, labor, and economic justice groups urge the NAIC to strengthen best interest standard proposal," http://ourfinancialsecurity.org/2018/01/joint-letters-afr-consumer-labor-economic-justice-groups-urge-naic-strengthen-best-interest-standard-proposal/.

Maryland Financial Consumer Protection Commission and Maryland General Assembly

Commission's 2017 Interim Report: Recommendations

The commission recommended, consistent with federal preemption issues, extending fiduciary duty in Maryland statute to all financial professionals who provide investment advice.

2018 Legislation Considered and Passed by the Maryland General Assembly

The legislation introduced in 2018 (Senate Bill 1068/House Bill 1634) would have established that the following specified persons are a fiduciary and have a duty to act primarily for the benefit of clients:

- a person who engages in the business of effecting transactions in securities for the account of others or for the person's own account;
- a broker-dealer or agent;
- an agent; and
- an investment adviser.

Under the legislation, a person would have had to disclose to a client, at the time advice is given, any gain, profit, or commission the person may receive if the advice is followed and a legal or disciplinary event that is material to an evaluation of the person's integrity or ability to meet contractual commitments to clients. The person would have been required to make diligent inquiries of each client to determine the financial circumstances and obligations of the client initially and subsequent to the first contact and the client's present and anticipated obligations to the client's family and for the client's family and goals for the client's family. The commissioner would have been required to adopt regulations.

Opposed by Investment Companies: Many investment companies expressed serious concerns with imposing requirements on federally registered broker-dealers that they said violate preemptive provisions in the Securities Exchange Act of 1934. Pursuant to preemptive provisions of federal law, they argued that the language that was in the introduced bill could not be lawfully applied to any federally registered broker-dealer. This is because, as of the National Securities Markets Improvement Act of 1996, federal law preempts any state from imposing on any federally registered broker-dealer any recordkeeping requirement that is not imposed under federal law.

Study Language: Section 6 of Chapters 731/732 states: "The commission is required to study the DOL rule and actions of SEC in addressing conflicts of interest in broker-dealers offering investment advice by aligning the standard of care for broker-dealers with that of the fiduciary duty of investment advisors. The commission is required to determine recommendations regarding changes to State law to provide the protection intended by the DOL rule addressing fiduciary duty standards of care."

Summary of Testimony at Maryland Financial Consumer Protection Commission October 10, 2018 Meeting

The following speakers provided comments on recommendations on aligning the standard of care for broker-dealers with that of the fiduciary duty of investment advisors:

- Barbara Roper, Director of Investor Protection, CFA;
- Melanie Lubin, Securities Commissioner, Office of the Attorney General; and
- Lisa J. Bleier, Managing Director and Associate General Counsel, Federal Government Relations, Securities Industry and Financial Markets Association (SIFMA).

According to Ms. Roper, state action is warranted because the DOL rule was vacated and SEC failed to propose to extend the DOL rule's strong protections to all securities accounts. In light of shortcomings in the SEC rule proposal, she said that there is an argument for states to step in since the rule is both weak and vague. States could adopt legislation to raise the standard of conduct when making recommendations to retail investors, using the language model in the DOL rule, which is taken directly from Section 913(g) of Dodd-Frank, requiring brokers and advisers alike to act in the best interest of the consumer, without regard to the financial or other interests of the firm or the individual agent. States could adopt the same for annuities as well as other insurance products that include an investment component; these are complex products and the conflict of interest is rampant. In addition, states could explore their authority to take action where there are misleading practices in how brokers and insurers market services.

Press releases prepared by CFA[9] summarized Ms. Roper's concerns. The CFA indicated that Reg BI does not clearly require brokers to do what is best for their customers, does not clearly prevent them from placing their own interests ahead of the customer's interest, is a weak and ineffective approach to enforcing the Investment Advisers Act fiduciary standard, and requires disclosures by brokers and advisers that are more likely to mislead investors than to dispel investor confusion.

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[9]"SEC Proposal Fails to Live Up to its "Best Interest" Label, dated August 7, 2018, and "Independent Testing Shows SEC's Proposed Customer Relationship Summary Form May Add to Investor Confusion," dated September 12, 2018.

Independent testing conducted by Kleimann Communications Group on behalf of AARP, CFA, and the Financial Planning Coalition, determined that SEC needs to revise and retest the content, language, and format of the proposed CRS. Participants did not understand disclosures regarding the differing legal obligations that apply to brokerage and advisory accounts; did not understand the term "fiduciary standard" and had mixed understanding about the term "best interest"; did not understand distinctions between different payment models, fees, and associated services; and did not understand how conflicts of interest would impact them.

According to Ms. Lubin, "SEC's Reg BI proposal muddies the landscape of broker-dealer duty rather than providing the clear guidance that exists under investment adviser fiduciary duty and its legal precedents. The SEC proposal provides that a broker-dealer act in the best interest of its retail customers. While that sounds like the definition of fiduciary duty, SEC did not propose an actual fiduciary duty to act in the customer's best interest. The SEC's proposal release makes clear that SEC does not expect that the broker will recommend the product or strategy that is best suited to achieving the client's financial goals, an approach that clearly would be required by a fiduciary standard and was required by the DOL rule. Rather, SEC interprets 'best interest' to permit a broker – as long as the situation is disclosed – to continue to recommend investments and strategies that are high cost, complex, illiquid and risky even when there are cheaper, simpler more liquid and safer alternatives. The proposed regulation would create a best interest standard that is not meaningfully better than the existing suitability standards."

To lessen the confusion and set a meaningful standard for a broker's duty to its clients, Ms. Lubin suggested that SEC should have proposed a broker-dealer fiduciary standard that aligns with that owed by an investment adviser. She also suggested that SEC should have prohibited abusive practices, including sales contests, trips, prizes, and other bonuses that are based on security sales volume. If SEC fails to amend its proposal and adopt a uniform fiduciary standard, Ms. Lubin suggested that the Maryland General Assembly pass legislation with the language that was included in the 2018 introduced bill, as stated above, amended with new language as follows (as Section 11-803 of the Corporations and Associations Article):

(a) This section applies to: (1) a person who engages in the business of effecting transactions in securities for the account of others or for the person's own account; (2) a broker-dealer; (3) an agent; (4) an investment adviser; and (5) an investment adviser representative.

(b) A person subject to this section is a fiduciary and has a duty to act primarily for the benefit of its clients.

(c) The commissioner may adopt regulations to carry out the fiduciary duty required under this section, including regulations: (1) defining, requiring, prohibiting or excluding an act, a practice, or a course of business of a person subject to this section and (2) designed to prevent a person from engaging in acts, practices, and courses of business in violation of this section.

According to Ms. Bleier, "SIFMA has publicly advocated for a heightened standard of contact for broker-dealers since prior to the passage of Dodd-Frank." Ms. Bleier stated that the following should be considered before moving forward with a state-specific duty of conduct for broker-dealers: (1) a nationwide standard of conduct is best achieved through SEC; (2) the definition of "fiduciary duty" has been well established over the preceding 40 years but may have different meanings when applied in different areas; (3) a state "patchwork" of laws would result in confusion and be unfair to investors; (4) states will have to navigate a host of legal issues since Section 103 of the National Securities Markets Improvement Act of 1996 expressly preempts states from enacting regulations that impose new or different recordkeeping requirements than those established under the Securities and Exchange Act; and (5) the DOL's vacated rule is not the right standard to use here. When asked about getting rid of quotas and contests for broker-dealers who may win a trip or get some other prize, Ms. Bleier indicated that she supports getting rid of them. To date, Nevada has enacted a state-specific law; regulations have yet to be implemented there. She indicated that many states, including Massachusetts, are waiting to see if SEC will act and that her organization can live with any standard as long as it applies to all states.

The Financial Services Institute (FSI) provided written comments. Their testimony indicated that they are "concerned that if Maryland moves forward with adopting a state-specific fiduciary standard of care it will have the unintended consequence of severely limiting access to high-quality individually-tailored advice for many hard-working American." FSI supports a federal uniform fiduciary standard of conduct for broker-dealers and investment advisors. They believe "SEC is the appropriate agency to create a uniform standard and are concerned that state-specific standards would create significant expense and compliance burdens without enhancing investor protection."

While not submitting testimony for the October 10 meeting, the following submitted written testimony in opposition to a state-specific fiduciary standard of care: American Council of Life Insurers, LPL Financial LLC, Insured Retirement Institute, T. Rowe Price, and SIFMA. The Investment Company Institute suggested including the following provision: "The provisions of this section shall not be read to impose upon any person any obligation expressly preempted by federal law."

Recommendations

The SEC Commissioners were split when they released for comments a proposed Reg BI to address the broker-dealer standard of conduct issue. Since SEC and the state insurance regulators (NAIC) have proposed standards that largely preserve the status quo, individual states may need to provide greater protections that investors expect from financial professionals who provide investment advice. Therefore, the commission suggests that it is worthy for the State to consider taking action. One commissioner suggests that further input from the stakeholders about the specific details of any recommendations would be appropriate as the General Assembly considers such recommendations.

The commission recommends that the General Assembly pass legislation that provides that a broker-dealer, broker-dealer agent, insurance producer, investment adviser, or investment adviser representative who offers advisory services or holds themselves out as advisors, consultants, or as providing advice, would be held to a fiduciary duty to act in the best interest of the customer without regard to the financial or other interest of the person or firm providing the advice. In addition to broadening the fiduciary duty standard in Maryland to broker-dealers and insurance producers, the fiduciary duty standard currently imposed on investment advisers in Maryland needs to be strengthened, as it is currently weaker than the national fiduciary duty standard. Broker-dealers or insurance agents who do not engage in providing advice or hold themselves out as doing so could continue to operate under a suitability standard. To comply with federal preemption laws, the statutory language should specify that State law does not impose on any broker-dealer any books and records requirement that is not imposed under federal law.

Chapter 6. Student Loan Servicers

Background

U.S. student loan debt totaled $1.56 trillion by September 2018,[1] with 44.2 million borrowers nationwide as of year-end 2017.[2] Student loan debt continues to rise and is now the second largest total debt balance after mortgage debt. Student loan debt has more than doubled since 2008.[3] According to a survey done by the Institute for College Access and Success, about 68% of 2015 college graduates had student debt, owing on average $30,100.[4]

The federal government plays a significant role in the student loan market. The U.S. Department of Education regulates the federal student loan industry and has established standards and procedures to which borrowers, lenders, educational institutions, and student loan services must follow. It also is actively engaged in lending to students through two loan programs: the Federal Direct Loan Program (FDLP) and the Federal Family Education Loan Program (FFELP). The federal government acts as the lender for FDLP loans. In the FFELP loan program, which was discontinued in 2010, loans were issued by private lenders and the federal government acted as a reinsurer. Over 90% of new student loans are currently made through FDLP.

Student loan servicers collect and receive any principal, interest, or other money owed under a student education loan, and perform other administrative services that relate to a student education loan.

The Federal Reserve has expressed concern that high levels of student debt and delinquency reduce borrowers' ability to acquire other types of credit, which may hamper the recovery of the housing market, a key driver of economic growth. The growth in outstanding student loan debt has also been accompanied by a marked increase in student loan delinquency. The Federal Reserve reported in 2017 that 10.3% of borrowers are behind on their payments, and 38% of their loans are in deferment.[5]

According to the Project on Student Loan Debt, the average debt of 2015 college graduates from Maryland institutions was $27,672, the twenty-eighth highest in the nation. About 56% of

[1]"Consumer Credit – G.19, October 2018 Release, Board of Governors of the Federal Reserve," https://www.federalreserve.gov/releases/g19/current/.

[2]"A Look at the Shocking Student Loan Debt Statistics for 2018," Student Loan Hero, https://studentloanhero.com/student-loan-debt-statistics/.

[3]"Student Debt's Grip on the Economy," *New York Times*, https://www.nytimes.com/2017/05/20/opinion/sunday/student-debts-economy-loans.html.

[4]"Student Debt and the Class of 2015," The Institute for College Access and Success, https://ticas.org/sites/default/files/pub_files/classof2015.pdf.

[5]"Report on the Economic Well-Being of U.S. Households in 2016 – May 2017," U.S. Federal Reserve, https://www.federalreserve.gov/publications/2017-economic-well-being-of-us-households-in-2016-education-debt-loans.htm.

Maryland graduates have student loan debt, which ranked thirty-sixth among all states. These estimates include only public and nonprofit four-year institutions. The Federal Reserve estimates that 16.7% of all Maryland individuals with a credit report have a student loan, compared with 16.2% nationwide.

Maryland Actions

In order to address the growing concerns of student loan borrowers in Maryland, the commission last year recommended (1) the General Assembly adopt a student loan bill of rights; (2) the State designate a student loan ombudsman; and (3) the State consider licensing student loan servicers.

The Maryland Financial Education and Capability Commission (MFECC) in its 2017 annual report made a series of recommendations, including creating a student loan bill of rights with a student loan ombudsman in the Office of the Commissioner of Financial Regulation (OCFR) and licensing student loan servicers. To support this recommendation, the MFECC report indicated that student loan borrowing complaints increased with over 800 complaints filed against their student loan servicers.[6]

Licensing requirements would have included recordkeeping and examination requirements, as well as specific provisions regarding servicing student loans, such as properly processing payments. Licensure of the student loan servicers would allow OCFR to know each servicer doing business in the State and take enforcement actions against the servicers.

2018 Legislation Considered and Passed by the Maryland General Assembly

The legislation introduced in 2018 (Senate Bill 1068/House Bill 1634) contained a proposal for new requirements for student loan servicers operating in Maryland. The bills as drafted would have prohibited a person from engaging in student loan servicing unless the person is (1) licensed or (2) exempt from licensing. The bills as drafted would have established an application process as well as requirements related to licensing and licensing renewal, preservation of records, OCFR's investigative and examination powers, compliance with federal laws regarding student loan servicing, prohibitions against certain conduct by licensees, staffing for OCFR, enforcement, violations, and reporting by OCFR.

During the hearings for the legislation, representatives from the student loan servicing industry testified and expressed opposition to requirements in the legislation related to the licensing of servicers at the state level. While the industry did not oppose the creation of the ombudsman role, representatives claimed that the law was unnecessary because they are already

[6] "Financial Education and Capability Commission 2017: Annual Report to the Maryland General Assembly," Maryland State Department of Education, http://cashmd.org/wp-content/uploads/2017/12/2017-Financial-Education-and-Capability-Commission-Report.pdf.

regulated by the Department of Education and noted that federal law potentially could preempt the State from regulating student loan servicers. Industry representatives also noted a potential increase in the cost of servicing student loans, to the extent that various states enact different licensing requirements.

The final legislation created the student loan ombudsman position within OCFR but struck all of the other language, including the licensing requirement for student loan servicers. In October 2018, Sean J. McEvoy was named the first ombudsman and OCFR unveiled its ombudsman website at: http://dllr.state.md.us/finance/consumers/frslombud.shtml. The website offers access to resources to student loan borrowers and a portal through which student loan borrowers can file their complaints.

Other States' Actions

A number of other states have adopted licensing requirements, business conduct standards, and an ombudsman specific to student loan servicers. Such requirements currently exist in California, Connecticut, Illinois, and the District of Columbia. Recent court action related to the District of Columbia licensing requirement, though, calls into question the states' authority to license student loan servicers of the FDLP loans and the government-owned FFELP loans.

In the U.S. District Court for the District of Columbia, *Student Loan Servicing Alliance vs DC, et al, No. 18–cv–640* (November, 21, 2018), the court considered the "question of whether the District of Columbia – and inferentially states – may require student loan servicers who manage federally-owned and federally-guaranteed student loans to obtain a license to operate in the District of Columbia in an effort to protect the consumers of those loans." The court concluded that the DC law is preempted under principles of conflict preemption as they relate to the servicing of the FDLP loans (owned by the federal government) and the government-owned FFELP loans (purchased and owned by the federal government), but not with respect to commercial FFELP loans (owned by private lenders but federally guaranteed).[7]

Summary of Testimony at Maryland Financial Consumer Protection Commission October 10, 2018 Meeting

The following speakers provided comments on recommendations for changes to State law to expand regulation of student loan servicers beyond the 2018 law that establishes a student loan ombudsman and requires servicers to designate an individual to represent the servicer in communications with the ombudsman:

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[7]The District Court's decision is subject to appeal to the U.S. Circuit Court for the DC Circuit. The U.S. Circuit Court for the Fourth Circuit has not addressed this issue.

- Jen Diamond, Communications and Program Manager, Maryland Consumer Rights Coalition;
- Chris Madaio, Assistant Attorney General, Office of the Attorney General; and
- Whitney Barkley, Senior Policy Counsel, Center for Responsible Lending.

Ms. Diamond called for the licensing of student loan servicers, stating: "servicers are committing many of the same offenses that the mortgage servicing industry participated in leading up to the financial crisis. Misapplied payments, incorrect information being reported to credit bureaus, poor advice from servicer to borrower, and other offenses that student borrowers experience today echo the problems experienced by homeowners throughout the foreclosure crisis. Worst of all, student loan servicers have been placing borrowers in forbearance plans that cost borrowers more money in the long run, rather than income-driven repayment plans which would make loan payments more affordable for struggling borrowers. However, unlike mortgage servicers, student loan servicers are rarely regulated at the state level and cannot be sued if a payment is applied improperly, simply because there is a lack of consistent industry standards around student loan servicers that would clarify the road to a lawsuit."

Mr. Madaio noted that federal regulation is not sufficient to assist consumers in regard to servicers, and that lack of clear standards for the student loan servicing industry allows servicer misconduct to occur.

Ms. Barkley testified that the "U.S. Department of Education is currently taking steps to roll back existing protections against student loan servicing abuses. In March 2017, the Department withdrew the servicing standards created by the previous Administration, which put in place safeguards against companies with a history of fraudulent and illegal practices. In addition to withdrawing their consumer-friendly servicing standards, the Department removed the requirement for 'high-touch servicing' from its guidelines for student loan servicers hoping to renew their contracts. Eliminating high-touch servicing means that those borrowers most at risk of default will not get the extra counseling they need to navigate all of the available options for repaying their loans on affordable terms." She added, "When the federal government fails to protect students, states must act to fill the void. Indeed, even with all the roll backs to student loan protections, the Department of Education explicitly stated that student loan servicers of federal student loans must abide by state servicing rules, laws, and regulations."

Recommendations

With the recent naming of the first student loan ombudsman, the State will have the benefit of learning about the areas that need additional education, regulation, and enforcement. The commission continues to believe that Marylanders would benefit by State standards being set for student loan servicers and by a bill of rights being established for student borrowers. In light of the recent District Court opinion with regard to a similar law

in DC, the commission discussed whether to require student loan servicers to register with OCFR and to comply with a set of standards, instead of being licensed (which would set strict eligibility requirements as recommended last year). As an example of registration, during the 2018 session, the General Assembly expanded State authority over consumer reporting agencies by codifying an existing regulatory requirement that consumer reporting agencies must register with OCFR; establishing a process for receiving and investigating complaints about consumer reporting agencies; and increasing civil monetary penalties for violations. The commission recommends that the General Assembly adopt legislation that requires student loan servicers to be registered with OCFR (or, at a minimum, comply with a set of statutory standards) through the Nationwide Multi-state Licensing System. The commission also recommends, as it did last year, that a bill of rights be established for student borrowers. Primarily, the legislation would provide OCFR with investigative and enforcement powers over student loan servicers.

Chapter 7. Retailers of Manufactured Homes

Background

Retailers of manufactured homes sell manufactured homes to consumers. Often, they provide consumers with a list of lenders that may finance a purchase of a retail home. Retailers may contract with their customers for the installation of their homes, or the consumer may hire a separate entity to install the home. Retailers must comply with various federal and state laws during their transactions.

Generally, a manufactured home means a structure that is transportable in one or more sections; is at least a specific length and width; is built on a permanent chassis; and is designed to be used as a dwelling, with or without a permanent foundation, when connected to the required utilities. In the manufactured housing industry, "mobile home" generally is understood to mean a factory-built home that was manufactured prior to the 1976 adoption of the manufactured housing construction standards administered by the Department of Housing and Urban Development (HUD). A factory-built home that is constructed according to the construction standards administered by HUD, the Manufactured Home Construction and Safety Standards, is known as a manufactured home.

Congress included a provision (Section. 107) in the Economic Growth, Regulatory Relief, and Consumer Protection Act (S.2155) enacted May 24, 2018, specifying that retailers of manufactured houses meeting certain requirements are not considered mortgage loan originators for purposes of the Truth in Lending Act (TILA).

TILA, enacted in 1968, is a federal law promoting transparency and protecting consumers taking out consumer loans. Its regulation is implemented through Regulation Z, which in part prohibits a loan originator from steering a consumer towards a loan that provides the loan originator with greater compensation than other transactions the loan originator offered or could have offered to the consumer. A loan originator includes mortgage brokers and employees of creditors and employees of mortgage brokers that originate loans, and thus may have included employees of retailers of a manufactured home. Under Regulation Z, a mortgage originator is allowed to steer a loan, however, even when the loan provides greater compensation if the loan is in the consumer's interest.

The commission is required to suggest clarifications of State law to ensure that Maryland buyers of manufactured homes are protected in their homebuying transaction.

Maryland Actions

Maryland Financial Consumer Protection Commission's 2017 Interim Report: Recommendations

After reviewing testimony during 2017, the commission recommended changes to ensure that purchasers of manufactured homes are protected during the buying process in light of the possible passage of S.2155. The commission recommended amending the definition of "mortgage loan originator" in State law, to specify that a "mortgage loan originator" includes a retailer of a manufactured home. The commission noted that clarifying the definition would make sure that Maryland buyers of manufactured homes are protected in their homebuying transaction if Congress were to pass S.2155.

2018 Legislation Considered and Passed by the Maryland General Assembly

The legislation introduced in 2018 (Senate Bill 1068/House Bill 1634) would have expanded the definition of "mortgage loan originator" to include a retailer of a manufactured home. As enacted, the legislation instead required the commission to study the possible exemption of retailers of manufactured homes from the definition of "mortgage originator" in federal law. Testimony during the bill hearings in the Senate and House of Delegates committees indicated a need to carefully consider the impact of altering the definition of "mortgage loan originator" in State law.

Summary of Testimony at Maryland Financial Consumer Protection Commission September 12, 2018 Meeting

The following speakers provided comments on recommendations for mortgage lending consumer protections for buyers of retail manufactured homes:

- Commissioner Antonio P. "Tony" Salazar;
- Assistant Commissioner Jedd Bellman;
- Ms. Marceline White, Executive Director, Maryland Consumer Rights Coalition (MCRC); and
- Mr. Bob Enten, Attorney, Maryland Bankers Association (MBA).

Commissioner Salazar provided background on the issue of altering regulation of retailers of manufactured homes. He explained that his office facilitated a manufactured housing workgroup to develop a consensus that would protect consumers in a manufactured home transaction while addressing the concerns of industry members and stakeholders.

Assistant Commissioner Bellman summarized the findings of the manufactured housing workgroup. He noted that a manufactured home retailer who originates loans are subject to the Maryland Mortgage Lender Law and discussed the four key recommendations of the workgroup. First, the workgroup recommended requiring that manufactured home retailers who do not originate loans, but provide information about loans, must do so in a fair and honest manner and may not otherwise steer consumers to products offerings less favorable terms to increase their compensation. Second, the workgroup recommended amending the definition of dwelling under Maryland law to ensure that manufactured home brokers, lenders, and originators are permanently subject to the mortgage lending laws in Maryland. Third, the workgroup recommended that retailers of manufactured homes who provide information to consumers regarding financing options must also provide a disclosure to consumers. The disclosure must provide specified information regarding borrower rights and the procedures for filing a complaint with the Commissioner of Financial Regulation. The fourth recommendation was regarding foreclosure and replevin. Mr. Bellman reported that most of the lenders are currently complying with the federal law provision that requires a creditor grantor to provide 30 days' notice to the consumer before it may initiate a self-help action or engage in replevin to repossess the manufactured home. Based on that, the workgroup recommended updating State law by increasing to 30 days from 10 days the notice period for applicable provisions under the credit laws in a repossession or action to repossess a manufactured home. The recommendation included exemptions for vacancies and surrender, similar to provisions provided for under federal law. Finally, Mr. Bellman noted that there were recommendations suggested to the group outside of the financing aspect, but the workgroup did not take a position on those recommendations to remain in the scope of the workgroup.

Ms. Marceline White on behalf of the MCRC and Mr. Bob Enten on behalf of MBA provided comments. Ms. White asked that manufactured homes be included in the Department of Housing and Community Development's Maryland Mortgage Program, which would increase affordable housing options for low-income consumers. In addition, she suggested including manufactured homes in the definition of real property so that consumers are afforded greater protections in other areas of State law. Finally, Ms. White recommended adopting policies that would require community owners to offer manufactured home residents the opportunity to purchase the land where their homes are located. Mr. Enten noted that manufactured home transactions are unique because the owner of the home does not own the property on which the home is located. Although members of MBA are not retailers of manufactured houses, the members do finance the sales of manufactured houses and are involved in manufactured housing transactions.

Commissioner Friedman pointed out that a retailer of manufactured housing generally must be registered with the Consumer Protection Division as a new home builder. These retailers, like other merchants, are prohibited from engaging in unfair, abusive, or deceptive practices when arranging financing, including misleading consumers through misrepresentations or omissions of material facts, taking advantage of a consumer's reliance on the retailer to act on the consumer's behalf, or engaging in unfair practices that harm a consumer.

Written Testimony Submitted to the Commission

The Manufactured Housing Institute (MHI), Innovations in Manufactured Homes (I'M HOME) Network, and Prosperity Now (formerly Corporation For Enterprise Development) submitted written testimony. MHI commented that it supported the recommendation from MCRC to expand the Maryland Mortgage Program to include manufactured homes, but did not support MCRC's other two recommendations. It also provided numerous comments about the specific recommendations and language circulated by the workgroup. I'M HOME requested that "any proposed change to state law should be explicit about the retailer's obligation to notify the consumer of any affiliation, financial relationship or other connection to the lenders for whom the retailer provides information." I'M HOME provided other suggestions regarding the workgroup's recommendations and identified other areas in which the workgroup could make recommendations if desired.

Recommendations

The commission recommends that the General Assembly adopt legislation that includes four provisions, which are reflective of the recommendations of the manufactured housing workgroup.

First, the commission recommends that if a retailer of a manufactured home provides information regarding financing the purchase of the home, the retailer (1) must do so in a fair and honest manner in compliance with the Maryland Consumer Protection Act and (2) may not otherwise steer a consumer to product offerings with less favorable terms. In addition, the retailer must provide a statement, in plain English, describing any financial relationship or affiliation between the retailer and the lender about whose products the retailer provides information.

Second, the commission recommends amending the definition of dwelling under Maryland law to ensure that manufactured home brokers, lenders, and originators are subject to the mortgage lending laws in Maryland.

Third, the commission recommends that retailers of manufactured homes who provide information to consumers regarding financing options also must provide a written disclosure to consumers on a form prescribed by the commissioner at the time the retailer provides financing information. The disclosure would include information regarding borrower rights and the procedure for filing a complaint with the Commissioner of Financial Regulation if a consumer is harmed or has been steered to an inappropriate product.

Fourth, the commission recommends increasing the notice requirement for an action of replevin or action to repossess a manufactured home to 30 days (consistent with federal law) or 45 days from 10 days. The notice requirement period should not apply to an action associated with a manufactured home that is surrendered or vacant.

Finally, the commission recommends expansion of the Maryland Mortgage Program to include purchases of manufactured homes. This change would allow greater access to affordable housing to low-income residents.

Chapter 8. Arbitration Rule

Background

According to the National Consumer Law Center (NCLC), "forced arbitration" clauses are terms included in contracts of adhesion that as a condition of purchase or employment require consumers or employees to give up their constitutional right to assert claims against a merchant or employer in court. The clauses appear in a variety of types of contracts, including credit agreements, cell phone contracts, nonunion employment agreements, and auto loans.

Although business advocates represent that arbitration clauses provide consumers with direct access to a private forum, in practice, many consumers are unable to use arbitration to resolve complaints for three reasons: (1) many clauses require consumers to pursue what are often small dollar claims individually, without the benefit of a class or group; (2) arbitration can be very expensive due to mandatory fees or requirements to use arbitration in another geographic location; and (3) businesses' greater familiarity with the process may allow them to prolong the duration of arbitration.

In 2015, the *New York Times* conducted an investigation about forced arbitration clauses and class actions as no government agency tracks class actions.[1] According to the article, of 1,179 class actions between 2010 and 2014 that companies sought to push into arbitration, judges ruled in the companies' favor in 4 out of every 5 cases. Further, the *New York Times* found that between 2010 and 2014, only 505 consumers went to arbitration over a dispute of $2,500 or less. Overall, consumers were not likely to go to arbitration if they were not able to participate in a class action or the amount of alleged damages was nominal.

Acknowledging the harm of forced arbitration clauses that prohibit class action suits, the Consumer Financial Protection Bureau (CFPB) issued the Arbitration Agreements Rule, which allowed consumers to bring class actions challenging abuses in the financial services sector. On November 1, 2017, however, President Trump signed a joint resolution passed by Congress disapproving the Arbitration Agreements Rule under the Congressional Review Act. In response, a Model State Consumer and Employee Justice Enforcement Act has been developed, as described below.

[1]Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *New York Times*, http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

National Consumer Law Center – The Model State Consumer and Employee Justice Enforcement Act

NCLC developed in November 2015 "The Model State Consumer and Employee Justice Enforcement Act" (Model State Act).[2] According to its publication, "the Act provides model statutory language to implement eight possible state interventions." The Act includes eight separate titles that protect against different harms related to forced arbitration of consumer and employment disputes: (1) Delegation of State Public Enforcement Authority; (2) Conditions on Persons Doing Business with the State; (3) Clear Notice and Single Document Rule; (4) Unconscionable Terms in Standard Form Contracts; (5) Prohibition of Forced Arbitration Clauses under State Law; (6) Data Disclosure Requirements for Arbitration Providers; (7) Appellate Jurisdiction; and (8) Preventing Respondents from Improperly Delaying the Arbitration Proceeding. It was written to provide solutions that likely would not be preempted by the Federal Arbitration Act.[3]

Maryland Actions

To address the harms that have resulted from the use of forced arbitration clauses, last year the commission recommended the State adopt the Model State Act.[4] The legislation introduced in 2018 (Senate Bill 1068/House Bill 1634) required the Commissioner of Financial Regulation to adopt regulations consistent with Titles III and IV of the Model State Act to prohibit a person over whom the commissioner has jurisdiction from engaging in any practice prohibited under those titles. In addition, the legislation required the Standing Committee on Rules of Practice and Procedure of the Court of Appeals to adopt rules consistent with the Model State Act.

The Maryland Bankers Association (MBA) testified during consideration of 2018 legislation that the changes related to arbitration would likely be preempted by federal law and therefore recommended that the language be stricken from the bill. In the final enacted legislation, the language related to arbitration was stricken and replaced with language requiring the commission to study "the Consumer Financial Protection Bureau arbitration rule and the Model State Consumer and Employee Justice Enforcement Act, including reviewing similar laws adopted in other states."

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[2]https://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf .

[3]The Supreme Court has held that the Federal Arbitration Act preempts States from enacting legislation that is specifically aimed at arbitration, but that States may enact legislation that addresses contracts in general. *See, e.g.*, *Doctor's Associates v. Casarotto*, 517 US 681, 686 (1996).

[4]"The Model State Consumer & Employee Justice Enforcement Act," National Consumer Law Center, https://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf.

Summary of Testimony at Maryland Financial Consumer Protection Commission Meetings (October 10 and November 16, 2018)

Commission Meeting on October 10, 2018

The following speakers provided comments on recommendations for changes to State law to provide protection intended by the CFPB Arbitration Rule and the Model State Consumer and Employee Justice Enforcement Act:

- Jane Santoni, Santoni, Vocci & Ortega, LLC;
- Lauren Saunders, Associate Director, NCLC; and
- Karla Gilbride, Staff Attorney, Public Justice.

According to Ms. Santoni, in her experience, "arbitrations are biased, do not fairly enforce the law, are slanted in favor of companies in numerous ways, do not adequately compensate consumers, and are no quicker or less time consuming than court cases." In addition, "[u]nlike cases filed in court, cases subject to arbitration cannot settle for a reasonable amount, and overwhelmingly can't be won. The facts and legal arguments in [her] cases have remained essentially the same. The only variable is that [her] clients no longer have access to their constitutional right to a jury trial." Ms. Santoni indicated that she has spoken with "defense counsel who have admitted that arbitration strongly favors their clients." Ms. Santoni noted that "when arbitration clauses first began appearing in contracts in Maryland there were defenses which we could successfully raise. Unfortunately, due to some recent Supreme Court decisions and Maryland appellate decisions, our ability to fight these clauses has greatly decreased."

According to Ms. Saunders, "Because effective enforcement of consumer protections depends on access to the courts, forced arbitration erodes the rule of law by permitting wrongdoers to get away with systematic violations." Ms. Saunders urged the commission to focus on Title I of the Model State Act that she believed would have the most impact on consumers: "authorizing whistleblower actions to expand the state's public enforcement capacity." According to Ms. Saunders, the "U.S. Supreme Court has upheld a federal statute that uses whistleblowers to pursue fraud claims on behalf of the government, and Governor Hogan signed a similar law in Maryland in 2015."

Ms. Saunders encouraged Maryland "to consider allowing whistleblowers to bring what are called in Latin '*qui tam*' actions on behalf of the state to enforce the law and recover civil penalties for the state."[5] Ms. Saunders noted that "Maryland has also permitted whistleblower

[5] *Qui tam* is short for a Latin phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*" that roughly translates to "he who brings an action for the king as well as for himself."

claims. Initially limited to Medicaid fraud, in 2015 Governor Hogan signed the Maryland False Claims Act, which expanded whistleblower actions in the State to other types of fraud against the State."

Title I of the Model State Act allows: (1) a person to initiate on behalf of the State (and not the individual) an action alleging violations of designated State consumer and worker protection statutes to recover civil penalties; (2) the state attorney general to intervene in the action and proceed with the claim as of right and for good cause; and (3) a court to award a person who initiates a claim an incentive award of up to 25% of the total monetary recovery if the person pursues the action to final judgment as the prevailing party (up to 10% if the state intervenes and pursues the action to final judgment as the prevailing party).

Ms. Gilbride provided an overview on the extent to which the Federal Arbitration Act (FAA) preempts state laws regarding arbitration. Ms. Gilbride highlighted "the concept of treating arbitration provisions like other types of contracts (the 'equal treatment principle')" and subsequently described "a series of key Supreme Court cases in which the equal treatment principle has been applied." Finally, Ms. Gilbride went on to explain the difference between "those cases that found state laws to be preempted by the FAA and those that did not."

Commission Meeting on November 16, 2018

MBA submitted additional comments regarding arbitration and testified at the November 16, 2018 hearing. Kathleen Murphy, President and CEO of MBA, noted that MBA's "members are vehemently opposed to the adoption of Title I of the 'Model State Consumer and Employee Justice Enforcement Act' or any Title thereof." According to Ms. Murphy, while "the argument is made that Maryland should adopt the [Title I of the Model State Act] because consumers need protection," the State of Maryland "already has one of the most far reaching laws for the protection of consumers in the country, the Maryland Consumer Protection Act (the 'CPA')." Ms. Murphy added: "[R]egardless of the pros and cons of arbitration versus litigation, the courts have made it crystal clear that attempts by states to void arbitration clauses are preempted." The State banking industry, she concluded, "strongly urges the Commission to reject the proposal to codify as Maryland law any portion of this one sided 'Model' State Act. We believe such legislation would negatively impact the financial services industry in the State, would adversely affect all parties to consumer contracts, and would not be beneficial to Maryland consumers."

In further correspondence dated November 26, 2018, from MBA, Ms. Murphy reiterated MBA's opposition to enactment of Title I or any other part of the Model State Act saying, "Title I will substitute the plaintiffs' bar for public officials to whom regulation of the financial services industry has been entrusted."

The MD-DC Credit Union Association also provided correspondence dated October 29, 2018, expressing that "class action litigation is far from the most efficient and effective way to resolve a dispute since it essentially puts member-owners in a position of having to sue themselves." The letter concludes that "the arbitration process has proven to be less confrontational and far less costly than litigation." The association strongly recommends that the State not move forward to adopt the Model State Act.

Recommendations

The commission discussed whether to recommend that the State adopt NCLC's Model State Act and in particular, Title I, allowing whistleblowers to bring *qui tam* actions on behalf of the State. The commission believes that, as CFPB found, forced arbitration clauses lessen consumer protection. Also, the commission believes that the issue of forced arbitration warrants further study to identify remedies which may serve to establish increased fairness for consumers. In light of the broad array of consumer contracts that it might affect, the commission recommends that the Office of the Attorney General and the Office of the Commissioner of Financial Regulation advise the General Assembly on ramifications of adopting Title I of NCLC's Model State Act.

Appendix 1. Maryland Financial Consumer Protection Commission's Charge, 2017 Recommendations, and 2018 Enacted Legislation

Chapter 18 and Chapter 781 of 2017 established the Maryland Financial Consumer Protection Commission to assess the impact of potential changes to federal financial industry laws and regulations, budgets, and policies, including changes to specified federal financial regulators as well as the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank); and to provide recommendations for federal and State actions that will protect the residents of the State in financial transactions and when receiving financial services.

The link below provides information related to the commission's activities during 2017 and 2018 on the commission's website. At this webpage, the following materials may be accessed:

- 2017 legislation that created the commission and summary of the commission's charge;
- 2017-2018 membership roster;
- 2017 meeting press releases, agendas, materials, and videos (October 26 and December 5);
- 2017 commission interim report (summary of findings and recommendations);
- 2018 enacted legislation;
- 2018 commission chair testimony at legislation hearings;
- 2018 meeting agendas, materials, and videos (June 5, September 12, October 10, November 16); and
- 2018 commission final report (summary of findings and recommendations).

http://dls.maryland.gov/policy-areas/maryland-financial-consumer-protection-commission

Summary of 2017 Interim Report Recommendations

In January 2018, the commission issued its interim report, which included numerous recommendations regarding strengthening financial consumer protection laws for Marylanders.

Recommendations for Maryland's Congressional Delegation

- The commission recommends continued advocacy and opposition, when appropriate, by Maryland's Congressional Delegation to legislative and regulatory efforts to lessen consumer and financial reforms.

- The commission recommends that Maryland's Congressional Delegation remain focused on the need to maintain strong and balanced financial consumer protection laws and regulations at the federal level. The commission also recommends that the delegation continue to support the independence of the Consumer Financial Protection Bureau.

- In addition, the commission recommends that Maryland's representatives support full funding for crucial market regulators, including the U.S. Securities and Exchange Commission (SEC) and the U.S. Commodity Futures Trading Commission (CFTC).

- Finally, the commission asks that the delegation regularly weigh in on behalf of Marylanders by all available means.

Recommendations for the Office of the State Attorney General and the Office of the Commissioner of Financial Regulation

Enhanced Enforcement and Investigative Resources

- The commission recommends vigorous enforcement by and funding of the Office of the Attorney General (OAG) and the Office of the Commissioner of Financial Regulation (OCFR), including additional dedicated State budget resources to increase staff levels within OAG and OCFR.

- The commission recommends that the State should appropriate $1.2 million to the agencies for up to an additional 10 employee positions comprised of attorneys, investigators, and administrative support staff.

Continued Use of Dodd-Frank 1042 Authorities

- The commission recommends that OAG and OCFR continue to use their authority under Section 1042 of Dodd-Frank to bring enforcement actions or other appropriate proceedings to enforce provisions of Dodd-Frank, particularly when federal regulators are not enforcing consumer protections.

Expand Violations of the Maryland Consumer Protection Act to Include "Abusive" Practices

- The commission recommends expanding the Maryland Consumer Protection Act (MCPA) to prohibit engagement in any "unfair, deceptive, or abusive trade practice" to close a possible loop-hole and strengthen the enforcement authority of OAG.

Expand Violations of the Maryland Consumer Protection Act (MCPA) to Include Violations of the Military Lending Act and the Servicemembers Civil Relief Act

- The commission recommends expanding MCPA to include violations of the Military Lending Act (MLA) and the Servicemembers Civil Relief Act (SCRA) to enable OAG to investigate and enforce all complaints by members of the Armed Forces about financial consumer protection violations.

Increase Civil Penalties for Violations of Maryland Consumer Protection Laws and Financial Licensing and Regulatory Laws

- In order to give OAG and OCFR more discretion in determining the appropriate civil penalty for violations of law and regulatory orders, the commission recommends increasing the level of civil penalty amount for any initial violation of MCPA and other financial and regulatory laws relating to nondepository financial services providers from $1,000 to $10,000 and to $25,000 for subsequent violations.

Recommendations for State Legislative Actions to Backfill Where Federal Protections Stepped Back

Fiduciary Duty

- The commission recommends, consistent with federal pre-emption issues, extending fiduciary duty in Maryland statute to all financial professionals who provide investment advice.

Forced Arbitration Clauses

- To address the harms that have resulted from the use of forced arbitration clauses, the commission recommends the State adopt the Model State Consumer and Employee Justice Enforcement Act: Titles I – VIII.

Manufactured Housing Retailers

- The commission recommends amending the definition of "mortgage loan originator" in State law, to specify that a "mortgage loan originator" includes a retailer of a manufactured home.

Payday and Consumer Lending

- The commission recommends filling possible gaps and eliminating loopholes in Maryland's current payday lending statute, particularly related to online lending and advance deposit products.

- The commission recommends (1) increasing the amount considered as a small loan and considered as a retail installment loan, particularly as these amounts have not been increased in State law since 1975 and 1977, respectively, and (2) specifying in the consumer law that contracts would be expressly void for specified violations. Loans made under the Maryland Consumer Loan Law (MCLL) provide more protections for consumers.

State Legislative Actions to Address Recent Developments

Student Loans

- In order to address the growing concerns of student loan borrowers in Maryland, the commission recommends (1) the State designate a student loan ombudsman; (2) the General Assembly adopt a student loan bill of rights; and (3) the State consider licensing student loan servicers.

Fintech

- The commission recommends that the General Assembly and OCFR ensure that Fintech firms are covered by Maryland consumer laws and regulatory protections.

Virtual or Cryptocurrencies

- The commission recommends that the General Assembly should, upon further study, consider updating current Maryland law including provisions for licensing dealers in cryptocurrencies by OCFR; the protections for investors and merchants transacting in cryptocurrencies, such as Bitcoin; and related enforcement authority. In addition, the commission recommends that companies that deal in virtual currencies should be required to comply with regulations for money transmitters.

Consumer Reporting Agencies

- In light of increasing challenges of cybersecurity and data breaches such as at Equifax and at Uber, the commission recommends prohibiting consumer reporting agencies from charging for the placement, temporary lift, or removal of a security freeze, as these are often an important remedy for identity theft.

- The commission further recommends the State strengthen, as appropriate, statutory procedures for correcting inaccurate information contained within a consumer report and require consumer reporting agencies to notify the public promptly (or within 30 days) after a breach is discovered. The commission also thinks it is worth considering requiring other businesses handling consumer financial data to report breaches (such as was reported by Uber last year) within 30 days.

Further Considerations Suggested by a Witness and Commission Members

Current Foreclosure Process

- Marceline White, Executive Director of the Maryland Consumer Rights Coalition, recommends that Maryland should repeal the current foreclosure process and change to a full-blown judicial foreclosure process.

Current Prudential Standards and Fees Applicable for Nonbank Financial Institutions

- Commission member Anne Balcer recommends that OCFR should have the authority to implement prudential standards for licensed nonbank financial institutions, particularly mortgage loan servicers and mortgage loan lenders.

When Can Consumer Protection Laws be Drafted so That They Do Not Preempt Local Jurisdiction

- Another commission member recommends asking OAG to consider when it may be appropriate to draft consumer protection laws that do not preempt local jurisdictions from enacting more stringent consumer protection laws.

Summary of Issues Included in the Final 2018 Session Legislation

The General Assembly passed several bills related to the commission recommendations.

Financial Consumer Protection

Financial Consumer Protection Act of 2018 ***(Chapter 732 – Senate Bill 1068 and Chapter 731 – House Bill 1634 of 2018)*** generally implement the recommendations in the commission's interim report.

Consumer Lending

- ***Chapter 732 and Chapter 790*** establish new requirements within the interest and usury sections of the Commercial Law Article for a "covered loan" that prohibit an unlicensed person from making such a loan. In addition, the Acts increase from $6,000 to $25,000 the threshold below which a loan is subject to small lending requirements within the MCLL and prohibit a person from lending $25,000 or less if the person is not licensed under (or exempt from) requirements of MCLL.

- The Acts also (1) increase the threshold whereby retail installment sales requirements apply to all tangible personal property from a cash price of $25,000 to a cash price of $100,000 and (2) establish that specified violations result in a loan becoming void as well as unenforceable.

Maryland Consumer Protection Act

- The Acts expand the definition of "unfair and deceptive trade practices" under MCPA to include "abusive" practices. In addition, the bills expand MCPA to include violations of the Military Lending Act and the federal Service Members Civil Relief Act.

Debt Collection

- The Acts prohibit a person from engaging in unlicensed debt collection activity in violation of the Maryland Collection Agency Licensing Act, or from engaging in any conduct that violates §§ 804 through 812 of the federal Fair Debt Collection Practices Act.

Enforcement and Penalties

- The Acts increase the maximum civil penalties that may be imposed for several types of violations, as shown in **Exhibit 1**. In general, ***Chapter 732 and Chapter 731*** harmonize the penalties for initial and subsequent violations and set the maximum penalty at $10,000 for an initial violation and $25,000 for subsequent violations.

Exhibit 1
Maximum Civil Penalties for Violations Modified by
Chapter 732 (Senate Bill 1068) and Chapter 731 (House Bill 1634)

	Current Penalty		Proposed Penalty	
	Initial Violation	Subsequent Violation	Initial Violation	Subsequent Violation
MCPA	$1,000	$5,000	$10,000	$25,000
OCFR General Enforcement	1,000	5,000	10,000	25,000
Mortgage Lenders	5,000	5,000*	10,000	25,000*
Mortgage Loan Originators	5,000	5,000*	10,000	25,000*
Check Cashers	1,000	5,000	10,000	25,000
Money Transmitters	1,000	5,000*	10,000	25,000*
Debt Management Services	1,000	1,000*	10,000	25,000*

*The maximum penalty is for each violation (rather than each subsequent violation) from which the violator failed to cease and desist or take affirmative action to correct.

MCPA: Maryland Consumer Protection Act
OCFR: Office of the Commissioner of Financial Regulation

Source: Department of Legislative Services

- Similarly, the bills increase the maximum penalty the State Collection Agency Licensing Board may impose against a licensed collection agency for a violation of a lawful order by the board. Specifically, the maximum penalty imposed for each violation cited increases from $500 to $10,000, and the total amount that may be imposed increases from a maximum of $5,000 to $25,000.

- The Acts also require the Governor to include a general fund appropriation in the State budget of at least $700,000 for OAG and $300,000 for OCFR, to be used for specified enforcement activities. In addition, the Acts require OAG and OCFR to use their authority under a specified section of Dodd-Frank, whenever considered appropriate, to bring civil actions or other appropriate proceedings authorized under Dodd-Frank.

Student Loan Ombudsman

- The Acts require OCFR to designate an individual to serve as the Student Loan Ombudsman. Each student loan servicer in the State must designate an individual to represent the student loan servicer in communications with the ombudsman. The ombudsman (in consultation with OCFR) must receive and process complaints about student education loan servicing, including receiving and reviewing complaints from student loan borrowers; attempt to resolve complaints; and compile and analyze complaint data.

- In addition, the ombudsman (in consultation with OCFR) must disseminate information about student education loans and servicing by helping borrowers understand their rights and responsibilities, providing information to the public and others, and disseminating information about the ombudsman. The ombudsman may refer any matter that is abusive, unfair, deceptive, or fraudulent to OAG for civil enforcement or criminal prosecution.

- The Acts also require the ombudsman to take other specified actions and, on or before January 1 each year, report its findings and recommendations to the General Assembly. Lastly, by October 1, 2019, the ombudsman must establish a student loan education course that includes educational presentations and material about student loans.

Consumer Reporting Agencies

Regulation

- ***Chapter 480 (House Bill 848) of 2018*** expands regulation of consumer reporting agencies (CRAs) under the Maryland Credit Reporting Agencies Act (MCRAA). The Act codifies an existing regulatory requirement that CRAs must register with OCFR; establishes a process for receiving and investigating complaints about CRAs; imposes a surety bond requirement on CRAs; and allows OCFR to recoup investigation costs.

- The Act also increases the maximum civil monetary penalty to $1,000 for the first violation of MCRAA and $2,500 for each subsequent violation of MCRAA and authorizes the imposition of a civil penalty instead of or in addition to any other action that may be taken.

Security Freezes

- ***Chapter 480*** requires CRAs to develop secure connections to process electronic requests for placing, lifting, or removing a security freeze and expands the definition of a "protected consumer" to include the elderly (age 85 or older), specified members of the military, and incarcerated persons.

- Additionally, ***Chapter 677 (Senate Bill 202)/Chapter 767 (House Bill 710) of 2018*** and ***Chapter 732 (Senate Bill 1068)*** prohibit a CRA from charging a consumer or a protected consumer's representative a fee for a placement, removal, or temporary lift of a security freeze.

Required Studies

Maryland Financial Consumer Protection Commission Studies (from *Chapter 732/Chapter 731*)

The commission is required to include related recommendations in its 2018 report to the Governor and the General Assembly.

Cryptocurrencies, Initial Coin Offerings, Cryptocurrency Exchanges, and Other Blockchain Technologies

- ***Introduced Bills:*** The introduced bills included study language and were slightly modified in the final legislation.

- ***Study Language:*** The commission is required to study cryptocurrencies, initial coin offerings, cryptocurrency exchanges, and other blockchain technologies. The commission is required to determine recommendations for State action to regulate these technologies.

Consumer Financial Protection Bureau Arbitration Rule and the Model Consumer and Employee Justice Enforcement Act

- ***Introduced Bills:*** The introduced bills would have required the Standing Committee on Rules of Practice and Procedure of the Court of Appeals to adopt rules consistent with the Act. Also, the Commissioner of Financial Regulation would have had to adopt regulations consistent with Titles III and IV of the Act to prohibit a person over whom the commissioner has jurisdiction from engaging in any practice prohibited under those titles.

- "Forced arbitration" clauses are the fine print terms included in contracts that require the consumer or employee to be unable to assert claims against a merchant or employer in court as a class action suit. The Act includes eight separate titles that protect against different harms related to forced arbitration of consumer and employment disputes.

- ***Comments from the Maryland Judicial Conference (Government Relations and Public Affairs):*** The Maryland Judiciary opposes the provision. The Court of Appeals, rather than the Rules Committee, is the body empowered to adopt rules of judicial administration, practice, and procedure which have the force of law. In addition, the Judiciary questions whether the legislature has the authority to direct the Court of Appeals to adopt rules (Article 8, Maryland Declaration of Rights, and Article IV, Section 18 of the Constitution).

- ***Other Comments:*** The requirement for the commissioner to adopt regulations should be further clarified to only apply to consumer financial contracts (and not contracts between two banks that may have arbitration language over a disputed loan participation; and not contracts between bank employers and employees or independent contractors).

- ***Study Language:*** The commission is required to study the Consumer Financial Protection Bureau arbitration rule and the Model Consumer and Employee Justice Enforcement Act, including reviewing similar laws adopted in other states. The commission is required to determine recommendations for changes to State law to provide the protection intended by the Act.

Retailers of Manufactured Homes

- ***Introduced Bills:*** The introduced bills would have defined "mortgage loan originator" under the Maryland Mortgage Originator's Law to include a retailer of a manufactured home.

- ***Consumer Financial Protection Bureau:*** Loan originator is defined as a person who, in expectation of direct or indirect compensation or other monetary gain or for direct or indirect compensation or other monetary gain, performs specified activities (*i.e.,* takes application; offers, arranges, or assists a consumer in obtaining or applying to obtain a loan; or negotiates, or otherwise obtains or makes, an extension of consumer credit for another person). The term is used to cover both individuals and business entities. Employees of a manufactured home retailer who do not do the specified activities are not included in the definition.

- ***Comments by the Commissioner of Financial Regulation:*** As drafted, it is unclear how to implement the provision. The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE Act), designed to enhance consumer protection and reduce fraud through the setting of minimum standards for the regulation of state-licensed mortgage loan originators, triggers licensing through the origination of a mortgage loan either by the acceptance of a mortgage loan application or the negotiation of the terms of a mortgage loan. A license under the Maryland Mortgage Originator's Law (MMOL) is held by individuals (not businesses). An individual can only originate a mortgage loan if that individual is sponsored by a Maryland licensed mortgage lender. Since it is unclear whether a retail seller is an individual or a business entity, it is unclear how to reconcile MMOL with the licensing and supervision of a business entity or if an individual needs to be licensed.

- ***Study Language:*** The commission is required to study the possible exemption of retailers of manufactured homes from the definition of "mortgage originator" in federal law. The commission is required to determine recommendations for clarification of State law to ensure that Maryland buyers of manufactured homes are protected in their homebuying transaction.

Fiduciary Duty: U.S. Department of Labor Conflicts of Interest Rule and Actions of the U.S. Securities and Exchange Commission

- ***Introduced Bills:*** The introduced bills would have established that specified persons are a fiduciary and have a duty to act primarily for the benefit of clients. Specified persons would have included (1) a person who engages in the business of effecting transactions in securities for the account of others or for the person's own account; (2) a broker dealer or agent; (3) an agent; and (4) an investment adviser. A person would have had to disclose to a client, at the time advice is given, any gain, profit, or commission the person may receive if the advice is followed and a legal or disciplinary event that is material to an evaluation of the person's integrity or ability to meet contractual commitments to clients. The person would have been required to make diligent inquires of each client to determine the financial circumstances and obligations of the client initially and subsequent to the first contact and the client's present and anticipated obligations to the client's family and for the client's family and goals for the client's family. The commissioner would have been required to adopt regulations.

- ***Maryland Law:*** Although Maryland law provides some protections for consumers who rely on the advice of securities professionals, it does not explicitly extend fiduciary duty to broker-dealers or their agents.

- ***Federal Action:*** The U.S. Department of Labor (DOL) finalized the fiduciary rule addressing conflicts of interest in the offering of retirement advice. Under securities laws, SEC has long had the authority to raise the standards that apply to broker-dealers offering investment advice. DOL is currently reviewing the fiduciary rule it adopted in 2016, the SEC is currently reviewing public comments about possible SEC rulemaking in this space, and the National Association of Insurance Commissioners (NAIC) is currently reviewing public comments on a draft proposal to impose a best interest standard on state-regulated insurance producers.

- ***Opposed by Investment Companies:*** Many investment companies expressed serious concerns with imposing on federally registered broker-dealers requirements that violate preemptive provisions in the Securities Exchange Act of 1934. Pursuant to preemptive provisions of federal law, the language that was in the introduced bill could not be lawfully applied to any federally registered broker dealer. This is because, as of the National Securities Markets Improvement Act of 1996, federal law preempts any state from imposing on any federally registered broker-dealer any recordkeeping requirement that is not imposed under federal law. This preemptive provision recognizes the fact that federally registered broker-dealers conduct business nationally. When individual states enact unique provisions regulating their activities or conduct, the provisions impede interstate commerce. The only way for a broker-dealer to demonstrate compliance with the disclosures and diligence requirements would be by maintaining records to document their compliance.

- ***Study Language:*** The commission is required to study the DOL rule and actions of the SEC in addressing conflicts of interest in broker-dealers offering investment advice by aligning the standard of care for broker-dealers with that of the fiduciary duty of investment advisors. The commission is required to determine recommendations regarding changes to State law to provide the protection intended by the DOL rule addressing fiduciary duty standards of care.

Maryland Commissioner of Financial Regulation Study

Fintech Firms and Technology Driven Nonbank Companies

- ***Study Language:*** The Commissioner of Financial Regulation is required to conduct a study to assess whether the commissioner has enough statutory authority to regulate "Fintech" firms or technology driven nonbank companies that compete with traditional methods in the delivery of financial services. The commissioner is required to identify any gaps in the regulation of Fintech firms, including any specific types of companies that are not subject to regulation under State law. The commissioner is required to report to the General Assembly by December 31, 2019, on its findings and recommendations for legislative proposals to regulate Fintech firms.

Issue that was Stricken from the Introduced Legislation But No Study Language

Student Loan Servicers

- ***Introduced Bills:*** The bills would have established new requirements for student loan servicers operating in Maryland. The bill would have established an application process for licensure and would have authorized the Office of the Commissioner of Financial Regulation to conduct investigations and enforce the regulation of student loan servicers.

- ***Comments by Federal Student Loan Servicers:*** 93% of all student loans are owned or guaranteed by the federal government and are governed by comprehensive rules under the Higher Education Act. There is oversight by the U.S. Department of Education, the Consumer Financial Protection Bureau, and the U.S. Department of the Treasury. They are subject to federal consumer protection and privacy laws. The effect of state regulation of a federal student loan program would create a complex process, borrower confusion, additional costs, and not address the real issues of student loan debt. The servicer's relationship with the borrower begins only after the student has taken out the loan and the funds have been spent. Complaints about student loans concern areas not controlled by servicers (*i.e.*, interest rates, repayment options, and inability to discharge in bankruptcy). Small servicers will be harmed with the added cost of licensing schemes, with audits, examinations, and annual licensing fees.

Request for a Maryland Financial Consumer Protection Commission Study

Consumer Data Breaches

- ***Comments from Credit Unions:*** There is a significant financial burden placed on credit unions and other financial institutions when an organization, third-party transaction processor, or other group has its financial transaction system or its consumer data breached, including the undetected fraud committed on a consumer, and the substantial work and cost credit unions and financial institutions are forced to outlay for the notification, cancellation, or replacement of the cards. The focus of accountable, comprehensive data breach legislation should be on where the actual breach occurred and should not be limited to credit reporting agencies. The legislation did not address this issue and did not provide a remedy to recover the actual costs credit unions had to absorb because of the fraud.

- ***Study Language:*** The credit unions request that the commission study consumer data breaches that occur to financial institutions and its consumers as a result of a merchant or processor's data being breached and the costs to the financial institutions. The study should include reviewing actions in other states. The credit unions request the commission determine recommendations as to who should share the responsibility of the costs of these breaches.

Appendix 2. Biographies of Commission Members

Gary Gensler, Chair

Senior Advisor to the Director, MIT Media Lab and Senior Lecturer, MIT Sloan School of Management, Former Chairman of the U.S. Commodity Futures Trading Commission, Undersecretary of the U.S. Treasury for Domestic Finance, and Assistant Secretary of the Treasury

Gary Gensler also had been Senior Advisor to U.S. Senator Paul Sarbanes in writing the Sarbanes-Oxley Act and co-authored *The Great Mutual Fund Trap,* a book on personal finance. Mr. Gensler worked on various political campaigns, most recently as CFO for Hillary Clinton's 2016 presidential campaign. Prior to his public service career, Mr. Gensler worked at Goldman Sachs for 18 years, having become a partner in the Mergers & Acquisition department, headed up fixed income and currency trading in Asia, and lastly was Co-head of Finance worldwide. He earned his undergraduate degree in economics, summa cum laude, and his MBA from the Wharton School, University of Pennsylvania. He is a recipient of the 2014 Tamar Frankel Fiduciary Prize.

Brian E. Frosh
Attorney General of Maryland

Prior to his current office, Attorney General Brian E. Frosh served in the Maryland General Assembly for 28 years, including 12 as chairman of the Senate Judicial Proceedings Committee. He has received awards from the Sierra Club, American Lung Association, Maryland State Bar Association, and the Maryland League of Conservation Voters. He was recognized by *The Daily Record* in 2010 with the Leadership in Law Award and was honored by his Senate peers with the First Citizen Award, presented to Marylanders who have been dedicated and effective participants in the process of making government work for the benefit of all. Prior to being elected Attorney General, he was an attorney in private practice since 1976.

Senator James Rosapepe
District 21, Prince George's and Anne Arundel counties
Member of the Senate Finance Committee

In his 22 years in the Maryland legislature, Senator James Rosapepe of College Park has specialized in financial and economic policy. He was Vice Chair of the House Ways and Means Committee and now is a member of the Senate Finance Committee. He has worked in the investment industry for more than 30 years, including serving on the boards of private equity funds and publicly traded companies. He sponsored the law creating the Maryland Financial Consumer Protection Commission and serves as a member. He also served as the U.S. Ambassador to Romania from 1998 to 2001.

Senator Joanne C. Benson
District 24, Prince George's County
Member of the Senate Finance Committee

Joanne C. Benson was elected in 1991 to the House of Delegates of the Maryland General Assembly to represent Prince George's County's 24th Legislative District. In 2011, she was elected to serve as the 24th District's first female senator and is currently the only female senator in the Prince George's County Senate Delegation. Senator Benson currently serves as Assistant Deputy Majority Leader of the Senate, a member of the Senate Finance Committee, and several joint committees. She also is a member of the Women Legislators of Maryland and serves as Chaplain of the Legislative Black Caucus of Maryland. Joanne C. Benson was born in Roanoke, Virginia. Senator Benson takes great pride in her 40-year career as an educator in Prince George's County Public Schools. Senator Benson is an activist and vigorous advocate for children, seniors, families, the disabled, and veterans.

Delegate C. William Frick
District 16, Montgomery County
Member of the House Economic Matters Committee

Delegate C. William Frick has served in the House of Delegates since 2007. He serves in House leadership as the Majority Leader. Born and raised in Montgomery County, he graduated from Montgomery County schools, Northwestern University, and Harvard Law School, and currently is an attorney in private practice. Delegate Frick sits on the Economic Matters Committee, and his interests include consumer protection, education, the environment, and constituent service.

Delegate Susan L. M. Aumann
District 42B, Baltimore County
Member of the House Economic Matters Committee

Susan L. M. Aumann grew up in the Hunt Valley community of Greencroft. A graduate of Notre Dame Preparatory School, she received a degree in Business Administration and Finance from the College of Notre Dame and later received a degree in Accounting. She has worked as an accountant and auditor for private and publicly held companies. Active in the Republican Party for more than 16 years, Delegate Aumann has been part of Governor Robert L. Ehrlich, Jr.'s campaign team since he first ran for House of Delegates in 1986. She was treasurer of the Bob Ehrlich for Maryland Committee until winning the primary. She has also been involved in a wide variety of community activities including: 42nd District Republican Club; Optimist Board Member; Friends of Loch Raven Reservoir; Member Elected to Republican Central Committee (1994-1998); Alternate to the Republican National Convention in San Diego (1996); Past Treasurer and Vice President of the North Central Republican Club; member of the Historic Hampton, Inc.; member of the Women's Committee of Hampton; and Board Member of Scenic Maryland.

Antonio P. "Tony" Salazar
Maryland Commissioner of Financial Regulation

Antonio P. Salazar was named as the new Commissioner of Financial Regulation at the Office of the Commissioner Financial Regulation effective July 5, 2017. Mr. Salazar led the Banking and Financial Institutions practice at the law firm of Davis, Agnor, Rapaport, & Skalny, LLC from 2009 until joining the office. Prior to joining the firm, he served as Deputy General Counsel of Provident Bank, a large regional mid-Atlantic bank based in Baltimore. Mr. Salazar started his banking career as an enforcement attorney with the Office of the Comptroller of the Currency. He holds a law degree from The George Washington University Law School and a Bachelor's degree from Georgetown University. Mr. Salazar is a graduate of Leadership Howard County, Class of 1999, has served on a number of local nonprofit boards, and is fluent in Spanish.

Anne Balcer
Executive Vice President of Congressional Bank
Former Maryland Deputy Commissioner of Financial Regulation

Anne Balcer is the Executive Vice President, General Counsel, and Internal Auditor for Congressional Bank, a Maryland chartered community bank. Prior to joining Congressional Bank in April 2013, she served as Maryland's Deputy Commissioner of Financial Regulation as an appointee of the O'Malley-Brown Administration. Before her career in public service, Ms. Balcer was the Director of the Foreclosure Prevention Division of St. Ambrose Housing Aid Center, Inc., in Baltimore City. She has testified before Congress, the TARP Oversight Committee, and in state and local legislatures on consumer protection, foreclosure, and fair housing. She was honored with the American Association of Residential Mortgage Regulators Distinguished Service Award in August 2012 and was named the Maryland Consumer Rights Coalition's 2012 Consumer Advocate of the Year. Ms. Balcer was also honored as one of *The Daily Record* 2012 Leadership in Law recipients.

Eric Friedman
Director, Montgomery County, Office of Consumer Protection

Eric Friedman is the Director of Montgomery County's Office of Consumer Protection. He has worked in Montgomery County's consumer protection office for the past 37 years, currently serves on Maryland's Collection Agency Licensing Board, and served on the Governor's Foreclosure Task Force. He received a law degree from George Mason University School of Law, a B.A. in Political Science from George Washington University, and is a member of the Maryland and D.C. Bars. Montgomery County's Office of Consumer Protection currently has a dedicated staff of 16, a $2 million budget, and collaborates with other government agencies and nonprofit organizations. The office strives to ensure integrity in our marketplace; and actively leverages resources to address consumer scams which target minority communities, seniors, and vulnerable consumers.

Mark Kaufman
President of City First Enterprises/Executive Vice President of City First Bank
Former Maryland Commissioner of Financial Regulation

Mark Kaufman is an Executive Vice President at City First Bank in Washington, DC, and President of City First Enterprises, an affiliated bank holding company. He previously served as Counselor to the Deputy Secretary of the U.S. Department of Treasury from 2014 to 2017, with responsibility for domestic finance issues. Previously, Mr. Kaufman served as Maryland's Commissioner of Financial Regulation from 2010 to 2014. He played a leadership role in the State's effort to respond to the foreclosure crisis and was named "Consumer Advocate of the Year" in 2014 by the Maryland Consumer Rights Coalition. Before his appointment in Maryland, he spent 15 years in investment banking, most recently as a Managing Director at CIBC World Markets in Baltimore and previously with Deutsche Bank, Alex Brown & Sons, and J.P. Morgan. From 1992 to 1994, he served on the staff of the Senate Banking Committee. Mr. Kaufman holds MBA and MPA degrees from Columbia University and a BA from Brown University. He also serves on the Board of Directors of the Enoch Pratt Free Library and the Jacob K. Javits Foundation.

Karren Jo Pope-Onwukwe, Esquire
Law Office of Karren Pope-Onwukwe, LLC

Karren Pope-Onwukwe is a prominent elder law and disability rights attorney, bar leader, and community activist; her practice centers around helping clients plan for aging, disability, and wealth transfer. She is past president of the Elder Law and Disability Rights Section Council of the Maryland State Bar Association, co-founder and past co-chair of the Elder Law Section of the Prince George's County Bar Association. *The Daily Record* named Ms. Pope-Onwukwe as 1of the 100 Top Women in Maryland for 2004. In 2007, Governor O'Malley appointed her to the Maryland State Advisory Council on Quality Care at the End of Life where she served until 2017. She also served as chair of the Prince George's County Executive's Aging Advisory Committee from 2003 to 2012. In 2009, Ms. Pope-Onwukwe was presented with the Distinguished Alumna Award from the University of Maryland University College (UMUC). She was the recipient of the 2012 Governor's Leadership in Aging Trailblazer Award and is the editor of *Practical Approaches to Maryland Guardianship*, which was published in 2010. Ms. Pope-Onwukwe earned a Bachelor of Arts from Eastern Kentucky University, a Bachelor of Science from UMUC, and a Juris Doctor from the Georgetown University Law Center.

Robin Barnes Shell
Attorney at Law

Robin Barnes Shell is an attorney in Maryland and currently investigates fraud, waste, abuse, and illegal acts in county government. She oversaw the startup of the Ombudsman and Constituent Services offices providing confidential, neutral, and independent assistance to constituents in Howard County Public School System and Prince George's County Public Schools System. Prior to her service in county government, she served as Deputy General Counsel to NeighborWorks America, a congressionally chartered community development and affordable housing nonprofit. In private practice, she provided legal counsel in complex real estate, banking and municipal finance transactions involving the construction of affordable housing, universities, and hospitals. Ms. Barnes Shell is a graduate of Georgetown University Law Center, Capital Bible Seminary, and Howard University.

Rodney H. Staatz
President and CEO, State Employees Credit Union (SECU)

Rodney H. Staatz has been President and CEO of SECU since 2003. With over 41 years of financial experience, Mr. Staatz has held various executive banking positions before joining the credit union movement in 1996. SECU is a $3.3 billion credit union headquartered in Linthicum, Maryland with over 250,000 members. Working in both the banking and credit union worlds has given Mr. Staatz a unique appreciation for what credit unions provide that for-profit financial institutions cannot provide. He recently served as Chairman of the Credit Union National Association and also sits on the boards of CSCU (Card Services for Credit Unions), OTS (Open Technology Solutions), S3 (Shared Services Solutions), and the Maryland-DC Credit Union Association.

Appendix 3. Meeting Agendas

Maryland Financial Consumer Protection Commission
Agenda
Tuesday, June 5, 2018, 1:00 p.m.
3E Senate Office Building, Annapolis

- **Chair's Opening Remarks**

- **Discussion of Cryptocurrencies, Initial Coin Offerings, Cryptocurrency Exchanges, and Other Block Chain Technologies**

  Melanie Lubin: Securities Commissioner, Office of the Attorney General, Securities Division

  Jerry Brito: Executive Director of Coin Center, a non-profit research and advocacy center focused on the public policy issues facing cryptocurrency and decentralized computing technologies.

  John Collins: Affiliate Berkman Klein Center for Internet and Society at Harvard University, where he focuses on emerging public policy issues surrounding financial technology with a specific focus on digital currencies and blockchain technology. Previously Head of Policy for Coinbase, and former Senior Advisor to the U.S. Senate Homeland Security and Governmental Affairs Committee.

  Jonah Crane: Regulator in Residence at the FinTech Innovation Lab in New York; advisor to several FinTech companies; and Executive Director of the FinTech Lab in Washington, DC (previously served as the Deputy Assistant Secretary for the Financial Stability Oversight Council at the U.S. Treasury Department).

  Andrew Wichmann: Associate at Gordon Feinblatt, LLC in Baltimore, where his practice focuses on technology law, intellectual property, and privacy and data security; previously worked as an Associate for an IP specialty boutique in Washington, DC and served as Corporate Counsel for a federal contractor in the biometrics and identity management industry.

- **Summary of 2017 Commission Recommendations, Legislation Enacted during the 2018 Session, and Required Studies (includes Issues that Were Not in the Final Legislation)**

  Tami Burt, Sally Guy, and Eric Pierce: legislative policy analysts, Office of Policy Analysis, Department of Legislative Services; and committee staff for the commission

- **Commission Discussion**

Maryland Financial Consumer Protection Commission
Agenda
Wednesday, September 12, 2018, 1:00 p.m.
3E Senate Office Building, Annapolis

- **Chair's Opening Remarks**

- **Discussion of the Impact to Financial Institutions and its Consumers from Data Breaches on Merchants and Processors**

  John Bratsakis President/CEO, MD|DC Credit Union Association

  Lisa Martin Vice President Compliance/Chief Compliance Officer, APG Federal Credit Union

  Richard Trumka, Jr. Assistant Attorney General, Consumer Protection Division

- **Recommendations for Mortgage Lending Consumer Protections for Buyers of Retail Manufactured Homes**

  Jedd Bellman: Manufactured Housing Working Group

- **Summary of 2017 Commission Recommendations, Legislation Enacted during 2018 Session, and Required Studies and Future Meetings**

  Tami Burt, Sally Guy, and Eric Pierce: Legislative Policy Analysts, Office of Policy Analysis, Department of Legislative Services; and Committee Staff for the Commission

  October 10 (Wednesday), 1 pm: Fiduciary Duty Standard, Arbitration Clauses, and Student Loan Servicers

  November 16 (Friday), 10 am: Federal Update; and Further Discussion of Cryptocurrencies, Initial Coin Offerings, and Cryptocurrency Exchanges

- **Commission Discussion**

Maryland Financial Consumer Protection Commission
Agenda
Wednesday, October 10, 2018, 1:00 p.m.
3E Senate Office Building, Annapolis

- **Chair's Opening Remarks**

- **Discussion on U.S. Department of Labor Rule and any Actions of SEC in Addressing Conflicts of Interest in Broker–Dealers Offering Investment Advice by Aligning the Standard of Care for Broker–Dealers with that of the Fiduciary Duty of Investment Advisors (recommendations for changes to State law to provide protection intended by the rule)**

  Barbara Roper: Director of Investor Protection, Consumer Federation of America
  Melanie Lubin: Securities Commissioner, Securities Division, Office of the Attorney
  Lisa J. Bleier: Managing Director and Associate General Counsel, Federal Government Relations, Securities Industry and Financial Markets Association (SIFMA)

- **Discussion on CFPB Arbitration Rule and the Model Consumer and Employee Justice Enforcement Act (recommendations for changes to State law to provide protection indented by the Act)**

  Jane Santoni: Santoni, Vocci & Ortega, LLC
  Lauren Saunders: Associate Director, National Consumer Law Center
  Karla Gilbride: Staff Attorney, Public Justice

- **Discussion on Regulation of Student Loan Servicers (recommendations for changes to State law to expand regulation beyond the 2018 law that establishes a Student Loan Ombudsman and requires servicers to designate an individual to represent the servicer in communications with the ombudsman)**

  Jen Diamond: Communications and Program Manager, Maryland Consumer Rights Coalition
  Chris Madaio: Assistant Attorney General, Office of the Attorney General
  Whitney Barkley: Senior Policy Counsel, Center for Responsible Lending

- **Commission Discussion: Recommendations for Legislative Changes**

  Data Breaches on Merchants and Processors
  Mortgage Lending Consumer Protections for Buyers of Retail Manufactured Homes

Maryland Financial Consumer Protection Commission
Agenda
Friday, November 16, 2018, 10:00 a.m.
3E Senate Office Building, Annapolis

- **Chair's Opening Remarks**

- **Discussion of Indirect Automobile Lending**

  Christopher J. Willis, Practice Group Leader, Consumer Financial Services Litigation, Ballard Spahr LLP

  Paul Metrey, Vice President, Regulatory Affairs; Chief Regulatory Counsel, Financial Services, Privacy, and Tax; National Automobile Dealers Association

  Tom Domonske, Attorney, Consumer Litigation Associates

- **Discussion on Expanding the "Ability to Repay" Standard to include Loan Modifications**

  Odette Ramos, Executive Director, Community Development Network of Maryland

  Philip Robinson, Attorney, Consumer Law Center

- **Commission Discussion: Recommendations for Legislative Changes**

  Cryptocurrencies, Initial Coin Offerings, Cryptocurrency Exchanges, and Other Block Chain Technologies
  Fiduciary Duty
  Arbitration Rule
  Student Loan Servicers
  Data Breaches on Merchants and Processors
  Retail Manufactured Homes