Update on Consumer Financial Services Investigations and Enforcement

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Today’s Discussion

- Introduction
- Update on Regulatory Investigations and Enforcement Priorities
- Fair Lending Is Back: DOJ, CFPB, and Banking Agencies Signal an Increase in Fair Lending Enforcement
- New Focus on Complex Investigations and Prosecutions of Criminal Misuses of Cryptocurrency
- CFPB Interest in Data Harvesting and Payment Systems
- The CFPB Is Going “BIG”: What that means, and what sectors may be next?
- Defending an Investigation: Observations from the Front Lines and Preparing for Litigation
- Closing Observations
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CFPB Enforcement by the Numbers (through 2020)

- $12.9 billion in consumer relief - Monetary compensation, principal reductions, canceled debts, and other consumer relief ordered as a result of enforcement actions.
- 175 million people eligible for relief - Estimated consumers or consumer accounts eligible to receive relief from enforcement actions.
- $1.6 billion in penalties - Civil money penalties ordered as a result of enforcement actions.

Actions by Year

Relief by Year

Source: https://www.consumerfinance.gov/enforcement/enforcement-by-the-numbers/
Enforcement Priorities of CFPB, FTC, Banking Agencies, DOJ, and State AGs
CFPB Enforcement Agenda

- New Enforcement Director – Eric Halperin
- Payment systems / Big Tech
- Fair Lending
- Housing insecurity
- Predatory auto lending
- Competition (Biden Administration Order)
- Repeat offenders / post-order compliance
- Cryptocurrency/ Virtual currency
- UDAAP (“Durable jurisprudence” for defining “abusive”)
- Pipeline
FTC, State Attorneys General, & State Regulators

- FTC
  - New Chair Lina Kahn
  - Negative Option Marketing Enforcement Policy
  - FTC Safeguards Rule
  - Resurrection of its Penalty Offense Authority (Education/Student Loans, Endorsements and Testimonials)
  - A focus on growing role of private equity and other investors
  - Confluence of Consumer Protection and Antitrust

- State AGs
  - Debt collection practices
  - Installment lending
  - Buy Now/ Pay Later and Lease-to-Own
  - Privacy and Data Security

- CA Department of Financial Innovation and Protection: UDAAP authority, active investigations, and more
- NY Department of Financial Services
Fair Lending Is Back: DOJ, CFPB, and Banking Agencies Signal an Increase in Fair Lending Enforcement
Combatting Redlining Initiative

- Led by Civil Rights Division’s Housing and Civil Enforcement Section, partnering with U.S. Attorney Offices, financial regulatory agencies (incl. CFPB), and state AGs.

- Takeaways:
  - Use U.S. Attorneys’ Offices to ensure that fair lending enforcement takes advantage of local expertise on housing markets and credit needs;
  - Extend DOJ’s analyses of potential redlining to non-depository institutions that DOJ indicated are originating the majority of mortgage loans;
  - Strengthen DOJ’s partnership with financial regulatory agencies to ensure identification and referral of fair lending violations to DOJ; and
  - Increase coordination with state attorneys general on fair lending matters.

- All types of loans, and all types of lenders.

- Director Chopra’s comments focused on the use of AI in lending decisions. The CFPB will be “watching for digital redlining,” citing what he called “algorithmic bias” and the need for investigation of whether “discriminatory black box models are undermining th[e] goal” of equal opportunity.

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CFPB has stated repeatedly that racial equity is a priority and fair lending will be key.


- AG Garland: “We will spare no resource to ensure that federal fair lending laws are vigorously enforced and that financial institutions provide equal opportunity for every American to obtain credit.”

- American Trustmark National Bank settlement (approved Oct. 27, 2021) was the first under the initiative.
  - Consent Order – Create $3.85m loan subsidy program for majority-Black and Hispanic neighborhoods in Memphis; open new lending office in such a neighborhood; $5m civil penalty
  - Several fair lending probes already open, more to come.

“Technology companies and financial institutions are amassing massive amounts of data and using it to make more and more decisions about our lives, including loan underwriting and advertising.

While machines crunching numbers might seem capable of taking human bias out of the equation, that’s not what is happening.”

CFPA defines “fair lending” as “fair, equitable, and nondiscriminatory access to credit for consumers.”

The Equal Credit Opportunity Act (ECOA) applies to all creditors and those who, in the ordinary course of business, regularly refer prospective applicants to creditors. Implemented by Regulation B. Illegal to discriminate against applicant regarding any aspect of a credit transaction:

- On the basis of race, color, religion, national origin, sex or marital status, or age (if applicant has capacity to contract);
- Because all or part of the applicant’s income derives from any public assistance program; or
- Because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

The CFPB has ECOA rulemaking authority and supervises for and enforces compliance. FTC also has enforcement authority.
Reg. B covers creditor activities before, during, and after the extension of credit.

- Information requirements; investigation procedures; standards of creditworthiness; terms of credit; furnishing information about credit; revocation, alteration, or termination of credit; and collection procedures.

Reg. B prohibited practices (12 C.F.R. § 1002.4):

- Discriminating against applicants on a prohibited basis regarding any aspect of a credit transaction.

- Making oral/written statements, in advertising or otherwise, to applicants or prospective applicants that would discourage, on a prohibited basis, a reasonable person from making or pursuing an application.
Disparate Impact & Disparate Treatment


Disparate treatment occurs when a creditor treats an applicant differently based on a prohibited basis.

- Can be overt/open or be found by comparing treatment of applicants who received different treatment for no discernable reason other than a prohibited basis.

Disparate impact occurs when a creditor employs facially neutral policies or practices that have an adverse effect or impact on a member protected class.

- Unless they meet a legitimate business need that cannot reasonably be achieved by means that are less disparate in their impact.
Lender Innovation: Alternative Data in Underwriting

• Also known as “non-traditional data”
• Information not traditionally used by national consumer reporting agencies in calculating a credit score:
  • On-time utility, cable, or mobile phone bill payments;
  • Cash flow data from bank statements; or
  • Data related to consumer behavior on the Internet (e.g., time spent on social media).

• Could be even more predictive than traditional data.
• Potential to expand credit access to “credit invisibles” and those with low credit scores under traditional model – disproportionately low-income, people of color, women, immigrants, and elderly.
Using an algorithm, rather than a human, to analyze a variety of factors to more accurately assess credit applicants.

**Beware** of unwitting discrimination

- “Black box” problem – algorithms can’t explain a result
- What if algorithm considers a data point that correlates strongly with protected characteristic?
- Algorithms could include information that creates biases against certain groups

AI algorithms can be compatible with ECOA/Reg. B; “a creditor may disclose a reason for a denial even if the relationship of that disclosed factor to predicting creditworthiness may be unclear to the applicant.”
New Focus on Criminal Misuses of Cryptocurrency & Regulation of Virtual Currency
National Cryptocurrency Enforcement Team (NCET)

NCET – Announced on October 6, 2021, will tackle complex investigations and prosecutions of criminal misuses of cryptocurrency, particularly crimes committed by virtual currency exchanges, mixing and tumbling services, and money laundering infrastructure actors.

Under the supervision of Assistant Attorney General Kenneth A. Polite Jr., the NCET will combine the expertise of:

- Department of Justice Criminal Division’s Money Laundering and Asset Recovery Section (MLARS);
- Computer Crime and Intellectual Property Section (CCIPS); and
- Other sections in the division, with experts detailed from U.S. Attorneys’ Offices.

The team will also assist in tracing and recovery of assets lost to fraud and extortion, including cryptocurrency payments to ransomware groups.

"Today we are launching the National Cryptocurrency Enforcement Team to draw on the Department’s cyber and money laundering expertise to strengthen our capacity to dismantle the financial entities that enable criminal actors to flourish — and quite frankly to profit — from abusing cryptocurrency platforms."

"As the technology advances, so too must the Department evolve with it so that we’re poised to root out abuse on these platforms and ensure user confidence in these systems."

- Deputy Attorney General Lisa Monaco.
Charter Applications - The banking agencies may, in the context of relevant charter applications, seek to ensure that applicants address risks, including risks associated with stablecoin issuance and other related services conducted by the banking organization or third-party service providers.

Securities, Commodities, and/or Derivatives - In the context of those stablecoins that are securities, commodities, and/or derivatives, application of the federal securities laws and/or the Commodity Exchange Act (CEA) may provide important investor and market protections, as well as transparency benefits.

Glass-Steagall Act - Relevant authorities, including the Department of Justice, may consider whether or how section 21(a)(2) of the Glass-Steagall Act (pertaining to prohibitions on unregulated deposit-taking) may apply to certain stablecoin arrangements.

CFPB - not a member of the working group that prepared the Report, it noted that the CFPB and consumer financial protection laws provide a number of safeguards in the payments sector, including, but not limited to, the EFTA, the GLBA, and CFPA (UDAAP).

Anti-Money Laundering - A stablecoin arrangement may also involve “money transmission services.” Such an arrangement may trigger federal AML/CFT obligations under the Bank Secrecy Act, and certain stablecoin issuers may also be subject to supervision and enforcement by FinCEN.
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Anti-Money Laundering - As a stablecoin arrangement may also involve “money transmission services,” such an arrangement may trigger federal AML/CFT obligations under the Bank Secrecy Act, and certain stablecoin issuers may also be subject to supervision and enforcement by FinCEN.
CFPB Interest in Data Harvesting and Payment Systems
Focus on payments systems, data harvesting, consumer choice/access restrictions, and more (e.g., EFTA, GLBA, etc.)

“Big Tech on Notice,” information requests:

- Name and type of all payment products, and planned products, senior management executives, and org charts
- Third-party relationships involved in delivery of payment products
- Types of related fees, amounts and how fees are assessed
- Data collected on consumers resulting for the use of a product
- Consumer protection policies, fraud detection, etc.
- Metrics, complaint handling, and other data

Issued pursuant to Section 1022(c)(4) of CFPA

Who’s next? What other “covered product” markets are not presently subject to supervision?
The CFPB Is Going “BIG”: What That Means, and What Sectors may be next?
CFPB Has Broad Authority and Wide Jurisdiction Over Various Markets

- Markets not subject to supervision? E.g., fintech service providers (including SaaS/BaaS providers), payment systems, credit counseling and debt services

- Debt Collection Rule takes effect on November 30, 2021

- Credit reporting

- Who is a covered person? Small business lending, securitization trusts, tribal lending, and service providers?

- Substantial assistance / vicarious liability for service provider

- What is a UDAAP? Is there any reining in the “Abusive” standard?
Defending an Investigation: Observations from the Front Lines and Preparing for Litigation
Commencing Enforcement Investigations

Enforcement relies on a number of sources of information to identify potential issues that may warrant opening an investigation, including:

- Priorities
- Consumer complaints
- The Bureau’s whistleblower hotline
- Referrals from federal regulators and other local, state, and federal agencies
- Market intelligence
- Post enforcement action settlement order compliance
- The results of supervisory exams
- Failure to adequately address Matters Requiring Attention (MRAs) or Supervisory Recommendations (SRs) may cause the CFPB to prioritize future supervisory exams or consider enforcement action
- Parallel investigations w/ DOJ, state AG (single or multistate, state regulators)
CFPB is authorized to conduct investigations before instituting judicial or administrative adjudicatory proceedings under Federal consumer financial law.

Enforcement uses investigations to gather facts and identify violations of federal consumer financial law to determine whether a public enforcement action is necessary.

Consumer Financial Protection Act authorizes the CFPB to issue investigational subpoenas known as civil investigative demands (CIDs) when looking into potential violations of law.

A CID may demand, among other things, documents, emails, reports, answers to written questions, and oral testimony.

Notification of Purpose - Each CID is required to state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.

CID recipients have a statutory right to petition the Bureau’s Director for an order modifying or setting aside a CID.

If necessary, CFPB may seek to enforce a CID in federal court.
Responding to a CID / Petitions to Modify or Set Aside

- CID Receipt
  - Scrutinize definitions and requests carefully!
  - Meet and confer with the CFPB Enforcement Staff
    - Within 10 days of receipt. Short window to devise strategy.
- To petition or not petition? – modifying or setting aside the CID
  - Must be filed within 20 days after service, and extensions of time are disfavored.
  - The CFPB rarely grants modifications, they have always been partial, and they have not been very substantive – all were granted in the last Administration.
- In re ACTIVE Network, LLC (July 29, 2019); In re Synchrony Financial (May 21, 2019); In re Wall & Associates, Inc. (May 21, 2019); In re Fair Collections and Outsourcing, Inc. et al. (Apr. 25, 2019); In re Candy Kern-Fuller (Apr. 25, 2019); In re Jawat Nesheiwat (Apr. 25, 2019).
- N.B.: Petitions become publicly available on CFPB’s website. But requests for confidential treatment of petitions are sometimes granted.
The Notice and Opportunity to Respond and Advise (NORA) process is used by Enforcement, at its discretion, to afford individuals and entities under investigation an opportunity to present their positions to Bureau staff before a lawsuit is filed against them.

The primary objectives of the NORA process are to:

- Allow Persons under investigation the opportunity to be heard before the filing of a lawsuit in situations where delay will not unduly harm consumers;
- Help ensure that enforcement actions are based on sound policy, and that they effectively further CFPB priorities;
- Alerts CFPB to potential unintended and undesirable consequences of enforcement actions; and
- Helps investigation targets make the CFPB aware of any material facts relevant to both the investigation and contemplated enforcement actions.

This is a chance to tell the CFPB your side of the story. A well-crafted NORA response can help reduce your liability – or stave off enforcement entirely – or help gird for litigation.
When warranted by the investigation, Enforcement may seek authority from the Director to take a public enforcement action. Alternatively, Enforcement may close the investigation without taking public action or refer the matter to the Office of Supervision Examinations to resolve the matter through our supervisory process. Enforcement may be granted the authority to settle an enforcement matter within certain parameters.

If the Director authorizes a public enforcement action, CFPB may bring the action in:
- state or federal court or
- institute an administrative adjudication proceeding.
- Administrative adjudication proceedings are formal adversarial proceedings conducted by an administrative law judge, who issues a recommended decision to the Bureau’s Director. The Director issues a final decision, either adopting or modifying the administrative law judge’s recommended decision.

When the CFPB enforces the law, the CFPB or a court may order the defendant to take action to remedy the harm it caused consumers.
- Consumer redress
- A wide range of injunctive relief to stop unlawful conduct and prevent future violations. In some instances that relief has included banning individuals and companies from future participation in the marketplace.
- Civil money penalties
The CFPB Is Not Invincible, examples:

- **Fair Notice - PHH v. CFPB (D.C. Cir. 2018)** – En banc court agreed that the CFPB’s $109 million disgorgement penalty imposed on PHH rested on a misreading of Section 8(c) of RESPA. Reinstated the panel’s conclusion that Section 8(c) of RESPA was a real safe harbor that allows Held that the CFPB was bound by RESPA’s three-year statute of limitations rather than the general five-year limitations period under 28 U.S.C. § 2462. Reinstated the panel’s conclusion that imposing a $109 million disgorgement penalty against PHH was inconsistent with fair notice principles because the government had never before found similar conduct to violate RESPA.


- **Securitization Trusts / Covered Persons? - CFPB v. The National Collegiate Master Student Loan Trust**, 2021 U.S. Dist. LEXIS 58013 (D. Del. Mar. 26, 2021) – Defendants successfully argued that CFPB Director’s ratification of a lawsuit after the statute of limitations had passed was ineffective and could not rely on equitable tolling to save the claims. The litigants had disputed whether the trusts at issue in the litigation are “covered persons” liable under the CFPA despite their status as passive securitization trust entities.

- **Notification of Purpose - CFPB v. Accrediting Council for Independent Colleges & Schools**, 854 F.3d 683 (D.C. Cir. 2017) – Defendant successfully argued that CID’s Notification of Purpose section failed to provide adequate notice of the basis of CFPB’s investigation. D.C. Circuit affirmed district court’s denial of the CFPB’s petition to enforce the CID.
The CFPB Is Not Invincible, examples cont.: 


- **Restitution** - *CFPB v. CashCall, Inc.*, 2018 U.S. Dist. LEXIS 9057 (C.D. Cal. Jan. 19, 2018) – CFPB failed to demonstrate it was entitled to $300 million in restitution and penalties because it did not show that small dollar lender intended to mislead consumers.

- **FDCPA Attorney Meaningful Involvement** - *CFPB v. Weltman, Weinberg & Reis Co., L.P.A.*, No. 1:17-cv-00817 (N.D. Ohio July 25, 2018) – CFPB lost at trial on FDCPA case because it failed to prove by a preponderance of evidence that debt collector misrepresented that its attorneys were “meaningfully involved” in collection of the debts.

- **EFTA/Reg. E/Preauthorized Transactions** - *CFPB Compliance Bulletin 2015-06* - CFPB reversed position from supervisory highlights and provide companies with guidance related to their obligations under the EFTA and Reg. E when obtaining consumer authorizations for preauthorized (EFTs) from a consumer’s account.
Thank you for attending today’s webinar

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