

# PUBLICATION

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## Looking Ahead: What the Auto Lending Industry Can Expect from the CFPB in 2016

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The CFPB's critics are getting louder, arbitration clauses are spending some time on the chopping block, and credit reporting continues to garner more and more attention. These are all things we can expect to focus on this year as the auto lending industry continues its power struggle with the CFPB.

### Senate passing "Reforming CFPB Indirect Auto Financing Guidance Act" (H.R. 1737)

All signs point to the Senate passing the Reforming CFPB Indirect Auto Financing Guidance Act (H.R. 1737) this year. Currently, the Act is in the Senate and has not been taken up for a vote yet, but several industry leaders are estimating as many as 60 votes in its favor.

Last November, [the House passed the Act with a resounding 392-96 vote](#). The Act aims to curtail the CFPB's attempts to regulate purportedly discriminatory auto lending practices. According to the CFPB, auto lenders are charging minorities a higher markup on products than similarly situated white borrowers. Auto dealers and lenders, however, have questioned the methodology used by the CFPB to reach this conclusion, and the Act is the auto industry's attempt to obtain more transparency from the CFPB.

Although President Obama will likely veto the Act if it passes in the Senate, there is a high probability that the Act will get passed by a Congressional override. If nothing else, the strong bipartisan support for the Act is a powerful indictment on the CFPB's forays into the auto lending space so far. We are likely to see stronger, louder outcry from the auto lending industry regarding the CFPB's attempts to issue guidance in 2016.

### Additional movement toward limiting arbitration clauses

This year, the CFPB is likely to issue a formal, proposed rule limiting the use of arbitration clauses in consumer lending agreements. In October 2015, the CFPB [announced its plans to propose rules limiting the use of arbitration clauses that affect a consumer's right to participate in a class action lawsuit](#).

Once the CFPB publishes its proposed rule and the comments period opens, we expect that many auto lending companies will submit comments opposing a final rule. A proposed rule is expected in mid-to-late 2016.

If the CFPB enacts a final rule curtailing arbitration clauses in consumer finance products, it is very likely that the rule will end up before the U.S. Supreme Court at some point. Arbitration clauses have been a hot topic in the Supreme Court as of late. In fact, the Court issued a new decision upholding arbitration clauses in December 2015: *DIRECTV, Inc. v. Imburgia*. In that case, Justice Ginsburg issued a dissent and relied on the CFPB's study finding that mandating arbitration and banning class action lawsuits harms consumers.

To be sure, Supreme Court involvement regarding a CFPB rule curtailing arbitration clauses is still years in the future. The recent landscape of case law regarding arbitration clauses will influence many commenters and will ultimately influence the CFPB's position as to whether such a rule is in the consumers' best interest.

## Continued criticism regarding the CFPB's methodology

In January 2016, the Republican staff of the House's Committee on Financial Services issued a [report](#) finding that the CFPB improperly issued settlement checks to white consumers in connection with the 2014 Ally Financial settlement. (In the 2014 CFPB/DOJ joint enforcement action against Ally, Ally was ordered to pay \$80 million in damages to a large class of claimants for its "discriminatory pricing system." There, the CFPB found that Ally charged minorities higher markups on auto loans than their white counterparts.)

According to the House Committee, [the CFPB inflated the number of potential claimants in order to inflate the settlement figure to which Ally ultimately agreed](#). Then, once a settlement agreement was achieved, the CFPB employed questionable metrics to identify 419,669 potential claimants – none of which were required to disclose their race before becoming eligible for compensation. The House Committee concluded that the CFPB unfairly "targeted a company that it knew had a strong incentive to settle for business reasons and applied undue leverage against the company to extract a large settlement."

The House Committee is the latest in a long line of critics of the CFPB's data mining processes, particularly in connection with its research regarding disparate impact on minorities. Many expect that CFPB Assistant Director Patrice Ficklin will be called to testify before the Financial Services Subcommittee on Oversight and Investigation in the spring of 2016. It will be interesting to see how, if at all, the CFPB reacts to the mounting criticism.

## Increased scrutiny regarding credit reporting

In its [Monthly Complaint Report published on March 1, 2016](#), the CFPB reported that, between November 2015 and January 2016, it received an average of 3,536 consumer complaints per month focusing on credit reporting. Although this figure represents a seven percent decrease from credit reporting complaints received in the same period last year, it is still the third most common type of complaint received by the CFPB.

Last August, the CFPB reported a "sharp increase" in credit reporting complaints between June and July 2015, and the CFPB has since been increasing its scrutiny in this arena. Unlike complaints against one specific product (like a mortgage or student loan), credit reporting complaints can implicate several different parts of the financial services industry.

According to the CFPB, 97 percent of the credit reporting complaints deal with the three major credit reporting agencies (Equifax, Experian and Trans Union). If the CFPB continues to increase regulation of these three companies, auto lenders may start feeling the pinch as the regulation inevitably spreads to data furnishers as well.