

Consumer Financial Services Outlook 2020

Wednesday, January 15, 2:00-3:15 pm ET

Panelists

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Today's Discussion

- Bank-Fintech Partnerships
- Future of the Consumer Financial Protection Bureau
- Enforcement and Litigation Trends
- Payments
- Regulatory Agenda
 - Federal Developments on the Horizon
 - State Developments on the Horizon
- Innovation and Sandbox
- A View from the Hill
- Observations for the New Year

Welcome and Today's Panelists...



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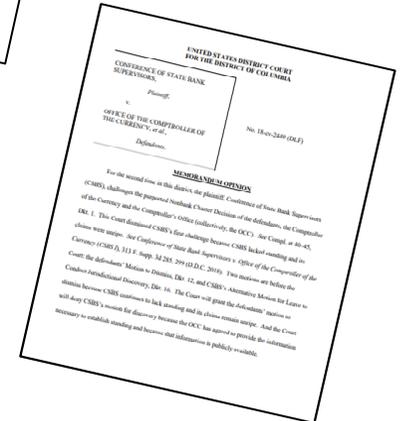
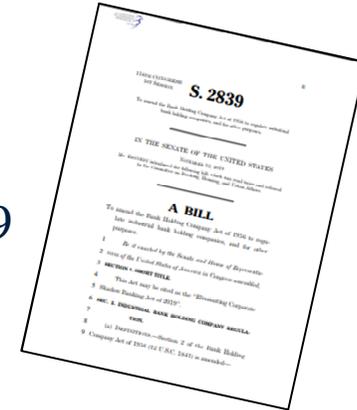
Jonathan L. Pompan, Moderator
Partner

Bank-Fintech Partnerships

Collaboration, opportunities, and threats amid regulatory shift

Bank-Fintech Partnerships: Bank Charter Update

- Industrial Loan Company (ILC) Charter (currently 7 states) – financial institutions not regulated by a federal banking agency
 - Pending applications
 - Opposition
 - S. 2839, Eliminating Corporate Shadow Banking Act of 2019
- Full Service National Bank Charter
- OCC Special Purpose National Bank Charter
 - *Conference of State Bank Supervisors v. OCC*
 - *Lacewell v. OCC*



Bank-Fintech Partnerships: Valid When Made and True Lender

- **Valid When Made Doctrine** – Provides that a loan, if valid at the time of inception, cannot be deemed invalid or its terms determined unenforceable due to its transfer, sale or assignment to another person.
 - *Madden v. Midland Funding* (2nd Circuit decision, confusion about the effect of a transfer on a loan’s valid interest rate)
 - Congress (Usury and Federalism)
 - OCC Issuance (Comments due January 21, 2020)
 - FDIC Issuance (Comments due February 4, 2020)
- **True Lender** – Courts disregard the form of the lending configuration in favor of a searching examination of its substance, considering a variety of factors designed to determine which entity is the actual, rather than nominal, lender.
 - Bank-Fintech Partnership Model
 - Not addressed in OCC or FDIC Issuance
 - Litigation Update
 - Bank/Fintech Company
 - Secondary market participants

Bank-Fintech Partnerships: Banking Agency Trends

- 2019 – Significant number of banking agency rulemakings and guidance
 - Capital treatment of high volatility commercial real estate (HVCRE)
 - Company-run stress tests
 - Change in applicable thresholds for capital and liquidity
 - Real estate appraisals
 - Community bank leverage ratio
 - Reduced reporting for community banks
 - Extended exam cycles for community banks
 - Rules to implement CECL
 - Volcker Rule
 - Exemption for community banks
 - Changes to proprietary trading rule
 - Depository Institution Management Interlocks Act threshold increase

Bank-Fintech Partnerships: Banking Agency Trends

- 2020 Bank/Fintech Opportunities
 - Community Reinvestment Act NPR
 - Clarification on qualifying activities
 - Expanding assessment areas – deposit-based requirement
 - Opportunities
 - Comment deadline March 9, 2020
 - Brokered Deposits NPR
 - Primary Purpose exception
 - Clarity through application
 - Opportunities

Future of the Consumer Financial Protection Bureau

Independent agency or for cause removal and impact on activities

Future of the CFPB: *Seila Law*

- Supreme Court to hear challenge to U.S. Court of Appeals for the Ninth Circuit ruling rejecting challenges to the constitutionality of the CFPB’s leadership structure. In *Seila Law*, a Ninth Circuit panel unanimously ruled the CFPB’s single-director structure was constitutional, prompting Seila to file a brief asking the Supreme Court to hear the case to review that finding.
- Is the removal “for cause” provision unconstitutional?
 - (1) Yes – remove “for cause” and keep everything else as an acceptable remedy. (Already written by Justice Kavanaugh in *PHH v. CFPB* (DC. Cir. 2016)).
 - (2) Yes – cannot remove “for cause,” so the entirety of Section X of the Dodd-Frank Act must be thrown out.
 - (3) Yes – cannot remove “for cause,” but can revise the Dodd-Frank Act to call for a Commission to keep with the legislative intent of independence.
 - (4) No – there are plenty of federal agencies just like the CFPB.
- Supreme Court argument on March 3, 2020.

CFPB Structure to Be Tested by the Supreme Court
Wednesday, December 4, 2019

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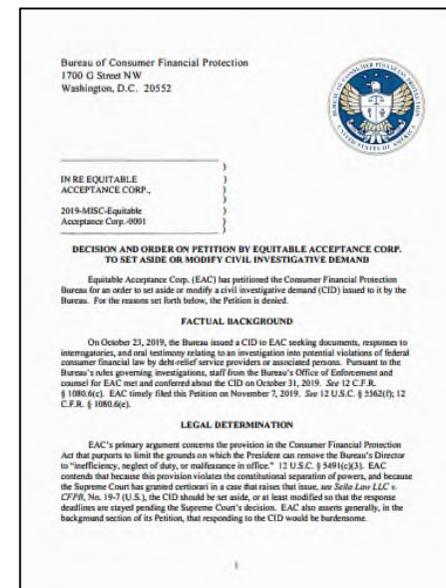
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Future of the CFPB: *Seila Law* Fallout

- Example of current impact on investigations and enforcement:
 - *In Re Equitable Acceptance Corp.*:
 - CFPB has refused to stay investigations on hold while Supreme Court considers constitutional challenge to structure of agency.
 - Equitable Acceptance had asked the CFPB to set aside its demand for documents, responses and oral testimony relating to the CFPB's investigation into potential consumer law violations, or at least delay its deadlines, until the Supreme Court ruled in *Seila*, but the CFPB has declined to do so in administrative forum.
 - “In the event directors position; that the Bureau determines at a later date that it is necessary to seek a court order compelling EAC's compliance with this CID, *see* 12 U.S.C. § 5562(e), the company can raise its constitutional objection as a defense to that proceeding in district court”.
 - The CFPB has in its ongoing litigation adopted the view that the removal restriction is unconstitutional but that its invalidity does not affect the remainder of the Bureau's statute, including the provisions authorizing the Bureau to issue and enforce CIDs. *See* Br. of Resp't, *Seila Law*, 2019 WL 4528136 (U.S.).
- Presidential Election:
 - If the Supreme Court rules that the CFPB director can be removed at the president's discretion and President Trump is not reelected in November, expect the consideration of a change at the top of the CFPB (consistent with current administration and CFPB position).



Enforcement and Litigation Trends

Shift from regulation by enforcement, but still active enforcement of federal consumer financial law by CFPB, with continued activity by FTC and other government authorities

Enforcement and Litigation Trends: CFPB

- Bottom line:
 - Investigations are being launched.
 - Lawsuits are being filed.
 - Exams are being conducted and remedial actions are being ordered.
- Areas of focus in 2019:
 - Student loans, credit scores and reports, mortgage and fair lending, debt collection, mortgage servicing, mortgage advertising, credit repair, small-dollar loans, money transfers, credit card disclosures, electronic payments, and more.
- By the Numbers:
 - 2019: ~24 announced public enforcement actions (plus ongoing litigation).

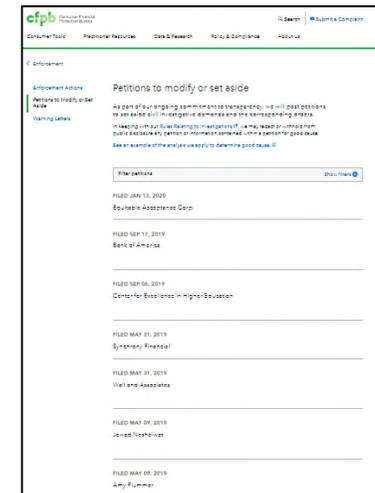
Enforcement and Litigation Trends: FTC

- No signs of slowing down at the FTC Bureau of Consumer Protection
 - Privacy and Data Security
 - \$5 billion enforcement action against social media company
 - Cambridge Analytica settlement
 - EU-US Privacy Shield Framework false representations
 - Children’s Online Privacy Protection Act
 - Threat assessment
 - Endorsements, Certifications, Influencers, and Consumer Reviews
 - Coaching and Mentoring Businesses
 - Fintech and Payments
 - Lead Generation
- But threats to the FTC’s enforcement authority under FTC Act § 13(b), 15 U.S.C. § 53(b), equitable monetary relief are being litigated

The screenshot shows a webpage from Venable LLP. The header includes the firm's name, navigation links for HOME, ABOUT, and CONTACT, and a search bar. The main content area is titled "ALL ABOUT ADVERTISING LAW" in large, bold letters, with a subtitle "REGULATORY & LITIGATION DEVELOPMENTS FOR ADVERTISERS AND MARKETERS". Below this is a featured article titled "Statutory Dreams or Equitable Nightmares: A Trifecta of Cases Before the Supreme Court Threaten the FTC's Enforcement Authority" by Leonard L. Gordon and Michael A. Munoz, dated December 30, 2019. The article text discusses the FTC's ability to obtain equitable monetary relief under Section 13(b) of the FTC Act, citing cases like *Liu v. SEC*, *FTC v. AMG Capital Management, LLC*, and *FTC v. Credit Bureau Center, LLC*. It mentions that the Supreme Court is set to hear oral argument on March 3, 2020, in *Liu v. SEC*. On the right side of the page, there is a "STAY CONNECTED" section with a "Subscribe By Email" form and social media icons for RSS and Twitter. Below the article, there are two "BLAWG 100 HONOREE" badges, one for the 2015 edition and one for the 2020 edition.

What's next at the FTC and CFPB?

- FTC and the CFPB hosted a public workshop on December 10, 2019 to discuss issues affecting the accuracy of both traditional credit reports and employment and tenant background screening reports
- Strictly Business: An FTC Forum on Small Business Financing
- Areas publicly known to have CFPB investigations:
 - Deferred interest credit cards, tax debt relief, student loan debt relief, lump sum payments for military pensions, debt collection



Enforcement and Litigation Trends: Other Agencies and State Examples

- FDIC
 - Oklahoma bank settlement for allegedly violating the TCPA and its implementing regulations, and Section 5 of the FTC Act based on the bank's telemarketing practices – heightened litigation risk (and not just CFPB and FTC).
- California
 - Multiple enforcement orders for alleged violations of the California Finance Lenders Law.
 - Proposed plan to increase resources for increased enforcement over:
 - "unlicensed financial services providers not currently subject to regulatory oversight such as debt collectors, credit reporting agencies and financial technology (fintech) companies" and UDAAP.
- New York
 - Active announced investigations in payroll advance, nonpublic investigations with enhanced consumer protection enforcement division.
 - Noteworthy settlement with an investor over financing and assistance to a rent-to-own home company alleged to have engaged in illegal, unlicensed mortgage-lending activity.
 - Governor's proposal to enhance authority and fill gaps, e.g., establish state licensing and supervision for debt collectors and enforcement authority against abusive conduct; target robocalls (stir/shaken) with authority for restitution and damages.
- Pennsylvania
 - Active agenda in consumer financial services enforcement, including state interest rates and lending.

Payments

Dynamic landscape shapes the movement of money

Payments: Industry Developments

- Looking back in 2019 . . .
 - Lots of consolidation in the merchant acquiring market
 - FIS / Worldpay
 - Fiserv / First Data
 - Global Payments / TSYS
 - Payment facilitation / software continues to grow
- Looking forward in 2020 . . .
 - Continued growth in payment facilitation
 - Push to card
 - ACH processing / third-party senders
 - Commercial payments

Payments: Legal and Regulatory Topics

- **BSA/AML** – The Bank Secrecy Act (“BSA”) requires “financial institutions” to implement anti-money laundering (“AML”) programs. Continued flow down of BSA/AML obligations to payments companies in areas like diligence of customers, monitoring of suspicious activity, and reporting to government.
- **Money Transmission** – Defined as the acceptance of currency or funds from one person *and* the transmission of currency or funds to another person.
 - Money transmission considerations are relevant for payment processors, payment facilitators, digital wallet providers, and ACH processors, among other payments companies.
 - Given the patchwork of state laws, states have been looking for ways to streamline the regulatory framework. With respect to money transmission, for example, the Conference of State Bank Supervisors (CSBS) has been working to harmonize rules and streamline application processes as part of its Vision 2020 plan.
- **Data Privacy and Security** – Statutes like the Gramm-Leach-Bliley Act (GLBA) and the California Consumer Privacy Act (“CCPA”) establish privacy and security requirements for payments and fintech companies.
- **Consumer Protection** – Banks and processors are viewed as “gatekeepers” or “chokepoints” for fraudulent activity engaged in by merchants. There is continuing scrutiny of the payments industry by FTC, CFPB, Department of Justice, and state attorneys general.

Payments: Recent Law Enforcement Actions

- FTC and CFPB Active Enforcement:
 - Allied Wallet (2019, FTC) (\$110,050,941)
 - EPS America (2018, FTC) (\$1,384,500)
 - EMS Systems (2017, FTC) (\$12,365,731)
 - Capital Payments (Bluefin) (2016, FTC) (\$2,600,000)
 - Cardflex (2015, FTC) (\$3,298,298.13)
 - Dwolla (2015, CFPB) (\$100,000)
- FTC Staff recommendation on Telemarketing Sales Rule (TSR) payment prohibitions and advance fee ban for recovery services expected.
- States' Activity:
 - State attorneys general have stated they will be more aggressive in going after financial services providers (which may include payments companies) engaged in unfair or deceptive acts or practices (UDAP) or other violations.
- One area to keep an eye on is the agreements between merchants and processors and issues related to deceptive fees, etc.

Payments: Marijuana and CBD Banking and Payments

- Marijuana
 - Marijuana remains illegal under the federal Controlled Substances Act.
 - Nevertheless, some banks and credit unions are providing banking services to marijuana-related businesses in states where marijuana has been legalized.
 - Card brands continue to take the position that card payments for marijuana are illegal under federal law and therefore prohibited by card brand rules.
- Hemp/CBD
 - Hemp/CBD are no longer controlled substances, but there are still various federal and state laws that may apply (e.g., Federal Food, Drug, and Cosmetics Act).
 - Some banks and payment processors are beginning to provide services to Hemp/CBD merchants through controlled, focused programs.

Disclaimer: Using, distributing, possessing, and/or selling marijuana is illegal under existing federal law. Compliance with state law does not guarantee or constitute compliance with federal law. This informational overview is not intended to provide any legal advice or any guidance or assistance in violating federal law.

Payments: Prepaid Card Developments

- CFPB's Prepaid Card Rule
 - Applies EFTA / Reg. E to Prepaid and TILA / Reg. Z to credit linked to Prepaid.
 - Implemented after various delays in April 2019 (generally, can still use previous disclosures to cycle through the old material with certain exceptions).
 - *PayPal v. CFPB* (US DC, Dec. 2019)
 - Digital wallets are fundamentally different from prepaid cards.
 - Confusing disclosures and 30-day cooling-off period linking certain credit cards to prepaid accounts.
 - CFPB not authorized pursuant to statutory law to do what it has done.
 - Lacked reasoned decision-making and arbitrarily done with no actual cost-benefit analysis.
 - Violates the First Amendment by compelling a government message without showing that it advances a substantial government interest.

Regulatory Agenda

Will regulatory reform initiatives come up against external deadlines?

Regulatory Agenda: CFPB Rulemaking

Agency Rule List - Fall 2019

Consumer Financial Protection Bureau

Agency	Agenda Stage of Rulemaking	Title	RIN
CFPB	Prerule Stage	Business Lending Data (Regulation B)	3170-AA09
CFPB	Prerule Stage	Higher-Priced Mortgage Loan Escrow Exemption	3170-AA83
CFPB	Prerule Stage	Property Assessed Clean Energy Financing	3170-AA84
CFPB	Prerule Stage	Qualified Mortgage Definition Under the Truth in Lending Act (Regulation Z)	3170-AA98
CFPB	Proposed Rule Stage	Debt Collection Rule	3170-AA41
CFPB	Proposed Rule Stage	Public Release of Home Mortgage Disclosure Act Data	3170-AA85
CFPB	Proposed Rule Stage	Remittance Transfers	3170-AA96
CFPB	Proposed Rule Stage	Home Mortgage Disclosure Act (Regulation C)	3170-AA97
CFPB	Final Rule Stage	Home Mortgage Disclosure Act (Regulation C)	3170-AA76
CFPB	Final Rule Stage	Payday, Vehicle Title, and Certain High-Cost Installment Loans	3170-AA80

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Regulatory Agenda: Deep Dive

CFPB Regulatory Initiatives

- Qualified Mortgage Definition (Replacement of QM Patch)
 - Ultimate solution could fundamentally change mortgage origination market.
 - Goal will be to expand QM safe harbors beyond agency loans and encourage more innovation.
- Small Dollar Lending (Payday and Title Loans)
 - Could be end of CFPB's efforts to regulate payday and title lending.
- Debt Collection
- Other
 - HMDA (public disclosure, further tweaks)
 - Business Lending Data
 - PACE

Regulatory Agenda: Debt Collection

“I do believe clear rules for collectors are important, and that’s why we’re engaging in rulemaking and modernization of the FDCPA.”

– CFPB Director Kathy Kraninger (Oct. 19, 2019)

- Notice of Proposed Rulemaking issued May 2019 to prescribe rules under Regulation F to govern the activities of debt collectors, as that term is defined under the Fair Debt Collection Practices Act (FDCPA). Proposal addresses:
 - Communications in connection with debt collection, such as safe harbor for voicemail messages, and use of text and email;
 - Interpret and apply prohibitions on harassment or abuse, false or misleading representations, and unfair practices in debt collection; and
 - Clarify requirements for certain consumer-facing debt collection disclosures (e.g., validation notice and model form).
- CFPB likely to publish a supplemental Notice of Proposed Rulemaking related to time-barred debt disclosures.
- Challenge: Timing and Congressional Review Act Deadline



Regulatory Agenda: CFPB Taskforce on Federal Consumer Financial Law and Defining “Abusive”

▪ CFPB Taskforce on Federal Consumer Financial Law

- Examine the existing legal and regulatory environment facing consumers and financial services providers and report to Director Kraninger its recommendations for ways to improve and strengthen consumer financial laws and regulations.
- Produce new research and legal analysis of consumer financial laws, focusing specifically on:
 - Harmonizing, modernizing, and updating the federal consumer financial laws — and their implementing regulations;
 - Identifying gaps in knowledge that should be addressed through research, ways to improve consumer understanding of markets and products; and
 - Potential conflicts or inconsistencies in existing regulations and guidance.

▪ Defining “Abusive”

- Congress prohibited covered persons and service providers from “UDAAP” and made it unlawful for “any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of” the CFPB’s UDAAP provisions.
- CFPB is contemplating a possible rulemaking to adopt a general definition of the term “abusive.”
- Concerns with perceived “subjective” use of “abusive” standard by prior CFPB Director Cordray and impact on compliance and business plans.
- “The only place we have provided additional definition [on “abusive”] is in enforcement actions that have also been quite rare. So this is something that is a decision before me as to whether we should put more guidance out there or what next steps we should take. So there will be news on that in the not too distant future.”
- CFPB Director Kathy Kraninger (Oct. 17, 2019)

Regulatory Agenda: FTC Ongoing Focus on Lead Generation Advertising (Division of Financial Practices in Lead)

According to the FTC Director of Consumer Protection the five “lessons” for users of leads from lead generators are:

1. Exercise due diligence
2. Establish contractual requirements and service-level standards for compliance and performance
3. Reserve audit rights
4. Monitor vendors and take action
5. Require vendors to maintain same standards with subcontractors

How will sellers meet these requirements if implemented by buyers?

Generating Leads Legally: Regulatory and Litigation Quick Hits

Thursday, March 28, 2019, 2 pm – 3 pm ET

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Regulatory Outlook: State Trends

- CSBS Vision 2020 – drive toward uniformity in exams and licensing, including state MSB exemptions and interpretations (agent of payee), NMLS 2.0 updates, and more.
 - “This effort is underway and ongoing. Improvements in the state regulatory system enable financial services innovation and build the foundation for a reimagined, networked approach to state nonbank regulation.”
- Usury Rate Caps – CA Fair Access to Credit Act, AB 539, limits the rate of interest that may be imposed on loans of \$2,500–\$10,000 to 36% plus the federal funds rate (effective January 1, 2020). State legislative activity regarding usury caps will continue.
- Commercial Financing Regulation – CA Commercial Financing disclosure requirements.
- Proposals to cover additional lead generation activity.
- “Mini”-CFPB Proposals – New York, California, who’s next?
- Nonpublic confidential multistate state attorneys general investigations.
- Continued coordinated examinations with CFPB.

Innovation and Sandbox

“Innovation drives competition, which can lower prices and offer consumers more and better products and services.” – CFPB Director Kathy Kraninger (Sept 10, 2019)

Innovation and Sandbox

CFPB

- Agency adopted new No Action Letter (NAL) and Trial Disclosure Program (TDP) Policy, along with a FinTech Compliance Assistance Sandbox (CAS), replacing Project Catalyst.
 - Firm regulatory safe harbors
 - Reciprocity with other regulators
 - Product “sandbox” that mirrors similar state initiatives
- First No-Action Letter issued to HUD Housing Counseling Agencies in September 2019.
- Second No-Action Letter issued to Bank of America to facilitate housing counseling services for prospective home buyers.
- CFPB partners with State American Consumer Financial Innovation Network (ACFIN), a network to enhance coordination among federal and state regulators to facilitate financial innovation.

A View from the Hill

**Chairwoman Waters to continue to push a robust consumer agenda;
Senator Warren to Take CFPB into the Presidential Election**

A View from the Hill

- Interest rates caps on installment and payday loans, credit cards, and other credit products that fall under the “rent-a-bank” system/scheme
- Hearings around anti-discrimination and fair lending practices in the industry, with a focus on student lending
- Legislation focusing on consumer credit bureaus, including regulating the dispute process
- Hearings examining enforcement decisions of Kraninger and the CFPB (pushed by Warren, executed by Waters)
- Congress recently passed the Consumers First Act, which passed the Democratic controlled House of Representatives. The Act establishes administrative requirements for the CFPB, including staffing levels, codifies the Office of Fair Lending and Equal Opportunity, and would establish certain requirements for boards and offices in the agency

Observations for the New Year

Takeaways and reminders...

Insights from panelists...



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Questions and Additional Information

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