

Consumer Financial Services Outlook 2024

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Today's Discussion

- Election Year and the Legislative Landscape
- Federal Enforcement Outlook
- Federal Regulatory Agenda and Policy Developments
- Hot Topics and Trends in Financial Services
 - Banking
 - Privacy
 - Payments, AI, and Cryptocurrency
 - Mortgage and Lending
- State Developments
- Wrap-up

Consumer Financial Services Outlook 2024

Panelists



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Election Year and the Legislative Landscape

CFS Policy Landscape

- Consumer Banking
 - Rate caps
 - Credit card processing
 - Payments/open banking (data brokers)
 - Data privacy
- Fintechs/Non-bank lenders
 - Regulation
 - Industrial bank charters
- Agency oversight
- Cryptocurrency
 - Stablecoins
 - Market structure
 - Illicit Finance

- Housing
- Capital Formation
- Merchant category codes (MCC)
- Capital flow to China
- ESG policies and “woke capitalism”
- Executive accountability/RECOUP Act

Agency proposals of particular interest:

- SEC – climate risks, custody rule
- CFPB – data privacy, fees, nonbank payments, FCRA; small business data
- Fed/OCC/FDIC – Basel III; liquidity; resolution authority; interchange fees

Second Session of Congress and Electoral Outlook

- Q1 legislative gauntlet with unfinished business from 2023 (FY24 appropriation, supplemental funding, etc.)
 - Last best chance for legislating until after the November elections
- Dysfunctional GOP House majority – down to 220-213
 - Governing by consensus/suspension calendar
- 2024 elections
 - 85-90% GOP Senate next Congress, independent of Presidential outcome
 - House will correlate closely with the national (popular) Presidential vote
- Lame duck session – must pass legislation (NDAA, Farm Bill, FY25 appropriation, etc.)
 - Chairman McHenry legacy-minded and looking to deal
- Rules and regs
 - First half of 2024 crunch period for Biden Admin given CRA lookback
 - SCOTUS revisiting *Chevron* doctrine



Federal Enforcement Outlook

Constitutional Challenges to the CFPB

- On October 3, the Supreme Court heard oral argument in *CFPB v. Community Financial Services Association of America, Ltd.*
 - The Fifth Circuit had found that the CFPB’s funding structure is unconstitutional and struck down the Payday Lending Rule.
- A ruling in CFSA’s favor has the potential to transform enforcement of consumer financial services laws and implementing regulations.
 - Under Section 1024(c)(3) of the CFPA, the FTC and the CFPB are required to “negotiate an agreement” for coordinating their enforcement actions to avoid duplication. If the CFPB could no longer enforce these laws through agency proceedings or in federal court, the FTC may be forced to pick up the slack.
- A decision from the Court is expected by June 2024.

CFPB Enforcement Activity in 2023

- Overall, there has not been a noticeable uptick in enforcement actions from the CFPB this year.
 - The CFPB has reported around 22 total actions (administrative and civil), which is about half the activity of “busy” years like 2015 and 2020, and similar to recent years.
 - The CFPB has not published its report on redress and penalties in 2023 enforcement actions, but a rough estimate is about \$220 million in known redress and \$240 million in penalties.
- This is similar to the past 8 years, except for 2022, where the total was over \$2 billion as the result of one notable case.

CFPB Enforcement Activity in 2023, cont.

- The CFPB filed a total of 15 new civil enforcement actions in federal court in 2023, of which 12 remain pending.
 - Of the 15, 3 were stipulated orders.
 - Of the 12 pending actions, 5 are actions to enforce CIDs.
- Most of the pending actions are either stayed or have a motion to stay pending the Supreme Court's ruling on the constitutionality of the agency's funding.

CFPB Civil Enforcement Activity in 2023, cont.

In addition to the CFPA, substantive claims were brought under:

- The Fair Housing Act
- The Interstate Land Sales Full Disclosure Act
- The Home Mortgage Disclosure Act
- The Electronic Fund Transfer Act
- The Federal Debt Collection Procedures Act
- The Truth in Lending Act
- The Fair Debt Collection Practices Act

The types of issues targeted included:

- Home and car loans
- Discriminatory lending or targeting of specific groups for allegedly illegal disclosure practice, including exploiting language barriers
- Misreporting home mortgage data
- Misrepresentations related to short-term, small-value auto title loans
- “Loan churning” or pushing consumers to refinance
- Improper disabling or repossession of cars subject to auto loans
- Failing to pay refunds owed for gap insurance on auto loans
- Double-billing and misapplied payments
- Insufficient or misleading “rental purchase” or “lease-to-own” disclosures
- For-profit education loans

CFPB Administrative Enforcement in 2023, cont.

The CFPB reported 19 administrative enforcement action in 2023, all of which were stipulated orders.

In addition to the CFPA, substantive claims invoked:

- The Electronic Fund Transfer Act
- The Equal Credit Opportunity Act
- The Fair Credit Reporting Act
- The Fair Debt Collection Practices Act
- The Home Mortgage Disclosure Act
- The Consumer Leasing Act
- The Real Estate Settlement Procedures Act
- The Truth in Lending Act
- The Military Lending Act

Administrative enforcement actions focused on:

- Overdraft and NSF fees and related disclosures
- Mortgage data and information collection for mortgage applicants
- Mortgage referrals
- Car and personal loan insurance and other add-ons
- Failing to honor loan extensions
- Insufficient and misleading disclosures for remittance transfers
- Failure to place/remove security freezes
- Improper use of consumer data
- Sign-up bonuses for credit cards
- Prepaid cards
- Medical debt collection

FTC Financial Services Enforcement Activity in 2023

- Overall, the FTC did not initiate many new civil actions against the financial services industry in 2023.
- Two new stipulated orders filed in federal court. These concerned:
 - Cryptocurrency investments (FTC Act and Gramm-Leach-Bliley Act)
 - Trade recommendation services and earnings representations (FTC Act and ROSCA)
- The FTC also resolved by stipulated order a pending lawsuit related to debt relief services, which included a \$17 million monetary judgment.
- The FTC announced that \$3.3 million had been distributed to consumers as the result of a settlement/default judgment related to student debt relief.
- Summary judgment and permanent injunction issued related to business that provided merchant cash advances.

Constitutional Challenges to FTC – *SEC v. Jarkesy*

- In *SEC v. Jarkesy*, the Fifth Circuit addressed the SEC’s enforcement authority, which is similar to the FTC’s enforcement authority.
- Fifth Circuit held that the SEC’s enforcement action suffered three constitutional defects:
 - The imposition of monetary penalties in an administrative action deprived Jarkesy of his Seventh Amendment right to a jury trial.
 - Congress delegated legislative powers to the SEC by allowing it to choose whether to sue in federal court or through an administrative proceeding without providing an “intelligible principle.”
 - SEC ALJ’s two layers of protection of for-cause removal impedes Article II’s requirement that the president must “take Care that the Laws be faithfully executed.”
- The SEC appealed the Fifth Circuit’s decision, and the Supreme Court heard argument on November 29.

Constitutional Challenges to the FTC

- Since the Fifth Circuit issued its opinion in *Jarkesy*, other litigants have raised similar and additional challenges to the FTC’s constitutionality.
- No court has adopted these arguments yet.

Case	Seventh Amendment	Non-Delegation	Article II Removal	Due Process	Equal Protection
<i>SEC v. Jarkesy</i> (5 th Cir.)	Unconstitutional ●	Unconstitutional ●	Unconstitutional ●		
<i>Illumina v. FTC</i> (5 th Cir.)		Constitutional ○	Constitutional ○	Constitutional ○	Constitutional ○
<i>FTC v. Intuit</i> (FTCALJ)		Constitutional ○	Constitutional ○	Constitutional ○	
<i>FTC v. Kochava</i> (D. Idaho)		Constitutional ○	Constitutional ○		
<i>Axon v. FTC</i> (D. Ariz)			Complaint Allegations Mooted by FTC’s Dismissal of Administration Action ●	Complaint Allegations Mooted by FTC’s Dismissal of Administration Action ●	
<i>US. V. Stratics Networks</i> (S.D. Cal)		MTD Briefed ●	MTD Briefed ●	MTD briefed ●	
<i>FTC v. Syngenta</i> (M.D.N.C.)			Constitutional ○		
<i>FTC v. Precision Patient Outcomes</i> (N.D. Cal.)		Counterclaimed ○	Constitutional ○	Counterclaimed ○	
<i>FTC v. Roomster</i> (S.D.N.Y.)			Constitutional ○		
<i>FTC v. Traffic Jam Events</i> (5 th Cir.)			Decision Pending ●	Decision Pending ●	
<i>Childhood Leukemia Foundation v. FTC</i> (D.N.J.)			Voluntarily Dismissed prior to MTD being filed ●	Voluntarily Dismissed prior to MTD being filed ●	



Federal Regulatory Agenda and Policy Developments

CFPB Fall Regulatory Agenda

As of September 30, 2023



Agency	Agenda Stage of Rulemaking	Title	RIN
CFPB	Prerule Stage	Fair Credit Reporting Act Rulemaking	3170-AA54
CFPB	Proposed Rule Stage	Overdraft Fees	3170-AA42
CFPB	Proposed Rule Stage	Required Rulemaking on Personal Financial Data Rights	3170-AA78
CFPB	Proposed Rule Stage	Mortgage Servicing	3170-AB04
CFPB	Proposed Rule Stage	Fees for Insufficient Funds	3170-AB16
CFPB	Proposed Rule Stage	Supervision of Larger Participants in Consumer Payment Markets	3170-AB17
CFPB	Proposed Rule Stage	Financial Data Transparency Act	3170-AB20
CFPB	Final Rule Stage	Amendments to FIRREA Concerning Automated Valuation Models	3170-AA57
CFPB	Final Rule Stage	Property Assessed Clean Energy Financing	3170-AA84
CFPB	Final Rule Stage	Registry of Nonbank Covered Persons Subject to Certain Agency and Court Orders	3170-AB13
CFPB	Final Rule Stage	Registry of Supervised Nonbank That Use Form Contracts to Impose Terms And Conditions That Seek To Waive Or Limit Consumer Legal Protections	3170-AB14
CFPB	Final Rule Stage	Credit Card Penalty Fees	3170-AB15

CFPB Rulemaking Highlights

Select Final Rules Issued by the CFPB in 2023



Digital Mortgage Comparison-Shopping Platforms & Related Payments under RESPA (Regulation X)

- Advisory Opinion stating digital technology platforms that enable consumers to comparison shop for mortgages and other real estate settlement services may violate the Real Estate Settlement Procedures Act (RESPA) if they steer consumers towards certain platform participants in exchange for compensation from those participants.

Small Business Lending Data Collection under the Equal Credit Opportunity Act (Regulation B)

- Regulation B amendments that, pursuant to Equal Credit Opportunity Act changes made by section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), require covered financial institutions to collect and report to the CFPB data on small businesses' applications for credit, including those owned by women or minorities.

Collection of Time-Barred Debt under the Fair Debt Collection Practices Act (Regulation F)

- Advisory Opinion stating that the Fair Debt Collections Practices Act (FDCPA) and its implementing regulation, Regulation F, prohibit covered debt collectors from suing or threatening to sue for the collection of a time-barred debt.

Facilitating the LIBOR Transition Consistent with the LIBOR Act (Regulation Z)

- Interim final rule amending Regulation Z, which implements the Truth in Lending Act (TILA), to incorporate benchmark rate replacements in light of the planned cessation of most USD LIBOR tenors and the Adjustable Interest Rate Act (LIBOR Act).

Fair Credit Reporting & Background Screening under the Fair Credit Reporting Act

- Two Advisory Opinions concerning consumer reporting agencies' obligations when reporting public record information, including adverse information in consumer reports, disclosing files to consumers upon their request.

CFPB Rulemaking Highlights



What may be next? Select Proposed Rules Issued by the CFPB in 2023

Credit Card Penalty Fees (Regulation Z)

- Proposal to amend credit card late fee rules in Regulation Z pursuant to Truth in Lending Act (TILA) requirements that they be “reasonable and proportional” to the corresponding late payment. The Proposed Rule would:
 - lower safe harbor dollar amount for late fees to \$8 and remove safe harbor for higher late fees for subsequent violations of the same type;
 - make the regulation’s provision for annual inflation adjustments to safe harbor amounts inapplicable to the late fee safe harbor amount; and
 - cap credit card late fee amounts at 25% of the required payment.
- Comments closed on May 03, 2023.

Required Rulemaking on Personal Financial Data Rights under CFPB Section 1033

- Proposal to require covered entities (e.g., banks) to make available to consumers, upon request, transaction and other data concerning a consumer financial product or service that the consumer obtains from the covered entity, establish obligations of third-parties accessing that data, provide privacy protections for that data, and help establish standards for sharing that data.
- Latest development in the CFPB’s efforts to implement the open-banking provision (Section 1033) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) following the release earlier in 2023 of a report summarizing feedback received from a Small Business Regulatory Enforcement Fairness Act (SBREFA) panel on its proposal.
- Comments closed on December 29, 2023.

CFPB Rulemaking Highlights



What may be next? Select Proposed Rules Issued by the CFPB in 2023

Larger Participants of a Market for General-Use Digital Consumer Payment Applications

- Proposal to add regulations that would establish CFPB supervisory authority over certain nonbank entities that are “larger participants” in a market for “general-use digital consumer payment applications”.
 - Create new provisions defining them as “larger participants of a market for other consumer financial products or services” under Section 1024 of the Consumer Financial Protection Act (CFPA).
 - Activities considered part of the market for general-use digital consumer payment applications would generally include nonbank entities that provide funds transfer or wallet services to consumers through a digital application if those services are available for consumers’ general use. Digital payment applications that limit their uses to specific types of transactions may be excluded.
- Proposed test for supervision – A nonbank entity covered by the CFPA must:
 - Provide general-use digital consumer payment applications with annual volume of at least 5 million consumer payment transactions; and
 - Not be a small business concern based on the Small Business Administration (SBA) size standard.
- If the CFPB’s supervisory authority is established, the CFPB would be authorized to require reports from and conduct examinations of these nonbank entities.

FTC Fall Regulatory Agenda

As of September 30, 2023



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Agency	Agenda Stage of Rulemaking	Title	RIN
FTC	Prerule Stage	Rule Concerning Energy and Water Use Labeling for Consumer Products	3084-AB15
FTC	Prerule Stage	Disclosure Requirements and Prohibitions Concerning Franchising	3084-AB49
FTC	Prerule Stage	Identity Theft Rules	3084-AB50
FTC	Prerule Stage	Regulatory Review	3084-AB53
FTC	Prerule Stage	Trade Regulation Rule on Funeral Industry Practices	3084-AB55
FTC	Prerule Stage	Children's Online Privacy Protection Rule	3084-AB58
FTC	Prerule Stage	Business Opportunity Rule	3084-AB65
FTC	Prerule Stage	Trade Regulation Rule on Commercial Surveillance	3084-AB69
FTC	Prerule Stage	Earnings Claims Trade Regulation Rule	3084-AB70
FTC	Prerule Stage	Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations	3084-AB73
FTC	Prerule Stage	Labeling Requirements for Alternative Fuels and Alternative-Fueled Vehicles	3084-AB78
FTC	Proposed Rule Stage	Telemarketing Sales Rule	3084-AB19
FTC	Proposed Rule Stage	Trade Regulation Rule on Ophthalmic Practice Rule	3084-AB37
FTC	Proposed Rule Stage	Health Breach Notification Rule	3084-AB56
FTC	Proposed Rule Stage	Use of Prenotification Negative Option Plans	3084-AB60
FTC	Proposed Rule Stage	Trade Regulation Rule Concerning Power Output Claims for Amplifiers Utilized in Home Entertainment Products	3084-AB62
FTC	Proposed Rule Stage	Trade Regulation Rule on Impersonation of Government and Businesses	3084-AB71
FTC	Proposed Rule Stage	Motor Vehicle Dealers Trade Regulation Rule	3084-AB72
FTC	Proposed Rule Stage	Non-Compete Clause Rule	3084-AB74
FTC	Proposed Rule Stage	Trade Regulation Rule Concerning Reviews and Endorsements	3084-AB76
FTC	Proposed Rule Stage	Unfair or Deceptive Fees Trade Regulation Rule	3084-AB77
FTC	Final Rule Stage	Standards for Safeguarding Customer Information	3084-AB35
FTC	Final Rule Stage	Premerger Notification Rules and Report Form	3084-AB46

FTC Rulemaking Highlights

What may be next? Select Proposed Rules Issued by the FTC in 2023



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Negative Option Rule

- FTC proposed replacing existing Negative Option Rule with and updated “Rule Concerning Recurring Subscriptions and Other Negative Option Plans.” Proposed rule incorporates aspects of Telemarketing Sales Rule (TSR), Restore Online Shoppers’ Confidence Act (ROSCA), and state automatic renewal laws by addressing, among other things:
 - Definition of “negative option feature”
 - Disclosure & misrepresentation of important information
 - Consumer consent
 - Cancellation methods & “save” attempts
 - Reminders, confirmations, and other notices
- Comments closed on June 23, 2023.

FTC Rulemaking Highlights

What may be next? Select Proposed Rules Issued by the FTC in 2023



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Trade Regulation Rule on Unfair or Deceptive Fees

- FTC proposed a “Rule on Unfair or Deceptive Fees” targeting unfair or deceptive practices relating to fees for goods or services. The proposed rule would add to Commission’s implementation of Section 5 of the FTC Act by:
 - Adding definitions for fee-related terms
 - Prohibiting hidden fees and “bait-and switch pricing”
 - Prohibiting misrepresentations of nature and purpose of fees
 - Creating disclosure requirements concerning fees
- Comments close on February 7, 2024 (following extension).

FTC Rulemaking Highlights



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

What may be next? Select Proposed Rules Issued by the FTC in 2023

Trade Regulation Rule on Use of Consumer Reviews and Testimonials

- FTC proposed a “Rule on the Use of Consumer Reviews and Testimonials” targeting unfair or deceptive practices involving consumer reviews or testimonials. The proposed rule would add to Commission’s implementation of Section 5 of the FTC Act by, among other things, prohibiting businesses from:
 - Creating fake third-party reviews, purchasing fake third party reviews, offering incentives for positive reviews, and “repurposing” real consumer reviews
 - Using prohibited reviews in marketing materials
 - Misrepresenting independent nature of reviews or failing to disclose certain connections
 - Suppressing certain kinds of reviews
 - Selling “indicators of social media influence” (e.g., likes)
- Comments closed on September 29, 2023.

FCC Closes 'Lead Generator' Robocall Loophole & Adopts Robotext Rules



Federal
Communications
Commission

Telephone Consumer Protection Act of 1991 (TCPA) gives the Federal Communications Commission (FCC) authority to regulate text messages. Pursuant to this authority, the FCC adopted rules aimed at lead generators and unsolicited texts.

1. Mobile wireless providers are now required to block text messages from numbers identified by the FCC as belonging to bad actors.
2. The Do-Not-Call Registry's protections, including consumer consent requirements, apply to text messages.
3. Texters, callers are prohibited from applying a single consumer consent to multiple telemarketers at once; comparison shopping websites and other lead generators must obtain consumer's prior express written consent one seller at a time.
4. FCC also encouraged providers to make email-to-text an opt-in service and sought comment on whether it can adopt rules on this topic in the future.

<https://www.fcc.gov/document/fcc-closes-lead-generator-robocall-loophole-adopts-robotext-rules>



Federal Communications Commission

FCC 23-107

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
Targeting and Eliminating Unlawful Text Messages)	CG Docket No. 21-402
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
Advanced Methods to Target and Eliminate Unlawful Robocalls)	CG Docket No. 17-59
)	
)	

**SECOND REPORT AND ORDER,
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING IN CG DOCKET NOS. 02-278
AND 21-402, AND WAIVER ORDER IN CG DOCKET NO. 17-59**

Adopted: December 13, 2023 **Released: December 18, 2023**

Comment Date: [30 days after Federal Register publication]
Reply Date: [45 days after Federal Register publication]

By the Commission: Chairwoman Rosenworcel and Commissioners Starks and Gomez issuing separate statements; Commissioner Simington approve in part, dissent in part and issuing a separate statement.

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FinCEN Beneficial Ownership Rules



Financial Crimes
Enforcement Network

- Beginning on January 1, 2024, entities that are created or registered to do business in the United States will be required to comply with the Financial Crimes Enforcement Network's (FinCEN's) Beneficial Ownership Information Reporting Rule under the Corporate Transparency Act (CTA).
- BOI Reporting Rule was adopted to help U.S. law enforcement and the financial industry root out bad actors seeking to hide their ill-gotten gains through shell companies or other opaque ownership structures.
- Entities subject to the reporting requirements will be required to disclose personal information about their beneficial owners, senior officers, and other control persons to FinCEN unless they meet an exemption.
- BOI information will be made available to Federal agencies engaged in national security, intelligence, or law enforcement activity; State, local, and Tribal law enforcement agencies with court authorization; foreign law enforcement agencies, judges, prosecutors, and other authorities that meet specific criteria; ***financial institutions with customer due diligence requirements*** and regulators supervising them for compliance.
- **NEXT UP**: FinCEN will next engage in a third rulemaking to revise FinCEN's customer due diligence rule for financial institutions, consistent with the requirements of the CTA.

Banking Update

Overview

We are currently in a regulatory supercycle following the 2023 regional bank failures

- Safety and soundness is the focus
- Agencies are looking at balance sheet basics and fundamental risk management practices, including in enforcement actions
- Third-Party Risk Management (TPRM) pervades
- Expect examiners to use a fine-tooth comb in all areas of bank businesses and structures
- Supervisory rating downgrades are possible, or higher ratings may be harder to get
- Non-banks are not immune from the regulatory uptick due to ripple effects and focus on interconnections between banks and non-banks



Increased regulation and rulemaking activity



Increased supervisory scrutiny



Increased enforcement activity and specificity

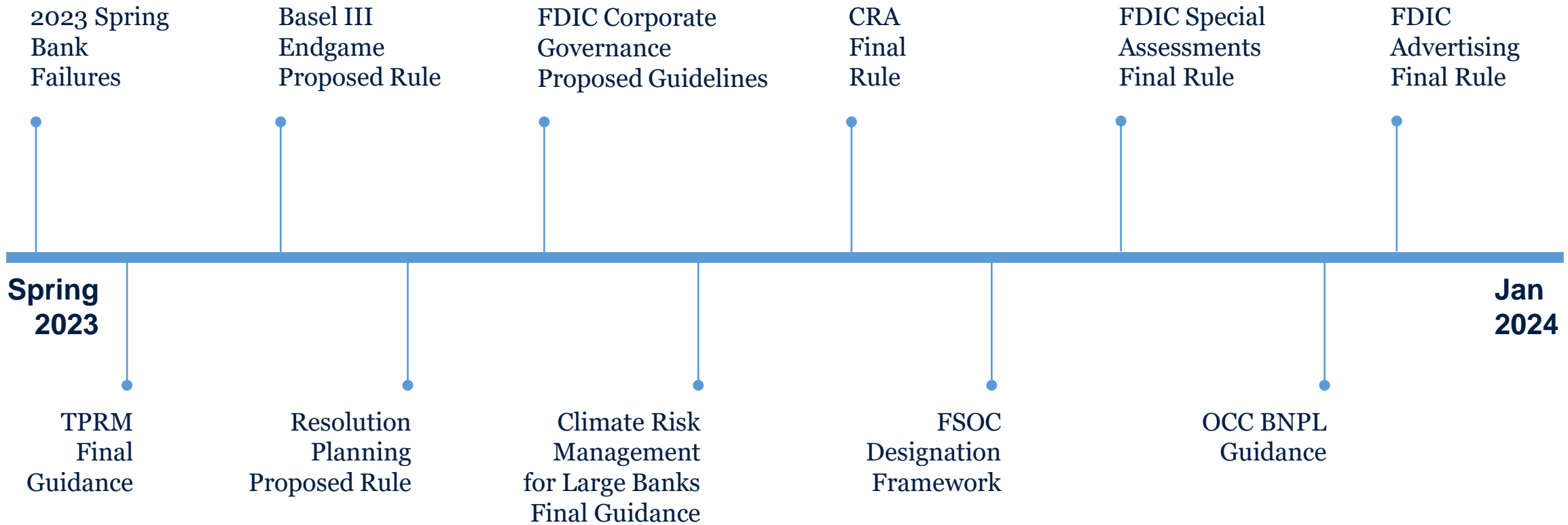


Less tailoring



Less time (to regulate; to respond)

Key Regulatory Developments—Mapping the Supercycle



Key Regulatory Developments—Mapping the Supercycle

Prudential

Basel III
Endgame
Proposed Rule

Resolution
Planning
Proposed Rule

FSOC
Designation
Framework

TPRM
Final
Guidance

FDIC Special
Assessments
Final Rule

FDIC Corporate
Governance
Proposed Guidelines

Social Policies

Climate Risk
Management
for Large Banks
Final Guidance

CRA
Final
Rule

OCC BNPL
Guidance

FDIC
Advertising
Final Rule

(Other notable efforts underway with FinCEN)

Financial Crimes

Consumer Protection



Key Regulatory Developments—Prudential

■ Basel III Endgame Proposed Rule

- Would directly apply to banking organizations with \$100 billion or more in total assets (covered banks)
- Would make many changes to the capital rules including:
 - New risk weighting regime (more granular) and expanded standardized approach
 - Eliminate advanced approaches for credit risk
 - Extend supplementary leverage ratio requirement to apply to all covered banks
 - Changes to the market risk capital requirements
 - Introduce expanded operational risk capital requirement
- Comments due January 16

■ Resolution Planning Proposed Rule

- Would generally require covered banks to issue and maintain outstanding a minimum amount of plain vanilla LTD that can be used to recapitalize them in the event of their failure
- The agencies expect that banking organizations affected by the proposal rule would have to issue \$70 billion in new debt
 - Some covered banks have already started
- Separately, proposed resolution plan submission guidance issued for large banking organizations under section 165(d) of the Dodd-Frank Act

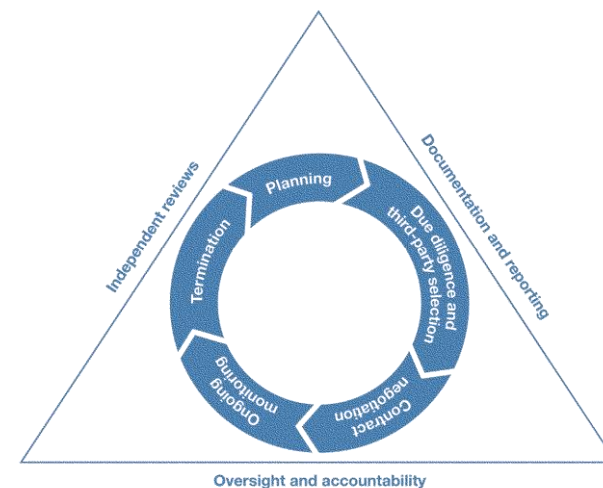
Key Regulatory Developments—Prudential

■ FSOC Designation Framework

- New interpretive guidance updates FSOC procedures to designate non-bank financial companies for Federal Reserve supervision and prudential standards
- Unwinds more favorable 2019 provisions
- Since 2020, the FSOC has issued reports or statements about the secondary mortgage market activities, money market mutual funds, climate-related financial risk, non-bank financial intermediation, and digital assets
- FSOC’s 2023 annual report added AI and the insurance sector, and specifically carved out discussion of regional banks
- FSOC concluded that sources of financial stability risk from regional banks may come from:
 - Increases in funding costs
 - Deposit outflows
 - Lending volume decline
 - Commercial real estate portfolios

■ TPRM Final Guidance

- Harmonizes the federal banking agencies’ expectations for banks’ management of vendors
- Permeating supervision scrutiny and enforcement actions
- Requires comprehensive and demonstrable management of the full lifecycle of the bank-vendor relationship
- Affects banks and non-banks, bank-fintech partnerships, BaaS arrangements



Source: Board, FDIC, and OCC

Key Regulatory Developments—Prudential

▪ FDIC Special Assessments Final Rule

- Under federal law, the FDIC must make a special assessment after using its systemic risk determination authority
- The system risk determination authority was used in connection with the 2023 bank failures
- In levying a special assessment:
 - FDIC does not need to follow normal deposit insurance assessment rates
 - FDIC considers who benefited from the action and the effects on the banking industry
- Under the final rule, the first \$5 billion of uninsured deposits will be deducted from the calculation
- The FDIC is essentially using the amount of a bank's uninsured deposits as a proxy to determine the bank's riskiness

▪ FDIC Corporate Governance Guidelines

- The FDIC has proposed guidelines that would establish corporate governance and risk management expectations for FDIC-regulated banks with \$10 billion or more in total assets (FDIC can apply them to smaller banks too)
- The proposed guidelines would be promulgated by rulemaking as an appendix to Part 364 of the FDIC's regulations
 - Thus, they would not be mere guidance
 - The FDIC explained in the preamble that this approach allows it to leverage its enforcement powers
- Takes a very prescriptive approach:
- Will likely generate comments based on
 - Principles of corporate law and the distinction between the roles of boards of directors and management
 - Interaction between banks and their holding companies

Key Regulatory Developments—Social Policies

▪ CRA Final Rule

- Establishes a new framework to evaluate banks that features four tests with varying applicability based on a bank's total assets
- The way the tests are designed will likely require banks to re-think their CRA plans and lending approaches to comply or maintain favorable ratings
- CRA ratings affect bank and holding company powers and structure options, both substantively and procedurally
- Interplay with the proposed capital rule is unclear:
 - CRA rule likely requires more lending
 - But the proposed capital rule is expected to arguably make such lending more difficult/costly

▪ Climate Risk Management for Large Banks Final Guidance

- Directly applies to covered banks and the U.S. operations and individual U.S. branches/agencies of foreign banks that have \$100 billion in total assets or more
- Not prescriptive, but covered entities will need to invest in new or evolving systems and processes to meet the agencies' risk management expectations
- Agencies look to timely, accurate, consistent, complete, and relevant data to support sound climate risk management efforts, and stress tests
- Does not require or expect any specific public disclosures, unlike other regulatory approaches
- Does not expressly discuss compensation policies

Key Regulatory Developments—Consumer Protection

▪ FDIC Advertising Final Rule

- Modernizes the rules governing the display of the FDIC official sign at branches and other locations (e.g., bank cafes)
- Requires a new official digital sign on digital channels (e.g., bank websites, mobile apps)
- Clarifies the FDIC’s rules regarding misrepresentations of deposit insurance coverage with specific scenarios
- Requires banks to maintain policies and procedures
- Comes on the heels of a sustained campaign of cease-and-desist letters to address misrepresentation issues

▪ OCC BNPL Guidance

- Focuses on certain safety and soundness aspects of BNPL lending
 - Credit risk management, write-offs, brief loan terms
 - Operational risks
- Also focuses on consumer protection aspects:
 - Ability to repay
 - Disclosures
 - Credit reporting

Supervision Developments

- The 2023 bank failures were criticized by many and acknowledged by the agencies as involving failures in effective supervision
- Increased supervision has followed, using a back-to-basics approach and increased granularity
 - Banks of all sizes are experiencing heightened supervisory scrutiny
 - Exams may take longer and be harder
 - Because supervisory ratings are not merely qualitative or weighted averages, we expect continued use of “Management” ratings downgrades or pressure
- Examination is fundamentally bespoke for each financial institution, and secretive
- Still, there were media leaks of confidential supervisory information in late August 2023, confirming the uptick in supervision, especially among regional banks

Fed Ramps Up Demands for Corrective Actions by Regional Banks

By Hannah Levitt 2023-08-30T11:49:21012-04:00

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US regulators are quietly demanding that regional lenders shore up their liquidity planning, part of a ramp-up in efforts to tighten supervision in the wake of three bank failures earlier this year.

The Federal Reserve has issued a slew of private warnings to lenders with assets of \$100 billion to \$250 billion, including [REDACTED] according to people with knowledge of the matter. The wide-ranging notices have touched on everything from lenders' capital and liquidity to their technology and compliance, the people said, asking not to be identified discussing confidential supervisory information.

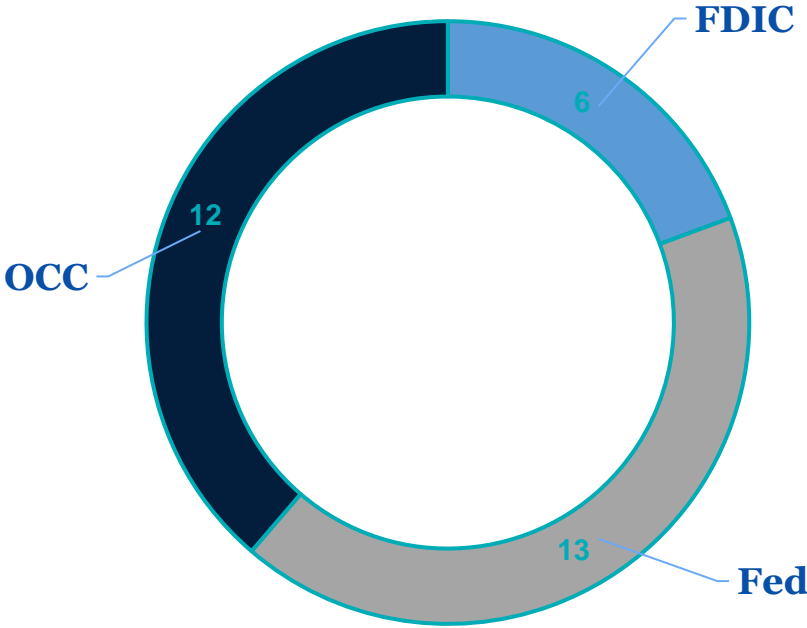
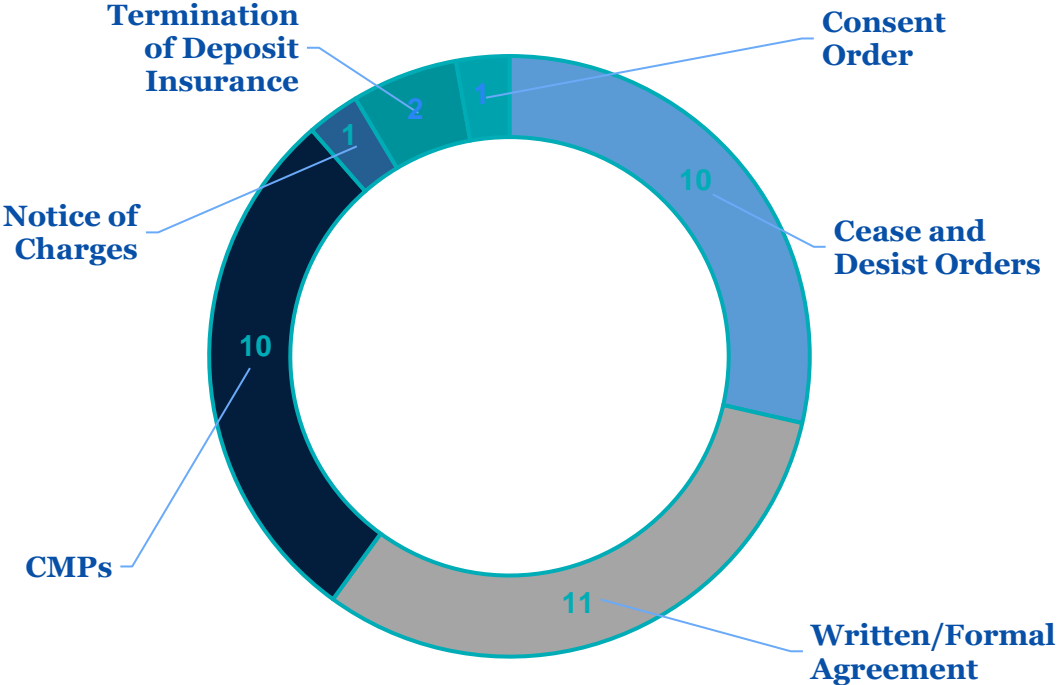
Enforcement—By the Numbers (April to Dec 2023)

35

Enforcement actions

4

Average enforcement actions per month



Enforcement Developments

UDAP, fair lending, BSA/AML issues remain important enforcement priorities for which CMPs are expected to be assessed

We are also seeing kitchen-sink enforcement actions that cover everything a bank is expected to do—at a granular level—generally in the form of written agreements or cease and desist orders

- Board responsibilities
- Policies and procedures
- Capital plans
- Liquidity management
- Concentration risks
- Credit review/analysis/losses
- Data management
- IT and systems
- Internal audit
- Internal controls

unsafe or unsound practice(s), including those relating to oversight by its management and board of directors (“board”); strategic planning; capital planning; stress testing; policy development and approval; management and board reporting; contingency funding planning; model risk management; concentration risk management; credit review; credit analysis; risk assessment; allowance for credit losses methodology; data management; internal audit; and internal controls.

These unsafe or unsound practice(s) are included in, but may not be limited to, the areas of corporate governance and enterprise risk management, credit underwriting and administration, liquidity risk management, and interest rate risk management;

Enforcement

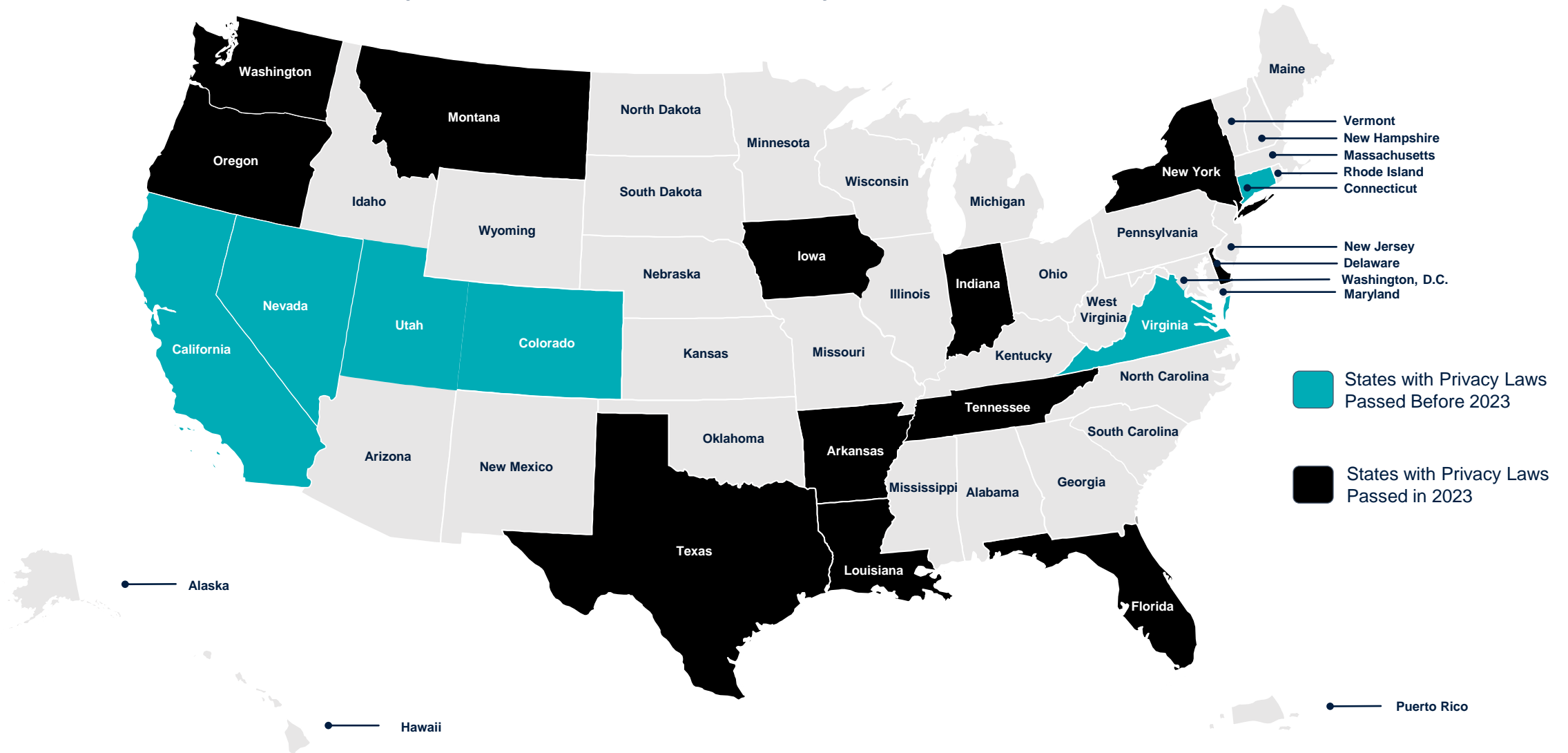
25% of recent enforcement actions mention TPRM deficiencies and affirmative steps to bolster compliance

- Banks are expected to manage their **non-bank vendors** in line with the recently harmonized and finalized TPRM guidance
- We also note that issues involving banks' management of connections with **non-bank affiliates** are also the subject of recent enforcement actions

- (a) the process for how the Bank selects, assesses, and oversees third parties;
- (b) the process for the identification and classification of all vendors based on risk criteria and risk assessment;
- (c) written contracts that outline the rights and responsibilities of all parties;
- (d) vendor review cycles that are based on the degree of risk posed by each vendor;
- (e) roles and responsibilities of management relating to due diligence and ongoing monitoring of third parties; and
- (f) documentation and reporting that facilitates Board and management oversight, accountability, monitoring, and risk management associated with third-party relationships; and

Privacy Update

State Privacy Laws (January 2024)



State Privacy Laws

- Over a dozen states have enacted “rights-based” consumer privacy laws that have gone, or will go, into effect over the next few years.
- Notably, these laws largely exempt data subject to GLBA or FCRA.
 - However, the California Consumer Privacy Act (CCPA) does not fully exempt financial institutions.
 - The CCPA may apply when financial companies collect personal data not subject to GLBA or the FCRA, such as on a marketing website.
- The CCPA is also a significant outlier because of its broad application.
 - Financial institutions that meet certain thresholds should be prepared to comply with the CCPA with respect to personnel and business contact data.
- Enforcement under the CCPA has targeted at least one FinTech company.



Payments, AI, and Cryptocurrency Developments

Payments Regulatory Developments

- Credit Card Competition Act
 - Bipartisan bill introduced by Sen. Durbin that would require large credit-card issuing banks (those with over \$100 billion in assets) to enable at least two credit card networks instead of just one, and at least one of those networks must be a network other than Visa or Mastercard.
- Federal Reserve Regulation II (Durbin) Interchange Fee Rulemaking
 - In November 2023, the Federal Reserve Board issued a proposed rule which would lower the interchange fee cap in Regulation II (Debit Card Interchange Fees and Routing). Further, the Board proposed to update the interchange fee cap every other year based on data from the Board's biennial survey of large debit card issuers.

Payments Enforcement Update

- FTC, CFPB, and other law enforcement continue to scrutinize payment processors for facilitating processing for merchants engaged in fraud.
- FTC v. Nexway (April 2023)
 - Alleged tech support scammers used pop-ups that appeared to freeze consumers' computers until the customers called a toll-free number for assistance and were subjected to deceptive and misleading sales pitches about buying tech support.
 - Tech support scammers did not have their own merchant accounts. Charges were processed through Nexway serving as “merchant of record.”
 - FTC Claims against Nexway:
 - Deceptive and unfair practices
 - Violated credit card laundering prohibition of Telemarketing Sales Rule
 - Provided substantial assistance or support to others who violated the TSR
 - \$16.75 million settlement; injunctive relief.

Payments Areas of Focus for 2024

- **Increased scrutiny of account-to-account / authorized push payment fraud**
 - Regulation E requires banks to credit customers for unauthorized transfers from their accounts made by third parties.
 - Regulators are considering widening the scope of Regulation E by requiring banks to cover authorized transactions that result in fraud losses. US Senators, in March 2023, sent a letter to the Federal Reserve, FDIC, NCUA and OCC urging review of the customer reimbursement and AML practices of banks that use a P2P payment service.
 - The CFPB is concerned about Person-to-Person Payment Fraud Conversation and is considering what should be done to mitigate such fraud. See: Person-to-Person (P2P) Payment Fraud Conversion Report November 2022

Payments Areas of Focus for 2024

■ **Faster Payments Options Expand and Scale**

– FedNow

- In December, the Federal Reserve announced that FedNow Service participation continues to show strong growth and diversity heading into the new year, with 331 institutions now sending or receiving on the network.

– RTP Network (Clearing House)

- Transactions on the RTP network in Q2 2023 came to 58 million for \$29 billion, up from 41 million transactions for \$18 billion in Q2 2022.

– Push-to-Card (Visa Direct and Mastercard Send)

- Allow businesses or individuals to push funds into an eligible cardholder's account (e.g., credit, debit, and prepaid)
- Continues to grow at a fast pace.

Payments Areas of Focus for 2024 (cont.)

FBO Accounts

- Designed to minimize risk of a payments or fintech triggering state money transmission licensing requirements.
- Payments company issues payment instructions to the bank to pull funds from a bank-owned FBO account or instructs its customer to deposit funds into the FBO account. When funds are received in the bank-owned/controlled account, the bank holds the funds pending instructions from the fintech.
- The funds are held in the bank account “for the benefit of” the fintech’s clients, indicating that the funds in the account are owed to those parties (and are not owned by the fintech).

Issues to Consider

- Who are the end-user clients (payees) that ultimately receive the funds?
- Can the bank effectively and comfortably monitor transactions and mitigate financial fraud?
- Does the relationship between the bank and fintech address key regulatory requirements (AML, sanctions, etc.)?
- Does the fintech have a reliable ledgering system to ensure management and distribution of funds?
- Small errors may result in large headaches.

Note that a fintech-focused bank recently announced it was limiting the availability of FBO accounts for its fintech partners.

Cryptocurrency Developments

- On January 10, 2024, the SEC approved the first spot Bitcoin ETFs (Exchange-Traded Funds).
- CFPB’s Proposed Rule on Consumer Digital Payment Applications provides that the term “**fun**ds” under the Consumer Financial Protection Act (CFPA) includes “**virtual currency.**”
- In October 2023, California enacted the Digital Financial Assets Law. The new law requires individuals and entities to obtain a license to engage in digital asset business activities.
- *SEC v. Ripple Labs Inc. S.D.N.Y.*, 20-cv-10832 (July 13, 2023)
 - In July 2023, the federal court hearing the SEC’s case against Ripple Labs issued its highly anticipated decision on whether Ripple sold its XRP token as a “security.” The court held that XRP, as a digital token, is not in and of itself a “contract, transaction, or scheme” that embodies the Howey requirements of an investment contract.
 - Ripple’s “programmatic” XRP sales (sales conducted on exchanges in blind bid/ask transactions) were not investment contracts. However, Ripple’s XRP sales to institutional investors were investment contracts.
 - *But see SEC v. Terraform Labs. Pte. Ltd. S.D.N.Y.*, 23-cv-1346 (July 31, 2023), finding all of Terraform Lab’s cryptocurrency tokens were securities.
- In June 2023, the SEC brought enforcement actions against Coinbase and Binance, two of the largest cryptocurrency exchanges. The SEC alleges that the exchanges unlawfully engaged in unregistered offers and sales of crypto asset securities.

Artificial Intelligence

- AI is being implemented in many ways:
 - AML / Fraud Monitoring
 - Identity Verification
 - Lending
 - Compliance
 - Customer Service
 - Predictive analytics
 - Cybersecurity and fraud defense
- According to recent media reports:
 - 80% of banks are implementing or planning on implementing AI solutions
 - 77% of financial services providers believe that AI will become essential to their business in next two years

General Considerations When Implementing AI

- FIs need to make sure that they understand how the technology works and that any implementation of new AI-based technology improves existing functionalities.
- FIs should
 - Review and understand the nature of the technology,
 - Develop a plan for how it will be used,
 - Implement the technology in accordance with the plan,
 - Measure and monitor the technology's performance for potential risks, and
 - Make adjustments to the use of technology to address any failings or issues that are identified.

Mortgage and Lending

Mortgage - A Look Back at 2023

- CFPB
 - The CFPB continued its enforcement activity, with a focus on fair lending and redlining, HMDA, and UDAAPs in lending and financing. The CFPB also issued its first public enforcement action alleging violations of RESPA Section 8 since 2017.
 - The CFPB issued guidance on digital shopping platforms for mortgages.
 - In June 2023, the CFPB signaled it was considering simplifying and streamlining its mortgage servicing rules.
- Federal Housing Agencies (FHA, Ginnie Mae, Fannie, Freddie, VA)
 - The Federal Housing Agencies continued to consider the effect of COVID-19 retention options, and in some instances extended their availability. At the end of 2023, the VA asked all mortgage servicers to pause any foreclosure proceedings of VA-guaranteed loans and extended the availability of its COVID-19 Refund Modification program through May 2024.

Mortgage - A Look Back at 2023

- Basel III
 - The Federal Banking Agencies' Basel III capital proposal would increase the credit risk weight both for balance-sheet mortgages and for loans sold to the GSEs. If finalized as proposed, it could mean a shift from bank-originated mortgages to non-bank originated mortgages.
- State Financial Regulators
 - State financial regulators and legislatures continued to be active in 2023, with new laws and regulations enacted in a variety of states regarding topics such as mortgage servicing, remote work, licensure requirements, and collection standards and licensure.

Mortgage – Spotlight on Fair Lending and Redlining

- **Fair lending remains a top concern for the CFPB and DOJ.**
- CFPB took two separate actions against mortgage lenders for reporting inaccurate HMDA data.
- DOJ separately obtained settlements against five mortgage lenders under its Combating Redlining Initiative in 2023.
- CFPB and DOJ released a statement about whether the use of immigration status in credit underwriting may violate fair lending laws.
- Appraisal Bias
 - The CFPB issued guidance on appraisal standards and the need to include prohibitions against discrimination.
 - CFPB and DOJ filed a Statement of Interest in a lawsuit alleging appraisal bias.
- CFPB filed an Amicus Brief in a case alleging “discriminatory and predatory” mortgage lending.

Lending and Related Activities

- States continue enacting interest rate caps on consumer loans – e.g., Colorado’s HB23-1229 applies after July 1, 2024.
- States continue to regulate and license Earned Wage Access providers.
 - Nevada (SB 290, eff. 1/1/24), Missouri (SB 586, eff. 8/28/23), California (Proposed Regs for “Income-Based Advances”).
 - Maryland (guidance on whether EWA is a loan), Connecticut (EWA providers must adhere to state’s small loan law).
 - Arizona & Montana (AG Op. Letters – certain EWA products not a loan under state laws).
 - Legislation being considered in GA, NJ, NY, NC, SC, and UT (and Congress).
- State commercial financing disclosure laws and regulations (i.e., TILA-style) continue to proliferate.
 - New York – regulations took effect August 1, 2023.
 - Florida & Georgia – statutory provisions took effect Jan. 1, 2024
 - Connecticut – statute regulating “sales-based financing” takes effect July 1, 2024. Annual registration required beginning Oct. 1, 2024.

State Developments

Hot Topics and Compliance Challenges

- Student loan servicers likely to be area of focus with resumption of federal student loan payments after pandemic pause.
 - September 29, 2023: Washington, Massachusetts, and 17 other state AGs send letter to Pres. Biden and Ed. Sec. Cardona urging them to limit harm to borrowers entering repayment. “Our offices also stand ready to hold companies that cause financial harm to our borrowers accountable for any unlawful conduct.”
 - Empire College Consent Order (DFPI 2/8/23) – Serviced its own loans without a license. Ordered to obtain a license.
- Private education finance and short-term vocational programs may be scrutinized as well.
 - CA DFPI issued final rules (effective 1/1/24) requiring licensure of student loans servicers and clarifying that “education financing products,” such as Income Share Agreements and installment contracts, are student loans.
 - *In re Prehired LLC, et al.* Stipulated Judgment, No. 22-11007 (Bankr. D. Del. Nov. 20, 2023) – CFPB + 11 states sued Prehired for offering Income Share Agreements to students who couldn’t afford to pay \$30,000 tuition for false representations about repayment, not disclosing important terms to consumers, and engaging in deceptive debt collection practices. \$4.2 million in refunds, cancel all outstanding ISAs (valued at \$27 million), shut down permanently, and pay a civil penalty of \$1.
- Employer-driven debt / Training Repayment Agreement Plans
 - CA DOJ Bulletin (7/25/23): Employer-driven debt likely violates portions of the Labor Code, Rosenthal Fair Debt Collection Practices Act, CA Consumer Financial Protection Law, and Unfair Competition Law.

Hot Topics and Compliance Challenges

- Rent-to-own and lease-to-own products and property-related lending in enforcement crosshairs
 - *In re EasyKnock, Inc.* – AOD with Mass. AG involving “proptech” company EasyKnock that engaged in unfair and deceptive acts and practices in the marketing of its Sale-Leaseback products with consumers, making consumers thinking they were getting loans, double-charging certain fees, and other practices. Ordered to pay \$200,000, cease all future Sales-Leaseback transactions in the state.
 - *Commonwealth v. MV Realty*, No. 2284CVO2823-BLS2 (Mass Super. Ct.) – MV Realty offered “Homeowner Benefit Agreement” product that offered small dollar cash payments to homeowners for a 40-year exclusive right for MV Realty to act as the listing brokerage when the homeowner decides to sell. AG alleged that, through unfair and deceptive marketing and sales tactics, MV Realty hid the true terms of the contract, which amounted to a loan. Also alleged that MV Realty used illegal methods for securing its rights under the contracts, including mortgaging homeowners’ properties in violation of Mass. laws.
 - AG obtained a PI against MV Realty that required it to discharge all mortgages on Mass. properties and prohibited it from obtaining or recording additional mortgages. MV Realty filed for bankruptcy in Sept. 2023.
 - State Attorneys General in California, Florida, Ohio, Massachusetts, North Carolina, Pennsylvania and New Jersey have also sued MV Realty for substantially similar conduct.

Hot Topics and Compliance Challenges

States taking a page from the CFPB's and FTC's playbook and attempting to regulate “junk fees.”

- California: Credova Financial, LLC Consent Order (DFPI Jan. 9, 2024) – Internet installment lender failed to disclose, third-party servicer convenience fees for making payments over the phone. Deceptive practice under the CA Consumer Financial Protection Law. Ordered to pay a \$50,000 penalty and disclose third-party convenience fees in the future.
- California: SB 478 signed in October 2023, effective July 1, 2024. Amends the CA Consumer Legal Remedies Act to make it unlawful to advertise, display, or offer a price for a good or service that does not include all mandatory fees or charges except postage, shipping & handling, and taxes or fees imposed by a government. Potential penalties include: actual damages, punitive damages, restitution, civil penalties (up to \$2,500/violation), injunctive relief, and attorney's fees and court costs.
- Massachusetts: Proposed regulations to address “deceptive” junk fees and require clear and conspicuous disclosure of total price of a product—including all fees, interest, charges, or other necessary expenses—when a product is advertised to consumers.
- 2022 Washington AG Survey: Over the past four years, 61% of Washington consumers were charged a fee they did not know would be applied until they were in the final stage of ordering a product or service; 36% reported being charged a fee they did not know would be applied until after they had purchased a product.

Hot Topics and Compliance Challenges

- Opportunity Financial, LLC v. Commissioner, Case No. 22STCVO8163 (Cal. Super. Ct. Oct. 30, 2023) – California DFPI’s attempts to regulate “true lenders” hits a snag.
 - Court denied DFPI’s motion for PI against Opportunity Financial (“OppFi”) in its litigation contending that OppFi is the “true lender” of loans originated by partner FinWise Bank and therefore subject to the state’s 36% interest cap.
 - DFPI not likely to succeed on the merits, largely because FinWise: uses its own funds to originate loans from accounts it controls; retains title and ownership of loans throughout the life of the loan, selling only loan receivables to an OppFi affiliate within days of purchase; retains a 5% interest in the loan receivables; and collects a percentage fee on each of the loans.
- California Commercial Financing UDAAP Regulation and Enforcement – continuing the trend of extending consumer lending protections to small businesses
 - Rule went into effect on October 1, 2023 – designed to protect nonprofits, small businesses, & family farms. No reported enforcement actions yet.

Final Thoughts and Wrap-up

Consumer Financial Services Outlook 2024

For an index of articles and presentations on CFS topics, see www.Venable.com/cfs/publications.



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Thank You!

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