

# Consumer Financial Services Legal and Regulatory Update

Financial Counseling Association of America

May 11, 2023

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**VENABLE** LLP



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# Today's Webinar

1. Introduction
2. Divided Congress
3. Today's CFPB and FTC
4. The Future of the CFPB
5. CFPB Rulemakings, Policy Initiatives, and Enforcement Trends
6. Privacy and Data Security
7. Potpourri / Q&A
  - Opportunities & Managing Risk

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# **Divided Congress and What this Means for the CFPB and FTC**

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# The 118<sup>th</sup> Congress and the Biden Administration

- Return of divided government and continued narrow majorities in both chambers
  - House – Republicans flip majority (mirror image of 117<sup>th</sup> Congress)
  - Senate – Democrats retain control and gain a seat for outright majority
  - Overall, this was the best midterm performance by President's party since 2002
- What does this mean?
  - House – a slim majority is still a majority
    - Aggressive oversight
    - RIP Biden legislative agenda
  - Senate – no more veto power for any one senator
    - Biden maintains control over judicial nominations and personnel – agency leaders are able to implement
    - Counterbalance to House Republican oversight
  - Biden administration – no course correction (including banking agencies)

# Big Picture

- 2024 presidential election will inform everything that does (and doesn't) happen in the next two years
  - GOP will seek to deny Biden any major “wins,” while conducting aggressive oversight meant to compliment eventual campaign messaging
- House – paltry majority and embattled leadership lend GOP oversight power but little else
  - Unwieldy Republican conference enjoys little policy leverage beyond default brinkmanship
  - Discrete areas of bipartisan interest at committee level could bear fruit
  - Oversight – populist bent, reflecting the mood of the base
    - Focus on “woke capital” and ESG industry, fiduciary responsibility, and proxy voting reforms and “Big Tech,” including data privacy, anti-trust/competition, and Section 230
- Senate – Democrats maintain ability to control nominations, and flipping Pennsylvania seat eases procedural challenges of a 50-50 chamber
  - Balance of power maintains possibility of bipartisan action – easier to strike a deal that requires 10 Republicans than one that needs 26+
- White House – Administration governs via regs/executive action with its preferred personnel

# CFS Legislative Landscape

- Congressional priorities:
  - Cryptocurrency
    - Stablecoins and CBDC
    - Jurisdictional disputes
    - AML/CFT requirements
    - Federal Reserve Master Accounts
  - ESG policies and “woke capitalism”
    - Climate-risk disclosures
    - ESG rating firms
    - State developments
  - Agency oversight
    - Securities and Exchange Commission
    - Consumer Financial Protection Bureau
    - Federal Reserve
  - Data privacy and changes to GLBA
  - Payments
  - Housing
- Key players
  - House: Rep. McHenry, Rep. Waters
  - Senate: Sen. Brown, Sen. Tim Scott, Sen. Stabenow, Sen. Boozman, Sen. Warren

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# Today's CFPB and FTC

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# CFPB and FTC: Working in Tandem

## Consumer Financial Protection Bureau



## Federal Trade Commission

**Lina M. Khan**  
Chair  
Sworn in: June 15, 2021  
[Biography](#) | [Speeches, Articles, & Testimony](#) | [Twitter](#)

**Rebecca Kelly Slaughter**  
Commissioner  
Sworn in: May 2, 2018  
[Biography](#) | [Speeches, Articles, & Testimony](#) | [Twitter](#)

Resigned

**Alvaro Bedoya**  
Commissioner  
Sworn in: May 16, 2022  
[Biography](#) | [Speeches, Articles, & Testimony](#) | [Twitter](#)

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# What's the Future of the CFPB?: CFSA v. CFPB (“The 5<sup>th</sup> Circuit Case”)

What Happened? What's Next?

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# How Did We Get Here?

Case: 21-50826 Document: 00516514748 Page: 1 Date Filed: 10/19/2022

**United States Court of Appeals  
for the Fifth Circuit**

No. 21-50826

United States Court of Appeals  
Fifth Circuit  
**FILED**  
October 19, 2022  
Lyle W. Cayce  
Clerk

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA,  
LIMITED; CONSUMER SERVICE ALLIANCE OF TEXAS,

*Plaintiffs—Appellants,*

*versus*

CONSUMER FINANCIAL PROTECTION BUREAU; ROHIT CHOPRA,  
*in his official capacity as Director, Consumer Financial Protection Bureau,*

*Defendants—Appellees.*

Appeal from the United States District Court  
for the Western District of Texas  
USDC No. 1:18-CV-295

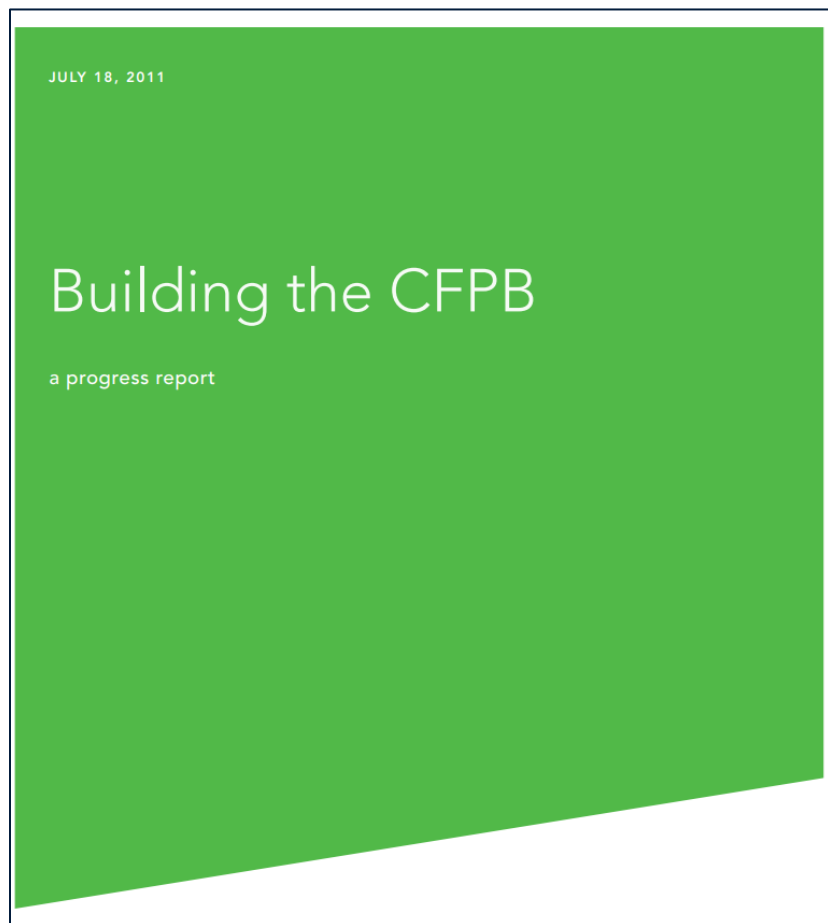
Before WILLETT, ENGELHARDT, and WILSON, *Circuit Judges.*  
CORY T. WILSON, *Circuit Judge:*

“An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced . . . , as that no one could transcend their legal limits, without being effectually checked and restrained by the others.” THE FEDERALIST NO. 48 (J. Madison) (quoting Thomas Jefferson’s *Notes on the State of Virginia* (1781)). In particular, as George Mason put it in Philadelphia in 1787, “[t]he purse & the

# Consumer Financial Protection Act of 2010

- Title X of the Dodd-Frank Act, entitled the “**Consumer Financial Protection Act of 2010**,” consolidated many federal consumer protection responsibilities into the CFPB.
- Stripped rulemaking authority for a host of federal consumer statutes from other agencies and authorizes CFPB to prescribe uniform rules
- Stripped federally-chartered institutions of a significant degree of charter preemption authority

# Building the CFPB



- Independent bureau of the Federal Reserve Board (FRB)
- A director with a 5-year term
  - Nominated by the President and approved by the Senate
- Statutory language that makes clear the FRB itself cannot interfere with the functions of the CFPB
  - An independent agency within an independent agency
  - FRB may delegate their bank consumer examination and supervision functions to the CFPB

# Funding of the New CFPB

- Under the Dodd-Frank Act, the CFPB is funded principally by transfers from the Board of Governors of the Federal Reserve System up to a limit set forth in the statute.
- The CFPB can request funds from the Federal Reserve that are reasonably necessary to carry out its consumer financial protection functions.
- The CFPB's funding from the Federal Reserve is capped at a pre-set percentage of the total 2009 operating expenses of the Federal Reserve System, subject to an annual adjustment.

## **According to the CFPB:**

“The Dodd-Frank Act followed long-established precedent in providing the CFPB with funding outside of the congressional appropriations process. Congress has consistently provided for independent funding for bank supervisors to allow for long-term planning and the execution of complex initiatives and to ensure that banks are examined regularly and thoroughly for both safety and soundness and compliance with the law.”



# CFSA v. CFPB

- Consumer Financial Services Association of America (CFSA) is an industry trade organization for small-dollar lenders that challenged the Payday Lending Rule, finalized in 2017.
- CFSA sued the CFPB to invalidate the Payday Lending Rule.
- CFSA made numerous arguments regarding the validity of the Rule. In particular, CFSA argued that the Rule should be invalidated because it was arbitrary and capricious, and the CFPB receives its funding in an unconstitutional manner.
- The CFPB receives its funding from the Federal Reserve rather than through Congressional appropriations.

44382 Federal Register / Vol. 85, No. 141 / Wednesday, July 22, 2020 / Rules and Regulations

**BUREAU OF CONSUMER FINANCIAL PROTECTION**  
**12 CFR Part 1041**  
[Docket No. CFPB-2019-0006]  
RIN 3170-AA80

**Payday, Vehicle Title, and Certain High-Cost Installment Loans**

**AGENCY:** Bureau of Consumer Financial Protection.  
**ACTION:** Final rule.

**SUMMARY:** The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to amend its regulations governing payday, vehicle title, and certain high-cost installment loans. Specifically, the Bureau is revoking provisions of those regulations that: Provide that it is an unfair and abusive practice for a lender to make a covered short-term or longer-term balloon-payment loan, including payday and vehicle title loans, without reasonably determining that consumers have the ability to repay those loans according to their terms; prescribe mandatory underwriting requirements for making the ability-to-repay determination; exempt certain loans from the mandatory underwriting requirements; and establish related definitions, reporting, recordkeeping, and compliance date requirements. The Bureau is making these amendments to the regulations based on its re-evaluation of the legal and evidentiary bases for these provisions.

**DATES:** This rule is effective October 20, 2020.

**FOR FURTHER INFORMATION CONTACT:** Joseph Barresi, Lawrence Lee, or Adam Mayle, Senior Counsels, Office of Regulations, at 202-435-7700. If you require this document in an alternative electronic format, please contact [CFPB\\_Accessibility@cfpb.gov](mailto:CFPB_Accessibility@cfpb.gov).

**SUPPLEMENTARY INFORMATION:**  
**Summary of the Rule**  
On November 17, 2017, the Bureau published a final rule (2017 Final Rule or Rule<sup>1</sup>) establishing consumer protection regulations for payday loans, vehicle title loans, and certain high-cost installment loans, relying on authorities under title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act).<sup>2</sup> The 2017 Final Rule addressed two discrete topics. First, the Rule contained a set of provisions with respect to the

underwriting of covered short-term and longer-term balloon-payment loans, including payday and vehicle title loans, and related recordkeeping and reporting requirements.<sup>3</sup> These provisions are referred to herein as the “Mandatory Underwriting Provisions” of the 2017 Final Rule. Second, the Rule contained a set of provisions, applicable to the same set of loans and also to certain high-cost installment loans,<sup>4</sup> establishing certain requirements and limitations with respect to attempts to withdraw payments on the loans from consumers’ checking or other accounts.<sup>5</sup> These provisions are referred to herein as the “Payment Provisions” of the 2017 Final Rule.

The Rule became effective on January 16, 2018, although most provisions (12 CFR 1041.2 through 1041.10, 1041.12, and 1041.13) had a compliance date of August 19, 2019.<sup>6</sup> On January 18, 2018, the Bureau issued a statement announcing its intention to engage in rulemaking to reconsider the 2017 Final Rule.<sup>7</sup> A legal challenge to the Rule was filed on April 9, 2018, and is pending in the United States District Court for the Western District of Texas.<sup>8</sup> On October 26, 2018, the Bureau issued a statement announcing it expected to issue notices of proposed rulemaking to reconsider certain provisions of the 2017 Final Rule and to address the Rule’s compliance date.<sup>9</sup> On February 14, 2019, the Bureau published a notice of proposed rulemaking (2019 NPRM) to revoke the Mandatory Underwriting Provisions of the 2017 Final Rule.<sup>10</sup> The 2019 NPRM

did not propose to amend the “Payment Provisions” of the 2017 Final Rule. The Bureau is finalizing the amendments to the regulations as proposed in the 2019 NPRM. Specifically, the Bureau is revoking: (1) The “identification” provision, which states that it is an unfair and abusive practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their terms;<sup>11</sup> (2) the “prevention” provision, which establishes specific underwriting requirements for these loans to prevent the unfair and abusive practice;<sup>12</sup> (3) the “principal step-down exemption” provision for certain covered short-term loans;<sup>13</sup> (4) the “furnishing” provisions, which require lenders making covered short-term or longer-term balloon-payment loans to furnish certain information regarding such loans to registered information systems (RISes) and create a process for registering such information systems;<sup>14</sup> (5) those portions of the recordkeeping provisions related to the mandatory underwriting requirements;<sup>15</sup> and (6) the portion of the compliance date provisions related to the mandatory underwriting requirements.<sup>16</sup> The Bureau also is revoking the Official Interpretations relating to these provisions. The Bureau is making these changes to the regulations based on a re-evaluation of the legal and evidentiary bases for these provisions.

The Bureau revokes the 2017 Final Rule’s determination that it is an unfair practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that consumers will have the ability to repay the loans according to their terms. For the reasons discussed below, the Bureau withdraws the Rule’s determination that consumers cannot reasonably avoid any substantial injury caused or likely to be caused by the failure to consider a borrower’s ability to repay.<sup>17</sup> The Bureau also determines that, even if the Bureau had not revoked its reasonable avoidability finding, the countervailing benefits to

<sup>1</sup> 12 CFR 1041.4 through 1041.6, 1041.10, 1041.11, and portions of § 1041.12.  
<sup>2</sup> The 2017 Final Rule refers to all three of these categories of loans together as covered loans. 12 CFR 1041.3(b).  
<sup>3</sup> 12 CFR 1041.7 through 1041.9, and portions of § 1041.12.  
<sup>4</sup> 82 FR 54472, 54814.  
<sup>5</sup> See Bureau of Consumer Fin. Prot., *Statement on Payday Rule* (Jan. 18, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/>.  
<sup>6</sup> *Conf. Fin. Servs. Law of Am. v. Consumer Fin. Prot. Bureau*, No. 1:18-cv-295 (W.D. Tex. filed Apr. 9, 2018). On November 6, 2018, the court issued an order staying the August 19, 2019 compliance date of the Rule pending further order of the court. See *id.*, ECF No. 53. The litigation is currently stayed. See *id.*, ECF No. 66 (Dec. 6, 2019).  
<sup>7</sup> See Bureau of Consumer Fin. Prot., *Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date* (Oct. 26, 2018), <https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/>.  
<sup>8</sup> *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 84 FR 4252 (proposed Feb. 14, 2019). On the same day, the Bureau published a notice of proposed rulemaking to delay the compliance date for the Mandatory Underwriting Provisions of the 2017 Final Rule. See *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, Delay of Compliance Date, 84 FR 4298 (proposed Feb. 14, 2019). On June 17, 2019, the Bureau published a final rule delaying the compliance date for the Mandatory Underwriting Provisions. See 84 FR 27907 (June 17, 2019).  
<sup>9</sup> 12 CFR 1041.4.  
<sup>10</sup> 12 CFR 1041.5.  
<sup>11</sup> 12 CFR 1041.6.  
<sup>12</sup> 12 CFR 1041.10 and 1041.11.  
<sup>13</sup> 12 CFR 1041.12(b)(1) through (3).  
<sup>14</sup> 12 CFR 1041.15(d).  
<sup>15</sup> See 12 U.S.C. 5513(c)(1)(A).

# U.S. Court of Appeals for the Fifth Circuit

- Panel held that the CFPB is funded in an unconstitutional manner.
- The court reasoned that the Constitution’s framers sought to create separation of powers by placing the power of the purse *exclusively* in Congress’s purview, articulated through the Appropriations Clause in the Constitution.
- When Congress combined authority (rulemaking, supervision, enforcement) over consumer financial services with the ability to self-fund into one agency, Congress violated the principle of separation of powers and the Appropriations Clause.

“We agree that, for the most part, the Plaintiffs’ claims miss their mark. But one arrow has found its target: Congress’s decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution’s structural separation of powers. We thus reverse the judgment of the district court, render judgment in favor of the Plaintiffs, and vacate the Bureau’s 2017 Payday Lending Rule.”



## U.S. Court of Appeals for the Fifth Circuit (cont'd)

“Congress’s appropriations power, including the express exemption from congressional review of its funding, renders the Bureau ‘no longer dependent and, as a result, no longer accountable’ to Congress and, ultimately, to the people . . . . By abandoning its ‘most complete and effectual’ check on ‘the overgrown prerogatives of the other branches of the government’—indeed, by enabling them in the Bureau’s case—Congress ran afoul of the separation of powers embodied in the Appropriations Clause.”

Slip op. at 32.

## U.S. Court of Appeals for the Fifth Circuit (cont'd)

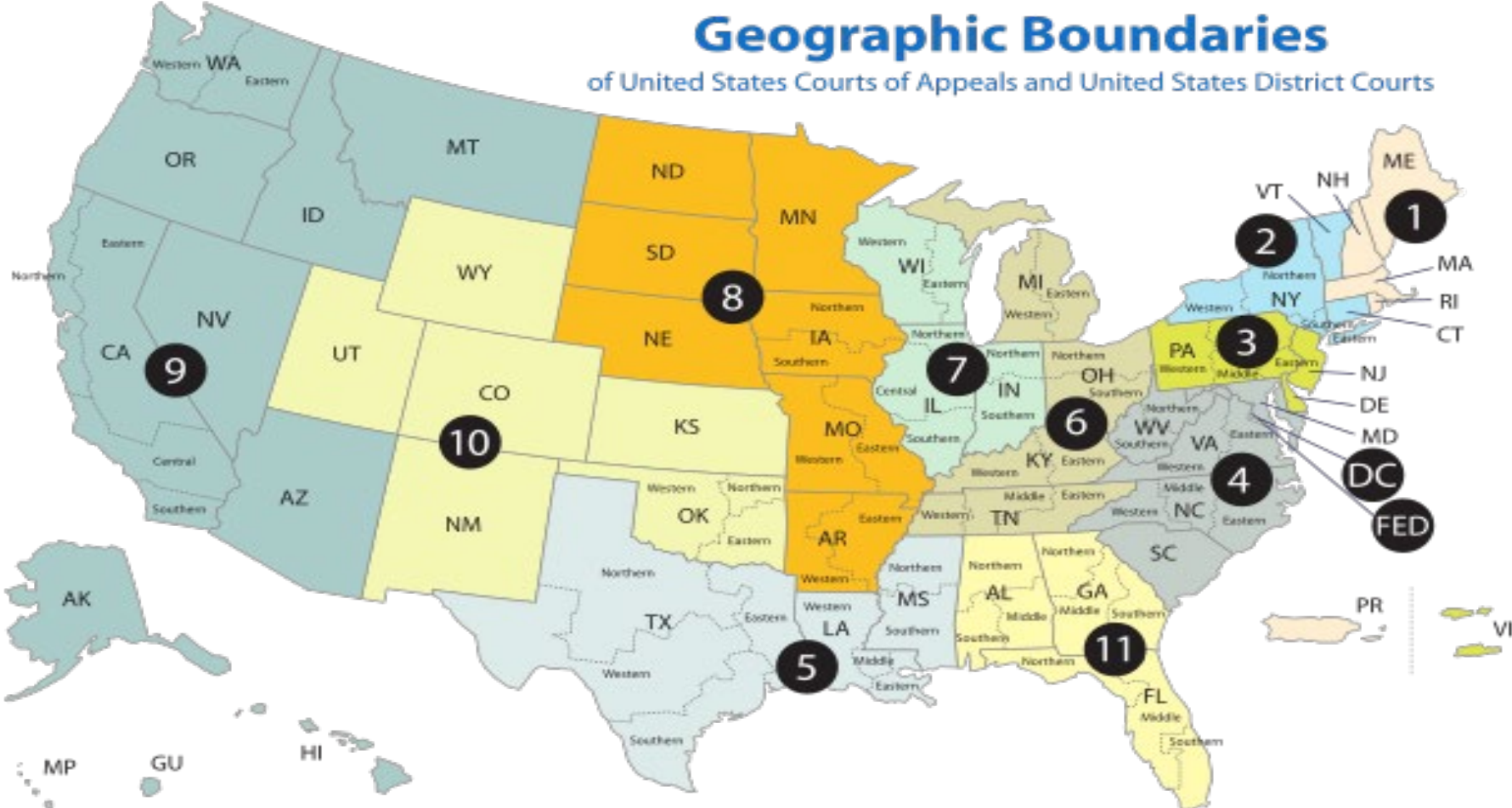
- The court required CFSA to show that the unconstitutional funding mechanism inflicted harm on CFSA before the court would invalidate the rule.
- But the court said this was straightforward in this case. Since the CFPB received all its operational funds through the Federal Reserve, the unconstitutional funding mechanism was the only way that the CFPB could have promulgated the rule.
- The court invalidated the Payday Lending Rule.

## U.S. Court of Appeals for the Fifth Circuit (cont'd)

“Because the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency’s unconstitutional funding scheme, there is a **linear nexus between the infirm provision** (the Bureau’s funding mechanism) **and the challenged action** (promulgation of the rule) . . . . Plaintiffs were thus harmed by the Bureau’s improper use of unappropriated funds to engage in the rulemaking at issue.”

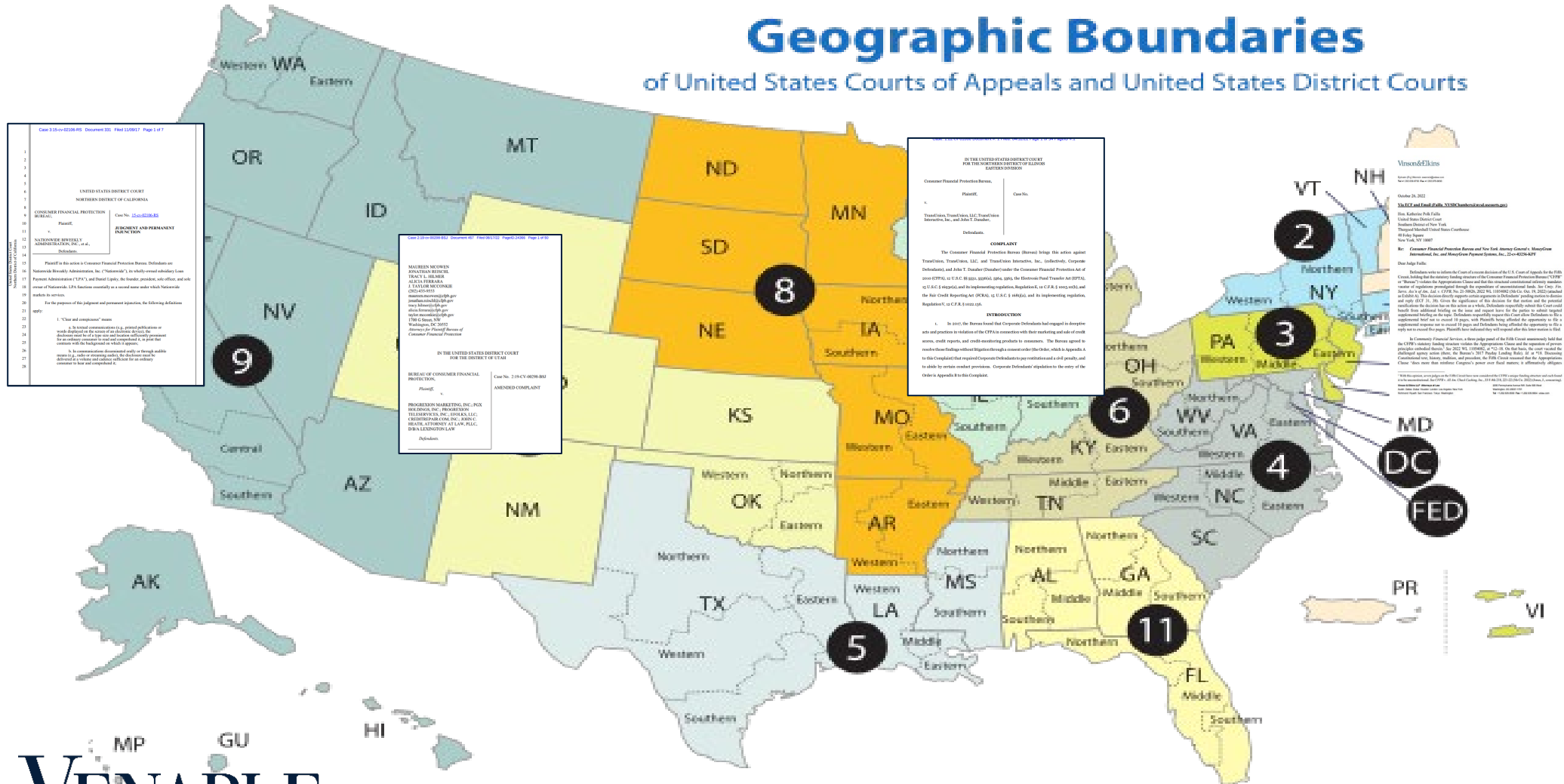
Slip op. at 38.

# U.S. Court of Appeals




# Courts Are Already Being Asked to Consider the Holding

## Geographic Boundaries of United States Courts of Appeals and United States District Courts





# What Other CFPB Actions May Be Challenged?



**EXAMINATION REPORT**

**Initial Information Request Date:** [Click here to enter a date.](#)

**Entity name:** [type]  
**City, State:** [type]

**Institution Product Line(s) Reviewed:** Choose an item.

**Affiliated Organizations Reviewed:** If examiners reviewed the activities of affiliated organizations that fall under the CFPB's jurisdiction, Insert the organizations' names. If not, type N/A.

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**CFPB Region:** Choose an item.

**CFPB Event ID:** 0000  
**CFPB Supervision ID:** 00000

**Entity Type:** Choose an item.


**Review Type:** Point-in-Time Examination

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## Cracking down on discrimination in the financial sector

By Eric Halperin and Lorelei Salas - MAR 16, 2022

Discrimination has a long and ugly history in our nation—and blatant acts of discrimination continue to occur every day. New manifestations of discrimination, embedded within systems and technologies, harm communities even where such acts are not visible. The COVID-19 pandemic brought into sharper focus the inequities that continue to plague the country, and the Consumer Financial Protection Bureau will fight to end discrimination in the financial sector.

We enforce a number of laws that can target discriminatory practices, including the Consumer Financial Protection Act (CFPA). The CFPA empowers us to identify, prohibit, and prosecute unfair, deceptive, and abusive acts or practices committed by any covered person or service provider in connection with any transaction for, or offer of, a consumer financial product or service. The CFPA defines an act or practice as unfair when 1) it causes or is likely to cause substantial injury to consumers that is not reasonably avoidable, and 2) such substantial injury is not outweighed by countervailing benefits to consumers or competition.

When people of color suffer racist conduct in the financial marketplace, it can cause substantial monetary and non-monetary harms. Depending on how the conduct occurs (face-to-face, digital, systematic, etc.), many individuals may be unaware they received disparate treatment or a discriminatory outcome. Even when they are aware, there can be a feeling of unavoidability or powerlessness to stop the discrimination.

However, such practices fall squarely within our mandate to address and eliminate unfair practices. For example, Director Chopra [has spoken](https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action/) (https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action/) about the work the CFPB will undertake to focus on the widespread and growing reliance on machine learning models throughout the financial industry and their potential for perpetuating biased outcomes.

Additionally, certain targeted advertising and marketing, based on machine

2021-CFPB-0006 Document 1 Filed 10/19/2021 Page 1 of 42

**UNITED STATES OF AMERICA  
 CONSUMER FINANCIAL PROTECTION BUREAU**

ADMINISTRATIVE PROCEEDING  
 File No. 2021-CFPB-0006

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<p>In the Matter of:</p>   <p><b>JPay, LLC</b></p>	<p><b>CONSENT ORDER</b></p>
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The Consumer Financial Protection Bureau (Bureau) has reviewed the practices of JPay, LLC (JPay or Respondent, as defined below) with respect to the marketing, provision, and servicing of prepaid cards and has identified the following law violations: (1) Respondent violated the Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693k(2), and its implementing Regulation E, 12 C.F.R. § 1005.10(e)(2), by requiring consumers to establish a Prepaid Account as a condition of receipt of a government benefit; (2) by violating EFTA and Regulation E, Respondent offered or provided a consumer financial product or service that is not in conformity with Federal consumer financial law, in violation of section 1036(a)(1)(A) of the CFPA, 12 U.S.C. § 5536(a)(1)(A); (3) Respondent engaged in unfair and abusive acts and practices by providing fee-bearing prepaid

# What does this all mean?

- Fifth Circuit is the only appeals court to have "ever held that an act of Congress violated the Appropriations Clause."
- The Second Circuit squarely rejected the Fifth Circuit's position and upheld the CFPB's funding structure. (CFPB v. Law Offices of Crystal Moroney PC)
- The Supreme Court granted certiorari on February 27, agreeing to hear the case in its next term with a decision likely coming in first half of 2024.
- Supreme Court may take one of several approaches....



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# **CFPB Investigations, Enforcement, and Policy Initiatives (non-exhaustive)**

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# Expanded Supervision / Focus on Repeat Offenders

- Nonbanks whose activities the CFPB has reasonable cause to determine pose risks to consumers. Expands nonbank exams beyond
  - mortgage, private student loan, and payday loan industries, regardless of size
  - “larger participants” in other nonbank markets for consumer financial products and services (i.e., consumer reporting, debt collection, student loan servicing, international remittances, and auto loan servicing)
- Continued Release of Consumer Financial Protection Circulars and advisory opinions:
  - make our positions on statutory authorities clear to covered entities, the public, and other consumer protection enforcers
  - transparency by launching a new way for the public to petition for rulemakings
- Emerging Trends from the Trenches: Perpetual exams for certain nonbanks vs. cadence of risk-based exams, payment processing fees, scrutiny of AI, concerns with failure to consider all available options (dark patterns), debt collection / loss mitigation, credit reporting, privacy, and more

“Supervision is **increasing its focus on repeat offenders**, particularly those who violate agency or court orders.

As part of that focus, Supervision has created a **Repeat Offender Unit**.

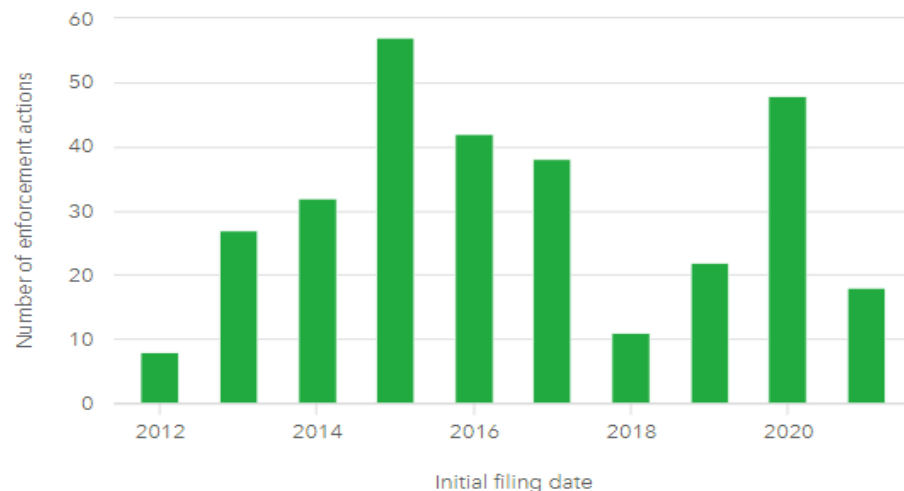
- reviewing and monitoring the activities of repeat offenders;
- identifying the root cause of recurring violations;
- pursuing and recommending solutions and remedies that hold entities accountable for
- failing to consistently comply with Federal consumer financial law; and
- designing a model for order review and monitoring that reduces the occurrences of repeat offenders.”

Source: CFPB Supervisory Highlights Fall 2022

# CFPB Developments (cont'd)

## Enforcement actions by year

This interactive graph shows the total number of CFPB public enforcement actions filed each year from our inception to the present. Hover over the bars to view the total number of public enforcement actions per year.



Date Published: July 2022

Download: [CSV file](#)

- Debt Relief Services (remnants of prior administration or new focus?)
- Student loan debt relief
- Mortgage assistance relief services (MARS)
- Credit Repair
- Debt buyer (repeat offender allegations)
- Debt collection
- Fintech Automated Savings Tool
- Nonbank Automotive Finance Company
- Banks
- And more....

\*Potential for expanded supervision and exams of nonbanks not presently subject to exams

# Nonbank Registration of Consumer Terms and Conditions

- January 11, 2023, CFPB published a proposed rule that would **require supervised nonbank entities to register and provide information about their use of certain terms and conditions in standard-form contracts.**
- In particular, the CFPB is targeting the following types of terms:
  - waivers of claims a consumer can bring in a legal action;
  - limits on the company’s liability to a consumer;
  - limits on the consumer’s ability to bring a legal action by dictating the time frame, forum, or venue for a consumer to bring a legal action;
  - limits on the ability of a consumer to bring or participate in collective legal actions such as class actions;
  - limits on the ability of the consumer to complain or post reviews; certain other waivers of consumer rights or other legal protections; and arbitration agreements
- Status: NPRM

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1092

[Docket No. CFPB-2023-0002]

RIN 3170-AB14

**Registry of Supervised Nonbanks that Use Form Contracts to Impose Terms and Conditions that Seek to Waive or Limit Consumer Legal Protections**

**AGENCY:** Bureau of Consumer Financial Protection.

**ACTION:** Proposed rule with request for public comment.

**SUMMARY:** The Consumer Financial Protection Act of 2010 (CFPA) requires the Consumer Financial Protection Bureau (Bureau or CFPB) to monitor markets for consumer financial products and services for risks to consumers in order to support the various statutory functions of the CFPB, and to conduct a risk-based nonbank supervision program for the purpose of assessing compliance with Federal consumer financial law (among other purposes).<sup>1</sup> Pursuant to these authorities, the CFPB is proposing a rule to require that nonbanks subject to its supervisory authority, with limited exceptions, register each year in a nonbank registration system established by the CFPB information about their use of certain terms and conditions in form contracts for consumer financial products and services that pose risks to consumers. In particular, these

# CFPB Interpretive Rule Limiting Applicability of CFPA’s “Time or Space” Exception

- In August 2022, the CFPB issued an interpretive rule limiting the applicability of the Consumer Financial Protection Act’s (CFPA) “time or space” exception.
  - Director Chopra indicated the rule is in response to the increase in “sophisticated behavioral targeted techniques” used to market financial products.
- As a general rule, entities that merely provide “time or space” for a financial company’s ad are not subject to CFPB jurisdiction. The new rule clarifies that digital marketing providers that are “materially involved” in developing content strategy are going beyond the provision of ad space and time—and therefore are not protected by the exception.
  - Providers who offer only “minimally involved” services, such as allowing a financial firm to run an ad on a particular website or application of the firm’s choosing, remain exempt from the CFPA.
- As a result, an increased number of digital marketers are now potentially subject to CFPB and state enforcement.
- **Publication Date:** August 17, 2022.

# CFPB Takes Aim at Digital Marketing Providers

**cfpb** Consumer Financial Protection Bureau (cfpb.gov/)

## CFPB Warns that Digital Marketing Providers Must Comply with Federal Consumer Finance Protections

Tech firms that use behavioral targeting of individual consumers regarding financial products are liable for violations

AUG 10, 2022

**WASHINGTON, D.C.** – Today, the Consumer Financial Protection Bureau (CFPB) issued an interpretive rule laying out when digital marketing providers for financial firms must comply with federal consumer financial protection law. Digital marketers that are involved in the identification or selection of prospective customers or the selection or placement of content to affect consumer behavior are typically service providers for purposes of the law. Digital marketers acting as service providers can be held liable by the CFPB or other law enforcers for committing unfair, deceptive, or abusive acts or practices as well as other consumer financial protection violations.

“When Big Tech firms use sophisticated behavioral targeting techniques to market financial products, they must adhere to federal consumer financial protection laws,” said CFPB Director Rohit Chopra. “Federal and state law enforcers can and should hold these firms accountable if they break the law.”

Digital marketing providers have transformed advertising. Traditional advertising relies on getting a product or service out to as wide an audience as possible. A traditional marketer, for example, may try to purchase time and space for a TV commercial on the most watched station or show. Digital marketers, on the other hand, seek to maximize individuals’ interactions with ads. They may harvest personal data to feed their behavioral analytics models that can target individuals or groups that they predict are more likely to interact with an ad or sign up for a product or service.

When digital marketing providers go beyond traditional advertising, they are typically covered by the Consumer Financial Protection Act as service providers. The Act contains an exception for companies that solely provide time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media. However, the CFPB stated today that the exception does not cover firms that are materially involved in the development of content strategy.



# Open Banking

**cfpb** Consumer Financial (cfpb.gov)  
Protection Bureau

## CFPB Kicks Off Personal Financial Data Rights Rulemaking

Proposals under consideration would fuel market competition and strengthen consumer data rights

OCT 27, 2022

**Washington, D.C.** – Today, the Consumer Financial Protection Bureau (CFPB) outlined options to strengthen consumers’ access to, and control over, their financial data as a first step before issuing a proposed data rights rule that would implement section 1033 of the Dodd-Frank Act. Under the options the CFPB is considering, consumers would be able to more easily and safely walk away from companies offering bad products and poor service and move towards companies competing for their business with alternate or innovative products and services.

“Dominant firms shouldn’t be able to hoard our personal data and appropriate the value to themselves,” said CFPB Director Rohit Chopra. “The CFPB’s personal financial data rights rulemaking has the potential to jumpstart competition, giving Americans new options for financial products.”

Data now touches almost every facet of the human experience, including in banking. Digital technology is transforming the markets, including how payment, deposit, and lending services are provided and who provides them. Big banks, financial tech companies, incumbents, and small start-ups are all jockeying to be in front. Today’s kick off begins the process of removing stumbling blocks to more competition and consumer choice.

This rulemaking aims to create a marketplace where companies would need to improve their offerings to keep their customers. Nascent firms would be able to use consumer-authorized data to build and widely offer products and services that can compete with big incumbents. Consumers could switch providers to get a better deal or escape poor customer service, and companies would have to keep and attract customers through competitive prices, high-quality services, and improved products.

The current environment illustrates the imperative for this rulemaking. Companies compile vast troves of personal data, including information about people’s use of financial products and services. By monopolizing the use of personal financial data, financial institutions are able to block competitors’

# Open Banking 1033 Rulemaking (Cont'd)

**cfpb** Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

October 27, 2022

## High-Level Summary and Discussion Guide of Outline of Proposals and Alternatives Under Consideration for SBREFA: Required Rulemaking on Personal Financial Data Rights

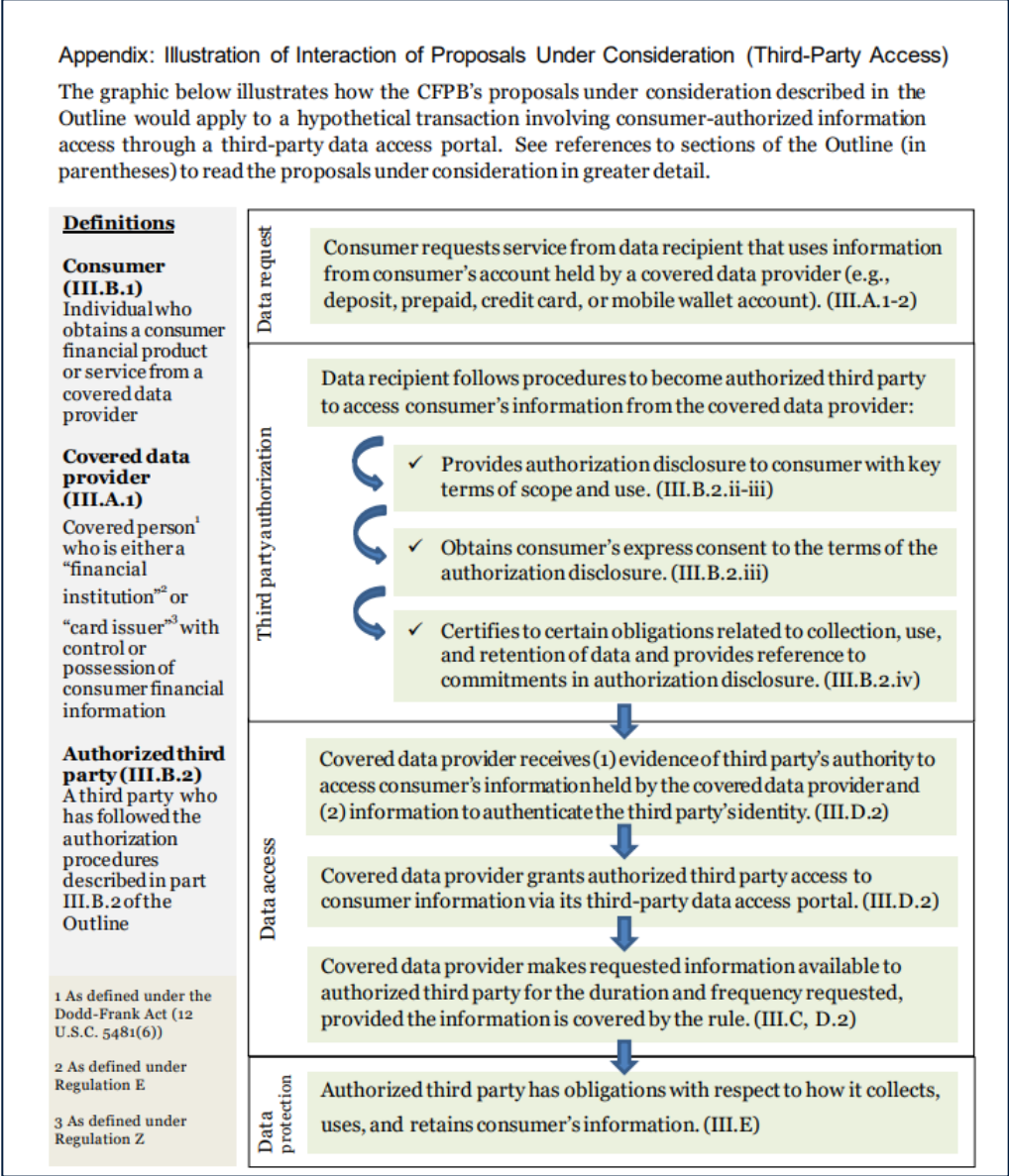
In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 1033(a) of the Dodd-Frank Act authorizes the Consumer Financial Protection Bureau (CFPB) to prescribe rules requiring “a covered person [to] make available to a consumer, upon request, information in the control or possession of the covered person concerning the consumer financial product or service that the consumer obtained from such covered person, including information relating to any transaction, series of transactions, or to the account including costs, charges and usage data.”<sup>1</sup>

The Bureau is now in the process of writing regulations to implement section 1033. Under the process established by Congress in the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the Bureau is required to consult with representatives of small entities likely to be affected directly by the regulations the Bureau is considering proposing and to obtain feedback on the likely impacts the rules the Bureau is considering would have on small entities.

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<sup>1</sup> Dodd-Frank Act section 1033, 124 Stat. 2008 (codified at 12 U.S.C. 5533(a)). The term “covered person” is defined at section 1002(6) of the Dodd-Frank Act. See 12 U.S.C. 5481(6).

1 HIGH-LEVEL SUMMARY AND DISCUSSION GUIDE OF OUTLINE OF PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION FOR SBREFA: REQUIRED RULEMAKING ON PERSONAL FINANCIAL DATA RIGHTS



# Junk Fees and Dark Patterns

**cfpb** Consumer Financial Protection Bureau (cfpb.gov/)

## CFPB Sues Payment Platform Used by Charity Race Organizers for Illegal Practices With Junk Membership Fees

ACTIVE Network generated more than \$300 million in revenue through digital dark patterns and online trickery

OCT 18, 2022

**WASHINGTON, D.C.** - Today, the Consumer Financial Protection Bureau (CFPB) sued the online event registration company ACTIVE Network for illegally charging people trying to sign up for fundraising road races and marathons into its annual subscription discount club, and for enrolling into its annual subscription discount club, CFPB's lawsuit describes how ACTIVE automatically enrolls families into its discount club by using digital dark patterns on whom just thought they were registering for a competition that would be up being enrolled into a costly membership club. The lawsuit asks the court to force ACTIVE to change this unlawful enrollment practice and to pay a penalty.

"The CFPB is suing ACTIVE Network for illegally charging consumers thousands of dollars in enrollment fees through its use of digital dark patterns and online trickery," said CFPB Director Rohit Chopra. "People who signed up to run in a charity race found out too late that they had been running away with their money."

ACTIVE Network is headquartered in Plano, Texas, and operates a digital membership system, used by organizers of events and activities, including marathons, YMCA camps, to allow participants to register and purchase products and services purchased by Global Payments Inc. (NYSE: GPN) for their events.

ACTIVE collects the consumer's registration and payment information. ACTIVE is then compensated with a portion of the revenue from the event. ACTIVE operates Active Advantage, a paid membership program that offers discounts for products and activities rarely related to the event. Consumers signed up to attend or support.

**Dark Patterns to Drive Up Enrollments**

## Bringing Dark Patterns to Light

STAFF REPORT | SEPTEMBER 2022

### Introduction

For decades, unscrupulous direct mail marketers and brick-and-mortar retailers have relied on design tricks and psychological tactics, such as pre-checked boxes, hard-to-find-and-read disclosures, and confusing cancellation policies, to get consumers to part with their money or data. As more and more commerce has moved online, so too have these manipulative design practices—termed “dark patterns”—only they have grown in scale and sophistication, creating ever greater challenges for consumers.<sup>1</sup>

As the nation’s leading consumer protection agency, the Federal Trade Commission’s (“FTC”) mission is to stop deceptive or unfair business practices in the marketplace, including those that take the form of dark patterns.<sup>2</sup> The FTC has, for example, sued companies for requiring users to navigate a maze of screens in order to cancel recurring subscriptions, using non-descript dropdown arrows or small icons to hide the full cost and other terms of rent-to-own or other payment products, and even sneaking unwanted products into consumers’ online shopping carts without their knowledge.<sup>3</sup> More recently, the agency issued an enforcement policy statement that warned companies against deploying illegal practices that trick or trap consumers into subscription services.<sup>4</sup>

On April 29, 2021, the FTC hosted a public workshop on digital dark patterns and explored whether user interfaces can have the effect of obscuring, subverting, or impairing consumer autonomy and decision-making.<sup>5</sup> The workshop featured a variety of speakers, including consumer advocates, members of Congress, researchers, legal experts, and other industry professionals. In this Staff Report, we discuss key topics from the workshop and academic literature, including the rise of dark patterns in the digital marketplace and common types of dark patterns. (See Appendix A.) For each common dark pattern addressed, we discuss consumer protection concerns and recommendations for companies.



Bringing **Dark Patterns** to **Light**

AN FTC WORKSHOP

### Junk Data in Credit Reports

...e credit reports of children in

Protection Bureau (CFPB) about their obligation to protect and remove consumers’ credit profiles. For example, the Bureau has found that some companies report information on minors they are not.

ing on a loan before they have never shown up in credit reports. Consumer reporting agencies have procedures to screen for and remove information that cannot be true.”

children in foster care may use a high rate of identity theft. For example, 100 children in the United States have had their personal information stolen by adults and agency workers. When children passing through their foster care system take loans, children in foster care often have credit reports that are clearly inaccurate and reflect a lack of financial independence.

istent or conflicting information in credit reports. Junk data in reports can affect a consumer’s employment, or paying for services. In some examples are credit reports that reflect a



# CFPB Targets Continuity Programs, and BNPL Study



## CFPB Sues MoneyLion for Overcharging Servicemembers and Trapping Consumers in Costly Memberships

The online lender allegedly required customers to pay hefty fees to access loans and often refused to cancel memberships

SEP 29, 2022

**Washington, D.C.** - Today, the Consumer Financial Protection Bureau (CFPB) sued MoneyLion Technologies, an online lender, and 38 of its subsidiaries, for imposing illegal and excessive charges on servicemembers and their dependents. The CFPB alleges that MoneyLion violated the Military Lending Act by charging more than the legally allowable 36% rate cap on loans to servicemembers and their dependents, through a combination of stated interest rates and monthly membership fees. The CFPB also alleges MoneyLion required customers to join a membership program to access certain "low-APR" loans, and then did not allow them to cancel their memberships until their loans were paid. This is the CFPB's fourth enforcement action related to the Military Lending Act in the past two years.

"MoneyLion targeted military families by illegally extracting fees and making it difficult to cancel monthly subscriptions," said CFPB Director Rohit Chopra. "Companies are breaking the law when they require monthly membership fees to obtain loans and then create barriers to canceling those memberships."

MoneyLion, based in New York City, is a financial technology company that offers online installment loans and other products. MoneyLion requires customers to join a MoneyLion membership program and pay monthly membership fees to access what it markets as its "low-APR" installment loan product.

The CFPB alleges that MoneyLion's practices violated the Consumer Financial Protection Act and the Military Lending Act. The Military Lending Act protects active duty servicemembers and their dependents, including by limiting the annual percentage rate applicable to credit extended to servicemembers and their dependents to 36%. Specifically, MoneyLion allegedly harmed consumers by:

CONSUMER FINANCIAL PROTECTION BUREAU | SEPTEMBER 2022

## Buy Now, Pay Later: Market trends and consumer impacts



# CFPB Guidance on Auto Renewal Programs



1700 G Street NW, Washington, D.C. 20552

Circular 2023-01

January 19, 2023

## Consumer Financial Protection Circular 2023-01

### Unlawful negative option marketing practices

January 19, 2023

#### Question presented

Can persons that engage in negative option marketing practices violate the prohibition on unfair, deceptive, or abusive acts or practices in the Consumer Financial Protection Act (CFPA)?

#### Response

Yes. “Covered persons” and “service providers” must comply with the prohibition on unfair, deceptive, or abusive acts or practices in the CFPA.<sup>1</sup> Negative option marketing practices may violate that prohibition where a seller (1) misrepresents or fails to clearly and conspicuously disclose the material terms of a negative option program; (2) fails to obtain consumers’ informed consent; or (3) misleads consumers who want to cancel, erects unreasonable barriers to cancellation, or fails to honor cancellation requests that comply with its promised cancellation procedures.

#### Background on Negative Option Marketing

As used in this Circular, the phrase “negative option” refers to a term or condition under which a seller may interpret a consumer’s silence, failure to take an affirmative action to reject a product or service, or failure to cancel an agreement as acceptance or continued acceptance of the offer.

Negative option programs are common across the market, including in the market for consumer financial products and services, and such programs can take a variety of forms. For example, in

<sup>1</sup> 12 U.S.C. 5481(6), (26), 5531, 5536. For simplicity, the remainder of this Circular refers to covered persons and service providers as “sellers.” The CFPB notes, however, that entities and individuals can be covered persons or service providers (and thus subject to liability under the CFPA) even if they do not themselves engage in “selling” a consumer financial product or service with a negative option feature.

*Consumer Financial Protection Circulars* are policy statements advising parties with authority to enforce federal consumer financial law.

# Insufficient Data Protection or Information Security is a Potential UDAAP

**cfpb** Consumer Financial Protection Bureau  
1700 G Street NW, Washington, D.C. 20552

Circular 2022-04  
August 11, 2022

## Consumer Financial Protection Circular 2022-04

### Insufficient data protection or security for sensitive consumer information

August 11, 2022

#### Question presented

Can entities violate the prohibition on unfair acts or practices in the Consumer Financial Protection Act (CFPA) when they have insufficient data protection or information security?

#### Summary answer

Yes. In addition to other federal laws governing data security for financial institutions, including the Safeguards Rules issued under the Gramm-Leach-Bliley Act (GLBA), “covered persons” and “service providers” must comply with the prohibition on unfair acts or practices in the CFPA. Inadequate security for the sensitive consumer information collected, processed, maintained, or stored by the company can constitute an unfair practice in violation of 12 U.S.C. 5536(a)(1)(B). While these requirements often overlap, they are not coextensive.

Acts or practices are unfair when they cause or are likely to cause substantial injury that is not reasonably avoidable or outweighed by countervailing benefits to consumers or competition. Inadequate authentication, password management, or software update policies or practices are likely to cause substantial injury to consumers that is not reasonably avoidable by consumers, and financial institutions are unlikely to successfully justify weak data security practices based on countervailing benefits to consumers or competition. Inadequate data security can be an unfair practice in the absence of a breach or intrusion.

#### Analysis

Widespread data breaches and cyberattacks have resulted in significant harms to consumers, including monetary loss, identity theft, significant time and money spent dealing with the impacts of the breach, and other forms of financial distress. Providers of consumer financial

*Consumer Financial Protection Circulars* are policy statements advising parties with authority to enforce federal consumer financial law.

- **Multi-factor Authentication:** Multi-factor authentication greatly increases the level of difficulty for adversaries to compromise enterprise user accounts, and thus gain access to sensitive customer data. Multi-factor authentication can protect against credential phishing, such as those using the Web Authentication standard supported by web browsers.
- **Adequate Password Management:** Unauthorized use of passwords is a common data security issue, as is the use of default enterprise logins or passwords. Username and password combinations can be sold on the dark web or posted for free on the internet, creating risk of future breaches. For firms that are still using passwords, password management policies and practices allow for ways to monitor for breaches at other entities where employees may be re-using logins and passwords.
- **Timely Software Updates:** Software vendors and creators, including open-source software libraries and projects, often send out patches and other updates to address continuously emerging threats. Upon announcement of these updates to address vulnerabilities, hackers immediately become aware that firms using older versions of software are potential targets to exploit. Protocols to immediately update software and address vulnerabilities once they become publicly known can reduce vulnerabilities.

# AI and Algorithms Held to Legal Requirements

## CFPB Takes Action Against Hello Digit for Lying to Consumers About Its Automated Savings Algorithm

Fintech's Algorithm Wrongfully Depleted Checking Accounts, Leading to Overdraft Penalties for Customers

AUG 10, 2022

SHARE & PRINT



WASHINGTON, D.C. - The Consumer Financial Protection Bureau (CFPB) is taking action against Hello Digit, LLC, a financial technology company that used a faulty algorithm that caused overdrafts and overdraft penalties for customers. Hello Digit was meant to save people money, but instead the company falsely guaranteed no overdrafts with its product, broke its promises to make amends on its mistakes, and pocketed a portion of the interest that should have gone to consumers. Today's order requires Hello Digit to pay redress to its harmed customers. It also fines the company \$2.7 million for its actions.

"Hello Digit positioned itself as a savings tool for consumers having trouble saving on their own. But instead, consumers ended up paying unnecessary overdraft fees," said Rohit Chopra. "Companies have long been held to account when they engage in faulty advertising, and regulators must do the same when it comes to faulty algorithms."

Hello Digit is a fintech company with its principal place of business in San Francisco, California. In December 2021, Hello Digit was acquired by Oportun Financial Corporation, a small-dollar lending company. Hello Digit offers a personal-finance-management app that promotes automated savings. When consumers sign up for the service, Hello Digit uses a proprietary algorithm to make automatic transfers from the consumer's checking account, called "auto-saves," to an account held in Hello Digit's name for the benefit of the consumers. The tool is meant to help people put aside money for vacations or rainy days.

As part of the sign-up process, consumers are required to grant Hello Digit access to their checking accounts. Hello Digit then uses its algorithm to analyze consumers' checking-account data to determine when and how much to save for each consumer. The company charges consumers a subscription fee of \$5 a month for its service.

The CFPB found that Hello Digit engaged in deceptive acts or practices, violating the Consumer Financial Protection Act.

- **Falsely guaranteed no overdrafts:** Hello Digit represented that its tool "never transfers more than you can afford," and it provided a "no overdraft guarantee." But instead, Hello Digit routinely caused consumers' checking accounts to incur overdraft fees charged by their banks. Hello Digit received complaints about overdrafts daily.
- **Broke promises to make whole on its mistakes:** The company also represented that if there was an overdraft, it would reimburse consumers. But the company often denied customers who tried to recoup their money. The company has received nearly 70,000 overdraft-reimbursement requests since 2017.
- **Pocketed interest that should have gone to consumers:** As of mid-2017, Hello Digit deceived consumers when it represented that it would not keep any interest earned on consumer funds that it was holding, when in fact the company kept a significant amount of the interest earned. Had Hello Digit kept its promise to not keep the interest on consumers' funds, consumers could have pocketed the extra savings.

Redress and \$2.7m fine.



# CFPB Issues Guidance on “Abusive” Acts or Practices



1700 G Street NW, Washington, D.C. 20552

## Policy Statement on Abusive Acts or Practices

April 3, 2023

### Background

In 2010, Congress passed the Consumer Financial Protection Act of 2010 (CFPA) and banned abusive conduct.<sup>1</sup> The CFPA’s prohibition on abusive conduct was the most recent instance of congressional tailoring of the Federal prohibitions intended to ensure fair dealing and protect consumers and market participants in the United States.<sup>2</sup>

Since the beginning of the 20<sup>th</sup> century, Congress has amended these prohibitions in response to evolving norms, economic events, and judicial interpretations, guiding those tasked with enforcing the law. Beginning with the creation of the Federal Trade Commission, and the development of the “unfair methods of competition”<sup>3</sup> and “unfair or deceptive acts or

<sup>1</sup> CFPA section 1036(a)(1)(B), 12 U.S.C. 5536(a)(1)(B). In CFPA section 1031, Congress prohibited covered persons and services providers from committing or engaging in unfair, deceptive, or abusive acts or practices in connection with the offering or provision of consumer financial products or services. CFPA section 1031(d) sets forth the general standard for determining whether an act or practice is abusive. See 12 U.S.C. 5531(d).

<sup>2</sup> See, e.g., *FTC v. Standard Educ. Soc’y*, 86 F.2d 692, 696 (2d Cir. 1936), *rev’d in part on other grounds*, 302 U.S. 112, 116 (1937) (describing the congressional prohibitions intended to regulate methods of fair dealing in the marketplace). Certain other Federal consumer financial laws, including the Fair Debt Collection Practices Act (FDCPA) and the Home Ownership and Equity Protection Act (HOEPA), reference either the term “abusive” or “abuse.” See 15 U.S.C. 1692d (FDCPA), 15 U.S.C. 1699(p)(2)(B) (HOEPA). The Telemarketing and Consumer Fraud and Abuse Prevention Act also directed the Federal Trade Commission (FTC) to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.” 15 U.S.C. 6102(a)(1).

<sup>3</sup> In 1914, Congress passed the FTC Act, which declared as unlawful “unfair methods of competition” but did not define the term “unfair.” Act of Sept. 26, 1914, ch. 311, sec. 5(a), 38 Stat. 717, 719 (codified at 15 U.S.C. 45(a)). Congress intended that

In this policy statement, the CFPB sets forth how abusive conduct generally includes

- (1) obscuring important features of a product or service or
- (2) leveraging certain circumstances—including gaps in understanding, unequal bargaining power, or consumer reliance—to take unreasonable advantage.

In particular, the statement describes how the use of dark patterns, set-up-to-fail business models like those observed before the mortgage crisis, profiteering off captive customers, and kickbacks and self-dealing can be abusive.

# Additional Regulatory Highlights (non-exhaustive)

- **FDIC Focus on Bank Partnerships** (unsafe or unsound practices) (March 2023 Consent Order w/CRB)
- **Use of Credit Reports:** CFPB issued a legal interpretation to ensure that companies that use and share credit reports and background reports have a permissible purpose under the Fair Credit Reporting Act.
  - Credit reporting companies and users of credit reports have specific obligations to protect the public's data privacy.
  - The advisory also reminds covered entities of potential criminal liability for certain misconduct.
- **Student Loan Debt Relief:** FTC and CFPB actions against student loan debt relief providers.
- **Focus on Payment Systems:** CFPB is surveying top payment service companies
- **CFPB Encourages States:** CFPB issued an interpretive rule that describes states' authorities to pursue lawbreaking companies and individuals that violate the provisions of federal consumer financial protection law. Because of the crucial role states play in protecting consumers, the Consumer Financial Protection Act grants their consumer protection enforcers the authority to protect their citizens and otherwise pursue lawbreakers.
- **Expanded Exam Authority:** CFPB announced that it is invoking a largely unused legal provision to examine nonbank financial companies that pose risks to consumers.
- **Debt Collection:** Regulation F Rulemaking Exam and Year One
- **FTC Safeguards Rule (new compliance requirements)**
- **Small Business Lending:** SBA opens 7(a) Loan Program to Fintechs



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# **Brief Privacy and Data Security Law Update**

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# FTC Safeguards Rule

The Safeguards Rule applies to [financial institutions](#) subject to the FTC’s jurisdiction and that aren’t subject to the enforcement authority of another regulator under section 505 of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6805. According to [Section 314.1\(b\)](#), an entity is a “financial institution” if it’s engaged in an activity that is “financial in nature” or is “incidental to such financial activities as described in section 4(k) of the Bank Holding Company Act of 1956, [12 U.S.C § 1843\(k\)](#).”

- [Section 314.2\(h\)](#) of the Rule lists 13 examples of the kinds of entities that *are* financial institutions under the Rule, including mortgage lenders, payday lenders, finance companies, mortgage brokers, account servicers, check cashers, wire transferors, collection agencies, credit counselors and other financial advisors, tax preparation firms, non-federally insured credit unions, and investment advisors that aren’t required to register with the SEC.
- 2021 amendments to the Safeguards Rule add a new example of a financial institution—finders. Those are companies that bring together buyers and sellers and then the parties themselves negotiate and consummate the transaction.

[Section 314.2\(h\)](#) of the Rule lists four examples of businesses that *aren’t* a “financial institution.” In addition, the FTC has [exempted from certain provisions of the Rule](#) financial institutions that “maintain customer information concerning fewer than five thousand consumers.”

The Safeguards Rule requires covered financial institutions to develop, implement, and maintain an [information security program](#) with administrative, technical, and physical safeguards designed to protect customer information. The Rule defines [customer information](#) to mean “any record containing [nonpublic personal information](#) about a customer of a financial institution, whether in paper, electronic, or other form, that is handled or maintained by or on behalf of you or your affiliates.”

(The definition of “[nonpublic personal information](#)” in Section 314.2(l) further explains what is—and isn’t—included.) The Rule covers information about your own customers and information about customers of other financial institutions that have provided that data to you.

[Information security program](#) must be written and it must be appropriate to the size and complexity of your business, the nature and scope of your activities, and the sensitivity of the information at issue.

## Reasonable Security Program

- a. *Designate a Qualified Individual to implement and supervise your company’s information security program.*
- b. *Conduct a risk assessment.*
- c. *Design and implement safeguards to control the risks identified through your risk assessment.* The Safeguards Rule requires:
  1. Implement and periodically review access controls.
  2. Know what you have and where you have it.
  3. Encrypt customer information on your system and when it’s in transit. Assess your apps. I
  4. Implement multi-factor authentication for anyone accessing customer information on your system.
  5. Dispose of customer information securely.
  6. Anticipate and evaluate changes to your information system or network.
  7. Maintain a log of authorized users’ activity and keep an eye out for unauthorized access. d. *Regularly monitor and test the effectiveness of your safeguards.* f. *Monitor your service providers.*
- g. *Keep your information security program current.*
- h. *Create a written incident response plan.*
- i. *Require your Qualified Individual to report to your Board of Directors.*

The effective date of the new rule is **June 9, 2023**



# Compliance Steps and Getting Ahead

- Data mapping
- Legal gap assessment
- Policies and notices
- Contracts (inbound and outbound data)
- Sensitive data
- California personnel and B2B data
- Consumer rights requests

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# Closing Observations / Questions & Answers

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For an index of articles and presentations on CFS topics, see  
[www.Venable.com/cfs/publications](http://www.Venable.com/cfs/publications).



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