

NAFCU Washington Update and Litigation Risk Review

Presented by
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NAFCU's Advocacy Priorities

1. **Growth:** support regulation and legislation that allows credit unions to grow
2. **Strong NCUA:** support a strong, independent NCUA as the primary regulator for credit unions
3. **Regulatory Relief:** support streamlined, tailored regulations and relief efforts
4. **Fair and Innovative Market:** support a fair playing field, particularly for national data and cybersecurity standards
5. **Promote Transparency:** support increased accountability
6. **Preserve the Credit Union Tax Exemption**



Key Players in the Administration



Regulatory Landscape

NCUA

- With the new three-member Board, NAFCU is optimistic the NCUA may provide more relief and tailored regulations. Chairman Hood has identified capital reform, cybersecurity, and reducing regulatory burden as top issues

CFPB

- Since being confirmed as Director in December 2018, Kathleen Kraninger has carefully evaluated the Bureau's existing and future rulemaking by proposing: a rule to roll back the ATR requirements of the 2017 payday lending rule; reviews of the 2009 overdraft rule and 2013 remittances rule; and a rule on third-party debt collection practices

Treasury

- The Treasury has taken the lead on implementing President Trump's regulatory reform agenda and has suggested: no first-party debt collection rule; TCPA reform; fewer restrictions on payday lending; and changes to the CFPB's remittances rule
- The Treasury has also been active on housing finance reform and is preparing a detailed reform plan in response to President Trump's recent memo directing the Treasury, HUD, and the FHA to develop plans

National Credit Union Administration

- **Rodney Hood** was confirmed to fill his seat and elevated to **Chairman** – term to expire in 2023
- From April 2015, the NCUA Board had functioned with only two members
 - For a rule or action to be passed, the board vote must be unanimous
- **Todd Harper** was confirmed to fill former Chairman Matz's seat– term to expire in 2021
- **Board Member J. Mark McWatters** term ended in August 2019, holding over
 - If he left, back to a 2 member Board if a replacement were not nominated & confirmed



NCUA – General Introduction

- In May, the NCUA released its **Spring 2019 Rulemaking Agenda**. Rulemaking agendas are released twice annually – the fall agenda should be released around October

Agency Rule List - Spring 2019

National Credit Union Administration

| Agency | Agenda Stage of Rulemaking | Title | RIN |
|--------|----------------------------|---|---------------------------|
| NCUA | Prerule Stage | Rate Ceiling for Federal Credit Union Loans | 3133-AE94 |
| NCUA | Prerule Stage | Compensation in Connection With Loans to Members and Lines of Credit to Members | 3133-AE97 |
| NCUA | Proposed Rule Stage | Investment and Deposit Activities | 3133-AE63 |
| NCUA | Proposed Rule Stage | Subordinated Debt; Regulatory Capital | 3133-AE66 |
| NCUA | Proposed Rule Stage | Credit Union Service Organizations (CUSOs) | 3133-AE95 |
| NCUA | Proposed Rule Stage | Purchase, Sale and Pledge of Loans | 3133-AE96 |
| NCUA | Proposed Rule Stage | Real Estate Appraisals (Residential) | 3133-AE98 |
| NCUA | Proposed Rule Stage | Golden Parachute and Indemnification Payments | 3133-AE99 |
| NCUA | Final Rule Stage | Real Estate Appraisals (Non-Residential/Rural) | 3133-AE79 |
| NCUA | Final Rule Stage | Payday Alternative Loans | 3133-AE84 |
| NCUA | Final Rule Stage | Federal Credit Union Bylaws | 3133-AE86 |
| NCUA | Final Rule Stage | Fidelity Bond and Insurance Coverage for Federal Credit Unions | 3133-AE87 |
| NCUA | Final Rule Stage | Loans to Members and Lines of Credit to Members (Maturities) | 3133-AE88 |
| NCUA | Final Rule Stage | Supervisory Committee Audits and Verifications | 3133-AE91 |

NCUA – Significant Rulemakings

- During its June Board meeting, the NCUA issued a proposed rule to delay its 2015 and 2018 risk-based capital (RBC) rules for another 2 years
 - New implementation date: January 1, 2022
- NAFCU has raised concerns about the following:
 - Definition of “complex”;
 - The workability of a community bank leverage ratio;
 - Risk-weight categories;
 - Goodwill;
 - Guidance/Rulemaking on asset securitization and subordinated debt



NCUA – Significant Rulemakings

Subordinated Debt (formerly Alternative Capital): The NCUA released an ANPR in January 2017 → proposed rule expected soon.

Secondary Capital:

- Broader call options to relieve market inefficiencies;
- Consistent examinations regarding evaluation of net worth;
- Relaxed pre-approval standards for issuing secondary capital; and
- Maintaining current regulations permitting only institutional investors

Supplemental Capital:

- Preserving the not-for-profit, mutual, member-owned structure of credit unions and ensuring that ownership interest (including influence) remains with members;
- Preserving the capital structure of credit unions and safety and soundness of the industry;
- Permanence so credit unions don't see a sudden outflow of capital;
- Ability to augment subordinated debt as the credit union grows; and
- A solution with market viability

NCUA – Significant Rulemakings

- **FCU Bylaws:**

- In March 2018, the NCUA issued an ANPR to streamline, clarify, and improve the standard FCU bylaws. The NCUA issued a proposed rule in November 2018. NAFCU submitted comments for both on several issues, including:

- Amendment Process
- Limitation of Service and Expulsion
- Member Attendance at Meetings
- Elections
- Recruitment and Development of Directors

EXAMINER'S GUIDE

- Determine credit union designated an individual responsible for coordinating and monitoring day-to-day compliance; and
- Review the training provided to appropriate personnel.

Examiners should discuss emerging or unresolved deficiencies with management and, if material deficiencies exist, they should include a discussion in the examination report.

Charter and Bylaws

The credit union's charter sets forth the field of membership (i.e., who the credit union may accept as members.) The credit union must seek approval from the regional director for any amendments to the charter (name change, field of membership change, etc.). Examiners may review the current field of membership and the credit union's procedures to ensure that only the individuals within those groups named in the charter are accepted as members.

Each credit union board adopts a set of bylaws, under which the credit union operates. These may consist of a combination of pre-approved bylaws, options, and standard amendments. Additionally, credit unions may obtain approval for nonstandard bylaw amendments if they meet certain criteria. Thus, the credit union has the responsibility to maintain a current and complete set of its own bylaws.

The bylaws function as a contract between the credit union and its members. Although credit unions must permit members to review the credit union's bylaws on request, they need not provide members with a copy of the bylaws.

NCUA – Lending Proposals

On May 24, 2018, the NCUA Board issued a proposal to expand the agency’s payday alternative loan (PAL) rule. The proposal would not change or replace the existing PAL rule, but would provide an alternative PALs II option.

| Features | PALs I (current rule) | PALs II |
|--------------------------------|--|---|
| Minimum Membership | One month minimum membership requirement. | No minimum length of membership requirement. |
| Loan amount | The principal of the loan is not less than \$200 or more than \$1000. | PALs II loan can be made in amounts up to \$2000. No minimum loan amount. |
| Loan Term | Six month maximum loan term. Minimum loan term of one month. | Twelve month maximum loan term. Minimum loan term of one month. |
| Number of Loans in Loan Period | The FCU cannot make more than three PAL loans in any rolling six-month period to any one borrower and makes no more than one PAL loan at a time to a borrower. | FCU only permitted to make one loan at a time to any one borrower, but would be able to make additional loans to that borrower with no time restrictions, provided there is only one loan outstanding at a time to that borrower. |

NCUA – Lending Proposals

- **Interest rate ceiling:**
 - Interest rate currently at 18 percent
 - NAFCU has encouraged the NCUA to consider the benefits of a variable interest rate
- **Maturity limits (loans to members):**
 - Credit unions are subject to a general 15-year maturity limit for many loans
 - NAFCU has urged the NCUA to expand this general maturity limit, including for mobile homes, second mortgages, and improvements to residences
 - FCU Act is pretty limiting though

CFPB



CFPB – Rulemakings

Agency Rule List - Spring 2019

Consumer Financial Protection Bureau

| <u>Agency</u> | <u>Agenda Stage of Rulemaking</u> | <u>Title</u> | <u>RIN</u> |
|---------------|-----------------------------------|--|---------------------------|
| CFPB | Prerule Stage | Business Lending Data (Regulation B) | 3170-AA09 |
| CFPB | Prerule Stage | Higher-Priced Mortgage Loan Escrow Exemption | 3170-AA83 |
| CFPB | Prerule Stage | Property Assessed Clean Energy Financing | 3170-AA84 |
| CFPB | Prerule Stage | Remittance Transfers | 3170-AA96 |
| CFPB | Prerule Stage | Home Mortgage Disclosure Act (Regulation C) | 3170-AA97 |
| CFPB | Proposed Rule Stage | Debt Collection Rule | 3170-AA41 |
| CFPB | Proposed Rule Stage | Home Mortgage Disclosure Act (Regulation C) | 3170-AA76 |
| CFPB | Proposed Rule Stage | Payday, Vehicle Title, and Certain High-Cost Installment Loans | 3170-AA80 |
| CFPB | Proposed Rule Stage | Public Release of Home Mortgage Disclosure Act Data | 3170-AA85 |
| CFPB | Final Rule Stage | The Expedited Funds Availability Act (Regulation CC) | 3170-AA31 |
| CFPB | Final Rule Stage | Payday, Vehicle Title, and Certain High-Cost Installment Loans; Delay of Compliance Date | 3170-AA95 |

CFPB – ATR/QM

- New QM category in Section 101 of EGRRCPA
- Bureau completed its required assessment of the ATR/QM rules in January 2019
 - In January, NAFCU's Regulatory Committee recommended changes to the ATR/QM rules during a meeting with Bureau staff
- NAFCU has sought clarification regarding the applicability of Section 101 to certain high cost, longer-term mortgages that are not—by regulation—entitled to a presumption of compliance
- Currently working on recommendations to address expiration of the QM Patch – Bureau released an ANPR that would let the GSE Patch expire

CFPB – Supervisory Issues

Home Mortgage Disclosure Act:

- March 1, 2019 filing was the first to require submission of new HMDA data points added by Dodd-Frank, as well as the Bureau's discretionary data points
- On June 12, NAFCU submitted comments to the Bureau's proposed rule to extend/raise reporting thresholds: (1) raise the closed-end threshold to either 50 or 100; (2) extend temporary 500 open-end lines of credit threshold to Jan. 1, 2022, then reset to 200

Military Lending Act:

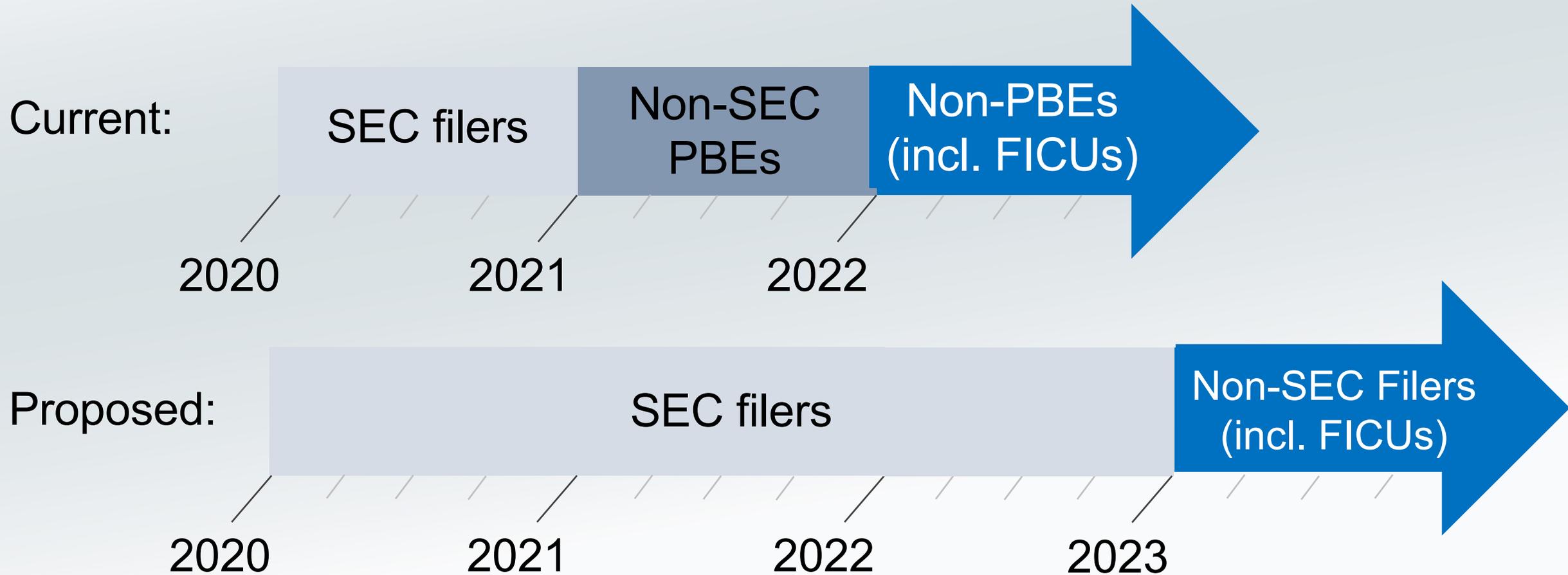
- On January 17, 2019, Director Kraninger asked Congress to grant the Bureau clear authority to supervise for compliance with the MLA. NCUA will continue to examine for MLA compliance
- NAFCU and the Defense Credit Union Council (DCUC) have advocated for changes to guidance on guaranteed acceptance protection (GAP) insurance. The Department of Defense has yet to address this issue

Other Regulators



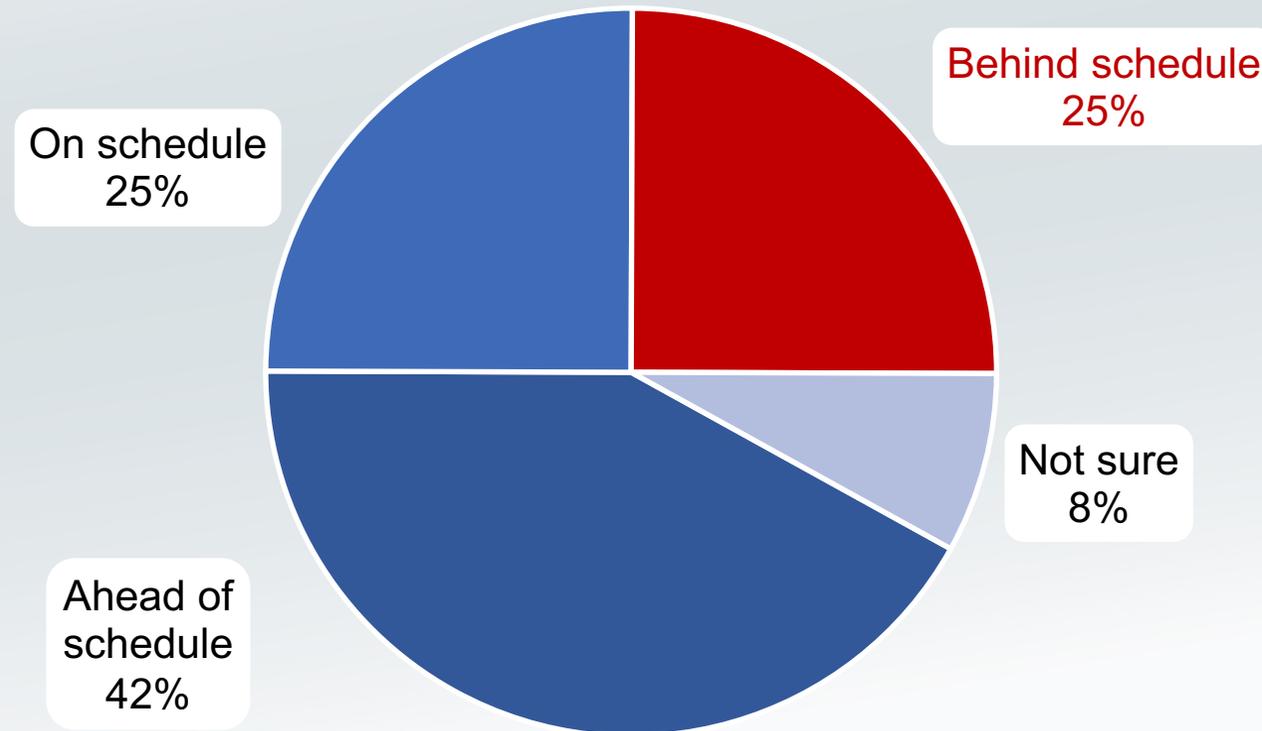
CECL

July FASB proposal would delay effective date for CECL until 2023



CECL

CECL Preparations Status



Source: NAFCU *Economic & CU Monitor* survey (Jan 2019)

GSE Reform

- **Treasury Secretary Steven Mnuchin** has expressed support for a bipartisan legislative solution to housing finance reform
 - President Trump asked Treasury, HUD, and the FHA to develop plans.
 - Treasury, HUD released plans in early September 2019
- **FHFA Director Dr. Mark Calabria** (former Chief Economist for VP Pence) has been vocal about the GSEs
 - April 2019, Calabria was confirmed by the U.S. Senate and sworn in
 - Calabria has supported a reduced government footprint, increased competition, robust capital requirements, and a strong regulator for housing finance market participants
 - The FHFA's recent annual Report to Congress contained a request to allow the FHFA more regulatory authority, including the power to charter competitors to the GSEs, and to examine third-party vendors

Federal Communications Commission

- A 2015 FCC order on the Telephone Consumer Protection Act (TCPA) caused frustration and confusion about the ability of financial institutions to market to and contact their members
- Litigation ensued over the 2015 Order and NAFCU intervened in the lawsuit – ACA International v. FCC
- In March 2018, the D.C. Circuit Court invalidated much of the FCC order, including the definition of “autodialer” and one-call safe harbor for reassigned numbers
- ***What does this mean?***
 - ➡ Credit unions can rest easy if they unknowingly call a reassigned number.
 - ➡ Most “autodialers” probably safe...until the FCC issues a new definition.

Federal Communications Commission

- On June 6, 2019, the FCC approved, effective immediately, a Declaratory Ruling and Order to allow voice service providers to automatically block suspected robocalls unless a consumer opts-out of the service
 - The final order did include a “safety valve” for callers
- The FCC also proposed a regulation to require voice service providers to implement a call authentication framework – SHAKEN/STIR – for call blocking

- ***What does this mean?***

 NAFCU is concerned that both of these initiatives could prevent credit unions from reaching their members with time-sensitive, important information, such as fraud alerts, data breaches, and even communications for loss mitigation calls as required under the mortgage servicing rules.

Key Meetings with Congress



Key Legislation Introduced in 116th Congress

Loan Maturity Relief

- H.R. 1661- Gives NCUA flexibility to extend 15-year general maturity for loans. Introduced on March 8, 2019, by Representatives Lee Zeldin (R-NY) and Vincente Gonzalez (D-TX)

Veteran's MBL Relief

- H.R. 2305 – Exempt MBLs made to Vets from MBL Cap. Introduced on April 12, 2019, by Representatives Vincente Gonzalez (D-TX), Paul Cook (R-CA), Tulsi Gabbard (D-HI) and Don Young (R-AK)

Key Legislation Introduced in 116th Congress

BSA/AML Reform

- H.R. 2514 – The COUNTER Act – passed HFSC by a 55-0 vote on 5/9/19
 - Examiner Training on BSA issues
 - Encourage technology
 - Index CTRs for inflation
 - Short-form SARs report in certain instances
 - Likely to be combined with Beneficial Ownership bill

Be Vigilant

Tax Issues

- On December 22, 2017, President Donald Trump signed the “Tax Cuts and Jobs Act” into law
- Credit union tax exemption was preserved
- Tax extenders/Technical Fixes continue to be discussed



Bankers have ratcheted up their attacks both in DC and in the states

CRA

- House Financial Services Committee examining CRA reforms
- Senator Elizabeth Warren’s “American Housing and Economic Mobility Act” reintroduced on March 13, 2019
 - While CRA not explicit for credit unions, requirements for underserved areas and community charters statutorily install CRA-like requirements.

Fintech & Data Security

Financial Technology Priorities

- NAFCU advocates for a level playing field:
 - Fintech companies require appropriate regulation and supervision
 - Fintech companies need to be accountable for protecting consumer financial data
- Regulators should promote innovation in a way that offers meaningful relief for credit unions



Data Security Priorities

- Maintaining a secure electronic environment was **ranked as the top strategic challenge** by credit union respondents in NAFCU's 2018 Report on Credit Unions
 - NAFCU seeks a national data security standard that holds merchants accountable for breaches occurring due to their own negligence
 - In January, NAFCU met with Treasury's Office of Critical Infrastructure Protection to discuss cybersecurity resources for credit unions and how Treasury might support its own recommendation that Congress develop a federal data security standard
 - Senate Banking Committee asked for comments on data security & data privacy
 - Several Congressional Committees examining data security and data privacy issues

Regulatory Challenges for CUs in 2020

- **Data Privacy**

- This fall, the California Department of Justice plans to publish a proposed rule on the CCPA
- At least 10 states have introduced draft bills to impose obligations on businesses to provide consumers with more control of their personal data → many similar to the EU's GDPR.
- NAFCU supports a national standard for data privacy



Challenges in 2020 and Beyond – Litigation Risk

- Pending or potential litigation poses risks to CUs
 - Can be resource intensive in terms of both money and staff time
 - Pose reputation risks in some cases
- Can include lawsuits filed by members or third parties, contracts that cannot be enforced
- A CU's ops can create litigation risk in multiple ways
 - New products with flaws or noncompliant terms/features
 - Employee misconduct
 - Inappropriate employment practices
 - Negligence claims (e.g. unsafe premises)
- Seeing more class action suits against CUs

Litigation – Individual vs Class Action

- Why class actions?
 - If the claims were all separate, inconsistent court decisions
 - Separate actions would lead to outcomes that negatively impact a member of the class who is not part of the suit, or
 - Individual claims not worth much so bad actors would not be held accountable
- For plaintiffs' attorneys, also means...



Overdraft/NSF Fee Litigation Risk

- Financial institutions have faced class action claims asserting overdraft or insufficient funds fees were improperly assessed
 - May claim violations of Regulation E even where a CU used the rule's model form
 - Usually claim the account agreement is unclear about when fees will be assessed or the account balance is calculated
 - Often include multiple state law claims
- State law claims more likely because Regulation E has a one year statute of limitations

Overdraft/NSF Fee Litigation Risk

- Claims against CUs go back several years – not new risk
- However, we have seen a rise in these kinds of cases
- Some firms seem to be targeting CUs, had a social medial campaign seeking potential class members
- Active firms include Kaliel PLLC, Cohen & Malad, The Kick Firm

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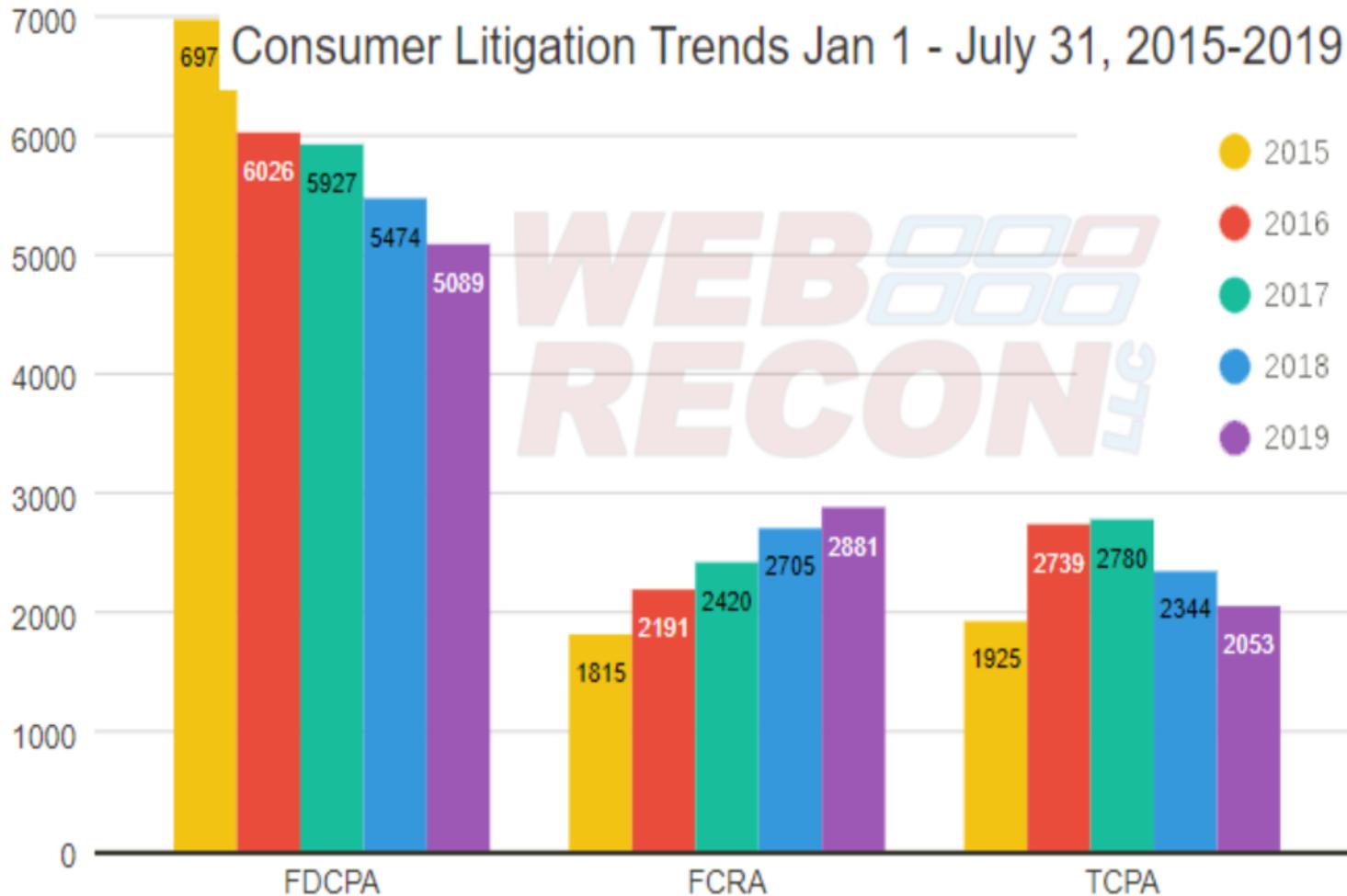
ADA Website Litigation – Where Are We Now?

- ADA requires accessibility, but there are not clear regulations for what makes an “accessible” website
- By spring 2018, hundreds of CUs in over two dozen states received demand letters, dozens of lawsuits were filed
- NAFCU filed its first amicus brief in December 2017
 - Filed 16 amicus briefs in 7 states including two federal in federal appeals court
- CUs in Virginia won early motions to dismiss, but CUs in Michigan lost – and recently won appeals
 - Three federal appeals courts have found in favor of CUs

ADA Website Litigation – Where Are We Now?

- As CUs began winning motions to dismiss, the firm targeting CUs slowed down, then shifted gears
 - The firm's recent filings are in CA and on access of online employment applications
- With multiple federal appeals courts indicating not just any consumer has the ability to bring a claim against a CU because of field of membership, industry is less of an “easy target” for plaintiffs’ attorneys
- BUT – recent suit filed against a CU – plaintiff is a member of the CU (out in AZ), not the same predatory CA firm

FCRA Litigation



- WebRecon tracks litigation trends, CFPB complaints
- Report a spike in FCRA lawsuits
- Seems to be a trend over a several year period
- 2,881 lawsuits so far in 2019

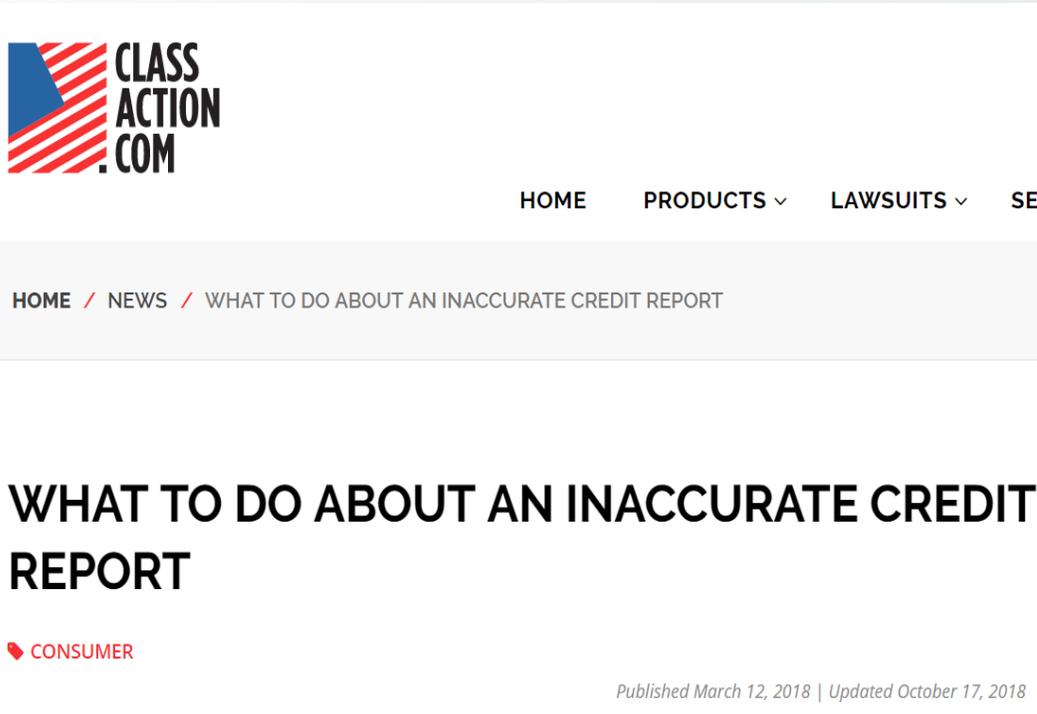
WebRecon.com, data is first 7 months of each year

FCRA Litigation

- Some recent FCRA cases against financial institutions including some against CUs
- Plaintiffs' attorneys will sometimes pair FCRA claims with Fair Debt Collection Practices Act (FDCPA)
- Many recent cases are in the context of employment provisions
- Others on inaccurate reporting or impermissible use of reports



FCRA Class Actions



- Not widespread against the industry at this point but some CUs impacted
- Plaintiffs attempting to challenge credit reporting of debts discharged in bankruptcy
- Some cases consumer reports were allegedly pulled without permissible purposes
- Many pending cases against various businesses, including banks, alleging violations of the notice requirements for employment background checks

Litigation Risk – What's Next?

Helpful to look at what banks are being sued for

- **Fair lending, immigrant borrowers** – a class action against Wells Fargo filed by DACA recipients could have broader implications if the plaintiffs are successful
- **TCPA** – a few pending class actions against a few banks



Litigation Risk – What's Next?

- **Fair lending** – with new HMDA data points publicly available, could lead groups to make challenges
- **Data privacy** – some states are considering laws in this area, sometimes with a private right of action for breaches

Recent Lawsuit “Investigations”

- Example from Classactions.org seeks consumers who may have gotten loans from CUs with dealer mark ups
- No suits filed yet, but if the investigation provides enough information, could come later

Lawsuit Investigation: Credit Union Auto Loan Fraud

June 11, 2019

This Alert Affects:

Anyone who bought a car from a dealership within the last four years and had their vehicle financed through the credit union “preferred” or “recommended” by the dealer.

What’s Going On?

Attorneys believe that many people who signed up for an auto loan with a dealership’s “preferred lender” credit union may have been charged a marked-up interest rate in what appears to be a common scheme. They’re investigating whether class action lawsuits should be filed.

Questions?

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