

March 13, 2016

Moneytree's Comments on Proposed Payday Rules

Moneytree is generally supportive of DFI's proposed rulemaking on chapter 208-630 WAC ("Proposed Rule") but has some suggestions to clarify a few provisions.

WAC 208-630-110

This amendment defines "advertise, advertising, and advertising material." Moneytree has no objection to this section of the Proposed Rule. This term only applies to a "small loan agent." *See id.* & WAC 208-630-136 (only reference to advertising in chapter 208-630 WAC is to activities of "small loan agent"). The small loan agent regulations do not apply to licensed payday lenders such as Moneytree. *See* WAC 208-630-110 ("Small loan agent services do not include ... services performed by any person holding a small loan endorsement"). Moneytree has no comment on this section of the Proposed Rule.

WAC 208-630-130

This amendment requires a new license applicant to include the company headquarters in its application. Moneytree has no objection. Moneytree notes that this information is already disclosed in the annual National Mortgage Licensing System ("NMLS") report filed by a licensee.

WAC 208-630-135

This amendment applies to small loan agents. Moneytree is exempt from the small loan agent regulations because the company has a small loan endorsement. *See* WAC 208-630-110. Moneytree has no comment on this section of the Proposed Rule.

WAC 208-630-155

This new section allows a licensee to establish one or more branch offices under a single license. This is DFI's current practice. Moneytree supports this proposal.

WAC 208-630-501

This section of the Proposed Rules has two parts. Subsection (1) of this section provides an example of the calculation of the due date for the repayment of the loan. Subsection (5) provides that borrowers can make earlier "payments" without paying a fee. Each is addressed.

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WAC 208-630-501(1)

Moneytree does not dispute the example of calculating the due date of a small loan and appreciates the clarification the example provides.

WAC 208-630-501(5)

Moneytree supports the essence of this subsection that allows a customer to pay a small loan earlier than the due date or pay it off in its entirety without paying an additional fee or penalty. This is Moneytree's policy. It is also our understanding of current law. *See* 31.45.073(f) (fees and interest "in the aggregate" cannot exceed various dollar amount based on size of loan); WAC 208-630-466(1) & (2) (same).

However, Moneytree suggests a rewording of the term "payments" (plural). Small loans are single-payment loans. Customers do not make multiple payments – they make one payment on the due date. This is reflected in the current version of WAC 208-630-520(4), which provides (emphasis added), "The borrower may pay off the *total amount due* at any time without penalty, fee, or charge for prepayment[.]"

The only way for a small loan to have "payments" would be if a customer made partial payments, which does not happen because these are single-payment loans. The use of the term "payments" (plural) could lead to the argument that partial pre-payments must be accepted. We doubt this is what DFI intends.

Partial pre-payments would lead to several operational difficulties. First, the Veritec database cannot process partial payments; a loan is either "open" or "closed." The database does not reflect a partial payment as reducing the outstanding balance. Second, a customer gives a licensee one Automated Clearing House ("ACH") authorization or one post-dated check for the full amount of the loan. A partial pre-payment would require the customer to sign a new ACH authorization or post-dated check for the new amount of the remaining balance.

A final concern about this subsection is the vagueness of the term "earlier." The proposed subsection states that a borrower can make "earlier" payments. Moneytree presumes this means earlier than the scheduled due date, but this should be clarified.

To address these concerns, Moneytree suggests that the proposed subsection be revised as follows: "The borrower can ~~make earlier payments or~~ pay off the loan entirely at any time before the due date at no additional charge or fee."

WAC 208-630-520

These amendments require the amounts and timing of scheduled payments for installment plans to be spread out equally instead of front-loaded or in a balloon payment. Moneytree already offers customers substantially equal amounts and timing of installment plan payments. We therefore support the overall purpose of this section. One part of the text of this proposed section would carry out its purpose, but other parts cause problems, which we doubt DFI intended.

WAC 208-630-520(4)(a)

This subsection reads: “Installment payments must be both substantially equal in payment amount and substantially equally distributed over the installment plan payment period.” This would accomplish the purpose of substantially equal amounts and timing of installment plan payments. Moneytree supports the adoption of this subsection.

However, we believe that the rest of this proposed section is unnecessary and potentially confusing or unworkable. For example, the remaining subsections as written are almost impossible to apply to a borrower who works more than one job and whose pay dates could fall on almost any schedule. For this reason alone, a blanket rule is unworkable such as the one included in the remaining proposed subsections mechanically requiring scheduled installments to be tied to pay dates. This difficulty is compounded by ambiguities and inconsistencies in the provisions of the remaining proposed subsections.

WAC 208-630-520(4)(b)

This subsection presents three problems and Moneytree therefore suggests that it not be adopted. First, it uses a term that conflicts with subsection 4(a). Subsection 4(b) provides that payments must be “evenly” spread out, but subsection 4(a) has a different standard: “substantially equally” distributed payments.

Second, this subsection requires at least one payment every 30 days. However, seven months of the year have 31 days. Some customers are paid once a month. Therefore, monthly-paid customers are paid every 31 days in seven of the twelve months a year. If a payment must be made every 30 days, this means that for seven months out of a year a monthly-paid customer must make a payment one day before they are paid. This could be a significant hardship for many customers.

Third, this subsection requires that payments be at least 14 days apart. However, some customers are paid every seven days. This creates two problems. The first is that another provision (subsection 4(d)) requires a payment after each pay date if the customer is paid less often than monthly. In the case of customers paid weekly, this would require a weekly payment, but this subsection (4(b)) prohibits payments within 14 days of each other – an impossibility for a weekly-paid customer. Assuming this subsection were interpreted to mean that a weekly-paid customer’s pay date would be every other week (to comply with the 14-day rule), then the second problem is that this skipping of a weekly pay date would mean that the payment will be double what it would be if paid weekly. Requiring a disproportionately large payment on alternating pay dates would be a hardship for many customers.

WAC 208-630-520(4)(c)

This subsection allows a customer and licensee to “mutually agree” to fewer payments as long as the payments are substantially equal in amount and substantially equally distributed. Moneytree supports this subsection. It would cure many of the difficulties

with the calculation of payment dates described above (if the problematic subsections remained in the final rule). Presumably, any installment plan agreement signed by both parties would be a “mutual agreement.” This would make the rest of the proposed subsections redundant.

WAC 208-630-520(4)(d)

This subsection applies to customers who are “paid” less often than once a month and requires their payments to be “after” each of their “pay dates.” This raises two issues. First, the use of “paid” is different than the defined term “pay dates.” Is it intended that the terms have different meanings in this proposed subsection? Second, a payment must be scheduled “after” each pay date. As noted above, for certain pay schedules (e.g., weekly) this conflicts with the requirement that payments be at least 14 and not more than 30 days apart. Moreover, how long after a pay date would be acceptable? It is not clear what this subsection is attempting to achieve.

WAC 208-630-520(4)(e)

This subsection defines a “pay date” as the date when a customer receives compensation from employment, government benefits, or other regular or predictable source of income or when the borrower’s bank account is credited with any direct deposit or electronic funds transfer, whichever is later.

If this subsection is to remain in the regulation, Moneytree suggests that it be revised for clarity. We make several drafting suggestions, which are summarized in track changes below.

The first suggestion is a change to the current text, which refers to the deposit of “any” direct deposit or electronic funds transfer. Presumably, DFI means the deposit or funds transfer of compensation from employment, government benefits, or other regular income – not any other kind of direct deposit or electronic funds transfer. For example, if a customer received a refund on a purchase by an ACH deposit, that would be “any” electronic funds transfer but would not be the kind contemplated by this subsection. Moneytree suggests modifying the subsection to tie the direct deposit or electronic funds transfer with the compensation, benefits, or income for the loan.

The second suggestion is that “whichever is later” be removed. It seems that the purpose of this subsection is to specify when a borrower “receives” income that is paid electronically. That could be stated directly without creating the potential confusion the current language creates. The “whichever is later” phrase suggests that there are two possible dates on which a borrower could “receive” a particular payment, which is not the case, and therefore is potentially confusing.

The third suggestion involves two instances of the use of different terms. Moneytree suggests that the same terms be used, or an explanation is given of why two different terms were used. The first instance is the use of “compensation” and “income.” The second is the use of the “days” a customer receives income and then the “date” when a

direct deposit or electronic funds transfer is made. Is a distinction between these terms intended?

If it is deemed necessary to define “pay date” the definition should be revised to something like the following:

For the purposes of installment plans, “pay date” includes any days when the borrower receives compensation from employment, government benefits, or any other regular or predictable source of income. For payments made by electronic funds transfer the pay date means ~~or~~ the date the borrower’s bank account is credited with the any deposit or other electronic transfer of funds from these sources, whichever is later.

WAC 208-630-520(4) overall

In sum, Moneytree suggests keeping subsections 4(a) and 4(c) as currently drafted, but not adopting subsections 4(b), 4(d), and 4(e).

WAC 208-630-532

This amendment eliminates the reference to loans after January 1, 2010 in the provision about not loaning to a customer in default on another loan. Moneytree supports this amendment.

WAC 208-630-545

This amendment allows the use of a trade name after DFI approval. Moneytree has no objection to the general principle behind the amendment. Moneytree uses its actual name to conduct business, not a trade name, so this provision does not directly affect us.

However, some of the provisions could adversely affect other licensees. This section states that when a licensee “conduct[s] business” with the trade name, it must either use the license name and trade name, or use the license number and trade name. The term “conduct business” is undefined. Assuming it means advertising, Moneytree notes that using the license number in advertising raises some practical concerns. Two concerns are the size of the font of the license number and the sufficiency of the disclosure in radio scripts. A third concern is that some licensees have operations in other states and use standardized materials in those states. They would be required to make costly revisions to these materials by adding a Washington license number to materials used in other states. Signage might need to be revised, which is very expensive. A more practical and less costly alternative would be if a license-number requirement were limited to a loan agreement.

Moneytree presumes this section imposes no new requirements on a licensee not operating under a trade name. Perhaps DFI could clarify this in this section.

WAC 208-630-555

This amendment clarifies that the purpose of the Veritec database is to, among other things, prevent a customer from having a balance that “exceeds” \$700 or 30% of gross

monthly income, instead of the current language, which is that the purpose is to prevent a balance that “is” one of those amounts. Moneytree supports this amendment.

WAC 208-630-556

This amendment makes two changes concerning the Veritec database. First, subsection (11) sets the date of a loan transaction, for the purposes of the right of rescission, at the date the customer actually receives the loan proceeds either in person or by direct deposit. The second change is to subsection 12(d), which would require a licensee to close a loan in the database as having been paid whenever a customer notifies the licensee that the loan was discharged in bankruptcy. Subsection 12(d) also adds that administratively closing the discharged loan is not allowed and notes that the discharged loan counts as one of the eight loans for the loan cap.

WAC 208-630-556(11)

Moneytree has no objections to the loan transaction date amendment. This subsection of the Proposed Rule is consistent with Moneytree’s understanding of current rescission requirements and its practice for setting this date for rescission purposes. However, for clarity, Moneytree suggests a textual change: adding “or electronic transfer of funds.” The reason is that another provision of chapter 208-630 WAC uses this term for the deposit of loan proceeds. *See* WAC 208-630-501(4). Using the same terms would eliminate the argument that a second meaning was intended. An additional reason is that “or other electronic transfer of funds” captures deposits made with future technology that might differ than the currently-used “direct deposit” technology.

Moneytree therefore suggests the following textual change:

For the purpose of rescinding a loan, the date of the transaction is the date the borrower actually receives the proceeds either in person or by direct deposit or other electronic transfer of funds into the borrower’s bank account.

WAC 208-630-556(12)(d)

This amendment requires loans discharged in bankruptcy to be closed in the Veritec database. We recommend that this be revised as follows:

~~When a borrower notifies you that their~~ you receive formal notice that a small loan has been discharged in bankruptcy you must close the loan as having been paid, leaving a comment in the comment box about the bankruptcy. Do not administratively close the loan. The loan must continue to count toward the borrower’s eight loan limit.

WAC 208-630-605

This amendment requires a business resumption plan in case an event damages or destroys a licensee’s books and records. Moneytree assumes this section requires the successful preservation or recovery of books and records in the event of a disaster instead of a true “business resumption plan,” which covers a variety of additional topics such as temporary office space, getting employees to a new location, and similar topics that go

beyond preserving or recovering books and records. Moneytree therefore asks DFI to clarify if this section is intended to ensure that licensees have a plan to protect books and records as opposed to a complete “business resumption plan” touching on additional issues.

Moneytree also asks for clarification that the “books and records” that must be protected by the plan are the books and records relating to a licensee’s financial condition and loan transactions as required by RCW 31.45.060(2), WAC 208-630-610, 640 and 670. If so, this section of the Proposed Rule should refer to those statutory and regulatory provisions so it is clear which “books and records” must be part of the plan.

WAC 208-630-606

This amendment requires licensees to have written policies and procedures for the destruction of “records,” including electronic records. It is unclear whether the “records” required to be retained are the “books and records” described in RCW 31.45.060(2) and WAC 208-630-610, 640, and 670. This should be clarified. “Books and records” relating to regulated activities must already be retained, and Moneytree has no objection to this. As noted above, Moneytree asks for clarification that “books and records” are the same as described in RCW 31.45.060(2) and WAC 208-630-610, 640, and 670.

This brings up the issue of the retention period. This section of the Proposed Rule describes the destruction of records “when the retention period ends.” Moneytree asks which retention period is being described. Presumably it is the two-year retention period for “books and records” relating to regulated activities as described in RCW 31.45.060(2). Moneytree asks DFI to clarify. If the two-year period is not intended, Moneytree asks DFI to clarify whether a licensee is allowed to set its own retention periods.

WAC 208-630-715

This new section requires an information security plan as referenced in the Graham-Leach-Bliley Act (“GLBA”). Moneytree complies with the GLBA so we do not object in principle to this section of the Proposed Rule. However, Moneytree notes two difficulties that can arise when any agency attempts to summarize complicated regulations from other agencies. First, it is very difficult to summarize complicated regulations but the summary – which is a generalization by necessity – is now part of a regulation binding upon a licensee. Second, the other agency’s regulation will change. This requires the first agency to update its summary of the now-changed regulation or, worse yet, results in a binding regulation that conflicts with the other agency’s regulation. Moneytree suggests that summaries of regulations be provided in non-rule formats such as Frequently Asked Questions on DFI’s web site.

WAC 208-630-716

This new section imposes various customer privacy requirements as referenced in the GLBA. Moneytree complies with this portion of the GLBA, too, so we do not object in principle to this section of the Proposed Rule. However, this section of the Proposed Rule also summarizes the customer-privacy requirements of the GLBA; Moneytree has

the same concerns about a summary of a complicated regulation as described in our comments above to section 715.

WAC 208-630-717

This new section reminds licensees that they might have duties under chapter 19.255 RCW after certain kinds of data breaches. Moneytree has no objection to this section of the Proposed Rules.

WAC 208-630-835

This amendment requires a licensee to report a “data breach” to DFI within 45 days of the breach. This seems to be similar to the requirement in the data breach statute, chapter 19.255 RCW, that a data holder notify the Attorney General within 45 days of a “breach of the security of the system.” *See* RCW 19.255.010(15) & (16). Moneytree supports the general principle of this section of the Proposed Rule and has policies and procedures in place to report these events as required by chapter 19.255 RCW.

However, the current text creates a problem. “Data breach” in the Proposed Rule is not defined. Moneytree suggests the use of the term “breach of the security of the system,” which is defined in RCW 19.255.010(4) as the:

[U]nauthorized acquisition of data that compromises the security, confidentiality, or integrity of personal information maintained by the person or business. Good faith acquisition of personal information by an employee or agent of the person or business for the purposes of the person or business is not a breach of the security of the system when the personal information is not used or subject to further unauthorized disclosure.

An additional suggestion is to tie the data breach to the licensee’s information systems. The current text describes notifying the DFI of any data breach when, we presume, only data breaches of the licensee’s information systems are contemplated.

Therefore, we suggest the following language for WAC 208-630-835(3):

Other. Post notification. Within forty-five days of a data breach of your information systems you must notify the director in writing. As used in this subsection, “data breach” has the same meaning as “breach of the security of the system” in RCW 19.255.010(4). This notification requirement may change based on directives or recommendations from law enforcement. See also WAC 208-630-717.

WAC 208-630-836

Finally, this amendment adds “small loans” to the title of the regulation about notifying DFI of a cessation of licensee’s business; no other changes are made to the regulation. Moneytree has no objection to this section of the Proposed Rule.

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