



Update on Consumer Financial Services Investigations and Enforcement

November 10, 2021



Jonathan L. Pompan

Partner

Andrew E. Bigart

Partner

Michael J. Bresnick

Partner

Leonard L. Gordon

Partner

Alexandra Megaris

Partner

VENABLE LLP

Disclaimer

This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can be provided only in response to specific fact situations.

This presentation does not represent any undertaking to keep recipients advised as to all or any relevant legal developments.

ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome.

CLE Credit

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which 1 hour applies to the general credit requirement, and by the State Bar of New York in the amount of 1 credit hours, of which 1 credit hours can be applied toward the Areas of Professional Practice requirement. Venable certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California and State Bar of New York, which govern minimum continuing legal education. Venable is a State Bar of California and State Bar of New York approved MCLE provider.

A code will be distributed during the program, and a CLE submission form will be sent to participants via email.

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

Our Panelists



Andrew Bigart
Partner



Michael Bresnick
Partner



Leonard Gordon
Partner



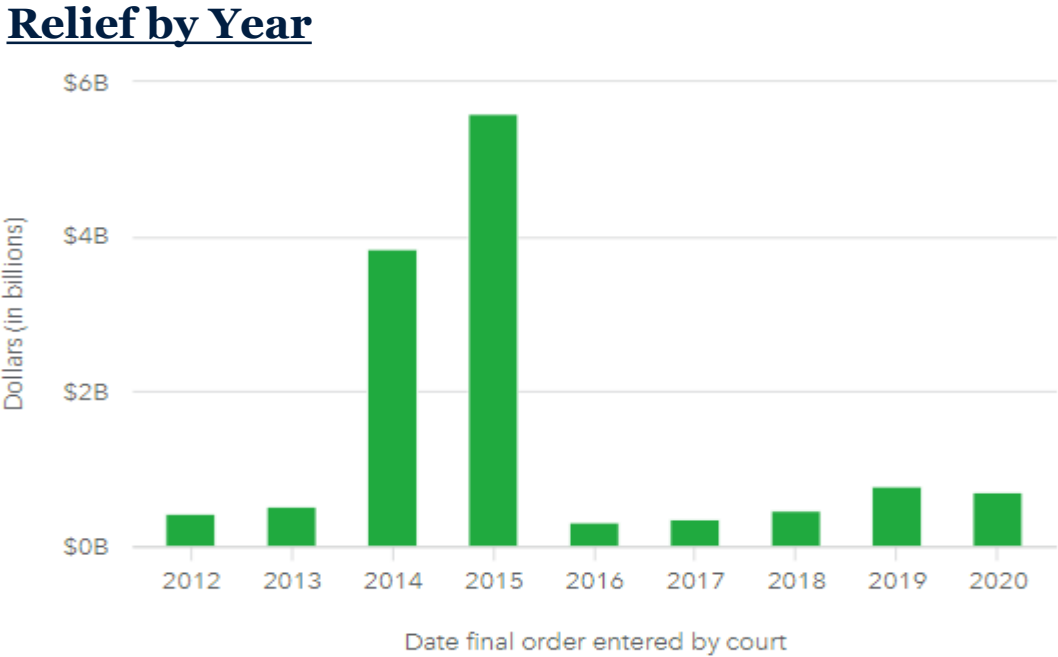
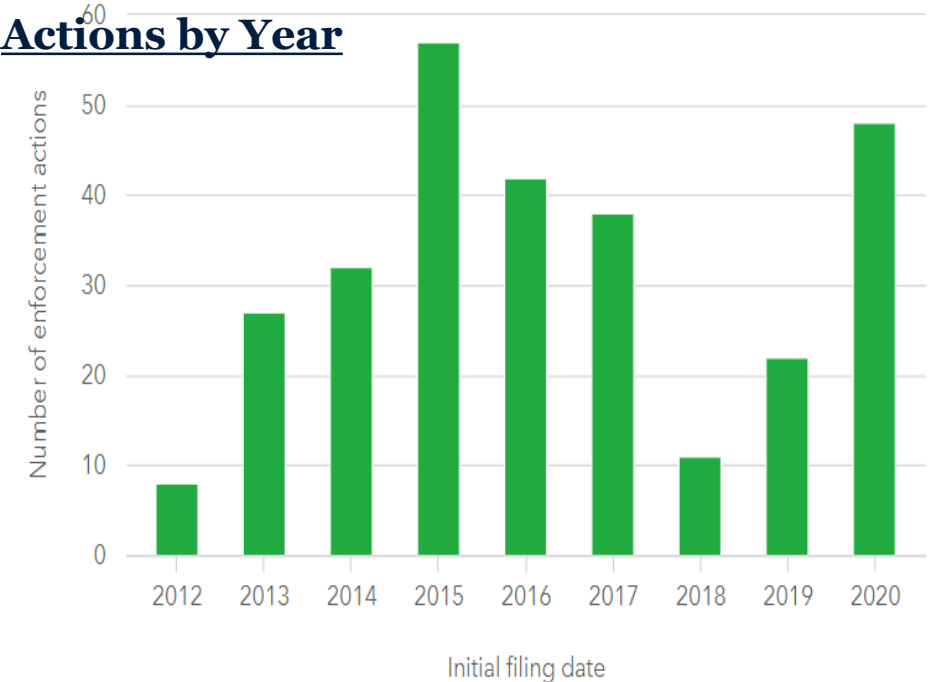
Alexandra Megaris
Partner



Jonathan Pompan
Partner & Moderator

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.





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

VENABLE LLP






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.

An official website of the United States government Here's how you know

 THE UNITED STATES DEPARTMENT OF JUSTICE

ABOUT OUR AGENCY TOPICS NEWS RESOURCES CAREERS

Home » Office of Public Affairs » News

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE Friday, October 22, 2021

Justice Department Announces New Initiative to Combat Redlining

DOJ, CFPB and OCC Announce Resolution of Lending Discrimination Claims Against Trustmark National Bank

The Justice Department announced the launch of the department's new Combatting Redlining Initiative today. Redlining is an illegal practice in which lenders avoid providing services to individuals living in communities of color because of the race or national origin of the people who live in those communities. The new Initiative represents the department's most aggressive and coordinated enforcement effort to address redlining, which is prohibited by the Fair Housing Act and the Equal Credit Opportunity Act.

"Lending discrimination runs counter to fundamental promises of our economic system," said Attorney General Merrick B. Garland. "When people are denied credit simply because of their race or national origin, their ability to share in our nation's prosperity is all but eliminated. Today, we are committing ourselves to addressing modern-day redlining by making far more robust use of our fair lending authorities. 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."

"Enforcement of our fair lending laws is critical to ensure that banks and lenders are providing communities of color equal access to lending opportunities," said Assistant Attorney General Kristen Clarke for the Justice Department's Civil Rights Division. "Equal and fair access to mortgage lending opportunities is the cornerstone on which families and communities can build wealth in our country. We know well that redlining is not a problem from a bygone era but a practice that remains pervasive in the lending industry today. Our new Initiative should send a strong message to banks and lenders that we will hold them accountable as we work to combat discriminatory race and national origin-based lending practices."

Redlining, a practice institutionalized by the federal government during the New Deal era and implemented then and now by private lenders, has had a lasting negative impact. For American families, homeownership remains the principal means of building wealth, and the deprivation of investment in and access to mortgage lending services for communities of color have contributed to families of color persistently lagging behind in homeownership rates and net worth compared to white families. The gap in homeownership rates between white and Black families is larger today than it was in 1960, before the passage of the Fair Housing Act of 1968.

Combatting Redlining Initiative, Cont.

- CFPB has stated repeatedly that racial equity is a priority and fair lending will be key.
- DOJ Task Force – New Combatting Redlining Initiative (Oct. 22, 2021)
 - 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.”

Source: Remarks of Director Rohit Chopra at a Joint DOJ, CFPB, and OCC Press Conference on the Trustmark National Bank Enforcement Action (Oct. 22, 2021)

Fair Lending Overview

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.

VENABLE LLP

BUREAU OF CONSUMER FINANCIAL PROTECTION | APRIL 2021

Fair Lending Report of the Bureau of Consumer Financial Protection



Fair Lending Overview, cont.

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

Two theories of ECOA/Reg. B liability: 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.

Lender Innovation: Artificial Intelligence in Underwriting

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

Innovation spotlight: Providing adverse action notices when using AI/ML models

By Patrice Alexander Ficklin, Tom Pahl, and Paul Watkins – JUL 07, 2020

As part of our consumer protection mission, Congress tasked the Bureau with ensuring that markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation. One area of innovation we are monitoring is artificial intelligence (AI), and particularly a subset of AI, machine learning (ML). For example, in 2017, the Bureau issued a Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process (RFI). We also issued a No-Action Letter to Upstart Network, Inc., a company that uses ML in making credit decisions, and

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.”

In 2015, the Bureau released a Data Point titled “[Credit Invisibles \(cfpb.gov/data-research/research-reports/data-point-credit-invisibles/\)](https://www.consumerfinance.gov/data-research/research-reports/data-point-credit-invisibles/).” The Data Point reported that 26 million consumers—about one in 10 adults in America—could be considered credit invisible because they do not have any credit record at the nationwide credit bureaus. Another 19 million consumers have too little information to be evaluated by a widely used credit scoring model.

AI has the potential to expand credit access by enabling lenders to evaluate the creditworthiness of some of the millions of consumers who are unscorable using traditional underwriting techniques. These technologies typically involve the use of models that allow lenders to evaluate more information about credit applicants. Consideration of such information may lead to more efficient credit decisions and potentially lower the cost of credit. On the other hand, AI may create or amplify risks, including risks of unlawful discrimination, lack of transparency, and privacy concerns. Bias in the source data or model construction can also lead to inaccurate predictions. In considering AI or other



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.

Stablecoin Report and Regulatory Focus

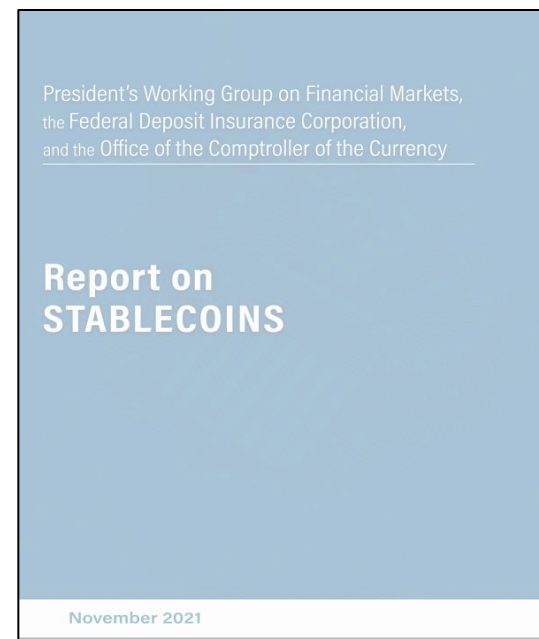
Charter Applications - The banking agencies may, in the context of relevant charter applications, seek to ensure that applicants address risks, including risks associated with stablecoin issuance and other related services conducted by the banking organization or third-party service providers.

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.



Stablecoin Re

Charter Applications - T may, in the context of releva seek to ensure that applicar including risks associated w and other related services c organization or third-party

Securities, Commoditie Derivatives- In the contex that are securities, commod application of the federal se Commodity Exchange Act (important investor and mar as transparency benefits.

Glass-Steagall Act - Rele including the Department o whether or how section 21(c Steagall Act (pertaining to p unregulated deposit-taking stablecoin arrangements.



cfpb Consumer Financial Protection Bureau (cfpb.gov/)

Statement of CFPB Director Chopra on Stablecoin Report

NOV 01, 2021

WASHINGTON, D.C. – CFPB Director Rohit Chopra released a statement today regarding the Report on Stablecoins issued by the President’s Working Group on Financial Markets, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation.

Statement of CFPB Director Rohit Chopra

The United States must do more to nurture a fast, safe, and competitive payments system. New technologies can help to advance this goal, which would yield enormous benefits for consumers, workers, and small businesses.

Today’s report examines stablecoins. Stablecoins are digital assets that are typically pegged to a sovereign currency. Over the last year, stablecoins pegged to the U.S. dollar increased by nearly 500% to \$128 billion outstanding. The report highlights how stablecoins could be vulnerable to runs and fire-sales in ways that could create stress on the broader financial system absent adequate oversight.

The Consumer Financial Protection Bureau was not a member of the working group that prepared this report. However, the agency will be taking several steps related to this market.

First, the CFPB recently solicited public input on how Big Tech companies might leverage their existing online dominance to rapidly scale the use of digital payment networks, including cryptocurrencies. Our solicitation for input follows the agency’s recent issuance of orders to Google, Apple, Facebook, Amazon, Square, and PayPal regarding their payments-related plans and practices. As the Report on Stablecoins notes, established players with large user bases could accelerate the adoption of stablecoins as a payment device, and lead to an excessive concentration of market power.

Second, the CFPB is actively monitoring and preparing for broader consumer adoption of cryptocurrencies. Currently, stablecoins are primarily used for speculative trading in cryptocurrency markets. However, stablecoins may also be used for and in connection with consumer deposits, stored value

IS

member of the working group that prepared stated that the CFPB and consumer financial provide a number of safeguards in the , including, but not limited to, the EFTA, CFPB (UDAAP)

laundering- As a stablecoin arrangement “money transmission services,” such an

ations

t, and

n

be

vision

t





CFPB Interest in Data Harvesting and Payment Systems

CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans

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?

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU
ORDER TO FILE INFORMATION ON PAYMENTS PRODUCTS

Pursuant to the Consumer Financial Protection Bureau’s (Bureau’s) authority under Section 1022(c)(4)(B)(ii) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. § 5512(c)(4)(B)(ii), COMPANY is hereby ordered to file with the Bureau the information specified below.

Purpose

The information provided to the Bureau in response to this Order will help the Bureau to carry out Congress’ mandate that the Bureau monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services. See 12 U.S.C. § 5512(c)(1).

This is a market-monitoring order issued under Section 1022(c)(1) & (4) of the Dodd-Frank Act, 12 U.S.C. § 5512(c)(1) & (4). It is not a supervisory order issued under Sections 1025 or 1026 of the Dodd-Frank Act, 12 U.S.C. §§ 5515 or 5516, nor is it being issued under section 1052 of the Dodd-Frank Act, 12 U.S.C. 5562.

Order Terms and Procedure

The information required by this Order shall be filed pursuant to the terms of this Order, including the stated Instructions and Definitions at Tab 1. Responses are required to all questions listed in the attachment at Tab 2.

Timely responses to the request are legally required. See 12 U.S.C. § 5512(c)(4)(B)(ii). Responses are due on or before 5:00 PM Eastern time, December 15, 2021. The instructions below contain more information about how to submit your response.

As indicated below, you should contact the Bureau as soon as possible if you have any questions about the terms of the Order or the procedure for responding to it.

The Bureau will treat the information received in response to this Order in accordance with its confidentiality regulations at 12 CFR § 1070.40 *et seq.*

It is so ordered on October 21, 2021.

Rohit Chopra
Director
Consumer Financial Protection Bureau



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?

cfpb Consumer Financial Protection Bureau (cfpb.gov)

Consumer Financial Protection Bureau Rescinds Abusiveness Policy Statement to Better Protect Consumers

MAR 11, 2021

WASHINGTON, D.C. - Today, the Consumer Financial Protection Bureau (CFPB) announced it is rescinding its January 24, 2020 policy statement, "Statement of Policy Regarding Prohibition on Abusive Acts or Practices." Going forward, the CFPB intends to exercise its supervisory and enforcement authority consistent with the full scope of its statutory authority under the Dodd-Frank Act as established by Congress. The CFPB has made these changes to better protect consumers and the marketplace from abusive acts or practices, and to enforce the law as Congress wrote it.

Congress defined abusive acts or practices in section 1031(d) of the Dodd-Frank Act. Paraphrasing Congress, that standard prohibits companies from:

- Materially interfering with someone's ability to understand a product or service
- Taking unreasonable advantage of someone's lack of understanding
- Taking unreasonable advantage of someone who cannot protect themselves, and
- Taking unreasonable advantage of someone who reasonably relies on a company to act in their interests.

The 2020 Policy Statement was inconsistent with the Bureau's duty to enforce Congress's standard and rescinding it will better serve the CFPB's objective to protect consumers from abusive practices.

For example, the 2020 Policy Statement stated that the CFPB would decline to seek civil money penalties and disgorgement for certain abusive acts or practices. The CFPB deters abusive practices and compensates certain harmed consumers using penalties, so the Policy Statement undermined deterrence and was contrary to the CFPB's mission of protecting consumers.

Going forward, the CFPB intends to consider good faith, company size, and all other factors it typically considers as it uses its prosecutorial discretion. But a policy of declining to enforce the full scope of Congress's definition of an abusive practice harms both the consumers who were taken advantage of and the honest companies that have to compete against those that violate the law.



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)

Fact Gathering

- 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.





Consumer Financial Protection Bureau

United States of America
Consumer Financial Protection Bureau

Civil Investigative Demand

To Seila Law, LLC
c/o Ammon Aiono
5319 Century Ln
Lynwood, CA 90262

This demand is issued pursuant to Section 1052 of the Consumer Financial Protection Act of 2010 and 12 C.F.R. Part 1080 to determine whether there is or has been a violation of any laws enforced by the Bureau of Consumer Financial Protection.

Action Required (choose all that apply)

Appear and Provide Oral Testimony

Location of Investigational Hearing	Date and Time of Investigational Hearing
Bureau Investigators	


Produce Documents and/or Tangible Things, as set forth in the attached document, by the following date 03/27/2017

Provide Written Reports and/or Answers to Questions, as set forth in the attached document, by the following date 03/27/2017

Notification of Purpose Pursuant to 12 C.F.R. § 1080.5

The purpose of this investigation is to determine whether debt relief providers, lead generators, or other unnamed persons are engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, and credit counseling, in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; 12 U.S.C. § 5481 et seq., the Telemarketing Sales Rule, 16 C.F.R. § 310.1 et seq., or any other Federal consumer financial law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

<p>Custodian / Deputy Custodian</p> <p>Cheryl Goodwin Consumer Financial Protection Bureau, Office of Enforcement 1700 G Street, NW Washington, DC 20552</p>	<p>Bureau Counsel</p> <p>Jan Singelmann, Amy Radon Consumer Financial Protection Bureau, Office of Enforcement 1700 G Street, NW Washington, DC 20552</p>
---	--

Date Issued	Signature
02/27/2017	
	Name / Title Cara Petersen/Deputy Enforcement Director

Service

The delivery of this demand to you by any method prescribed by the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service. If you fail to comply with this demand, the Bureau may seek a court order requiring your compliance.

Travel Expenses

Request a travel voucher to claim compensation to which you are entitled as a witness before the Bureau pursuant to Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562.

Right to Regulatory Enforcement Fairness

The CFPB is committed to fair regulatory enforcement. If you are a small business under Small Business Administration standards, you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

Paperwork Reduction Act

This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

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.

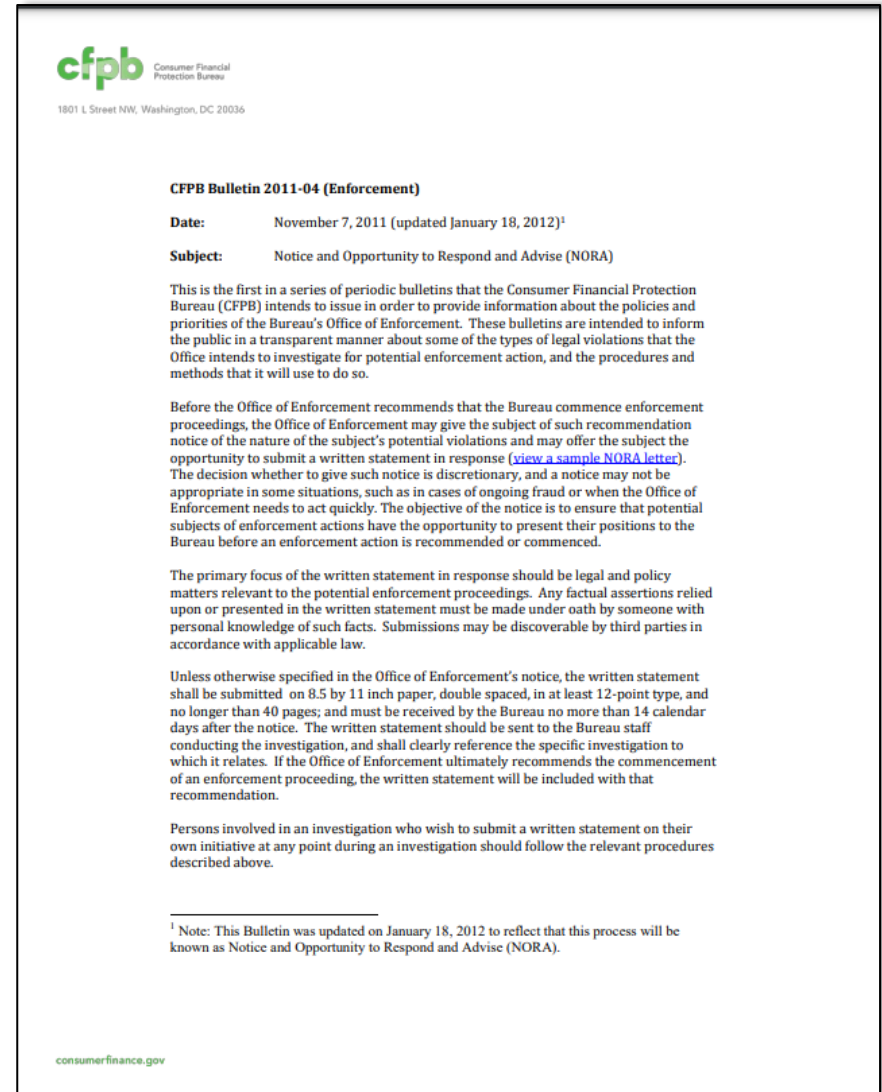
Notice and Opportunity to Respond and Advise

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:

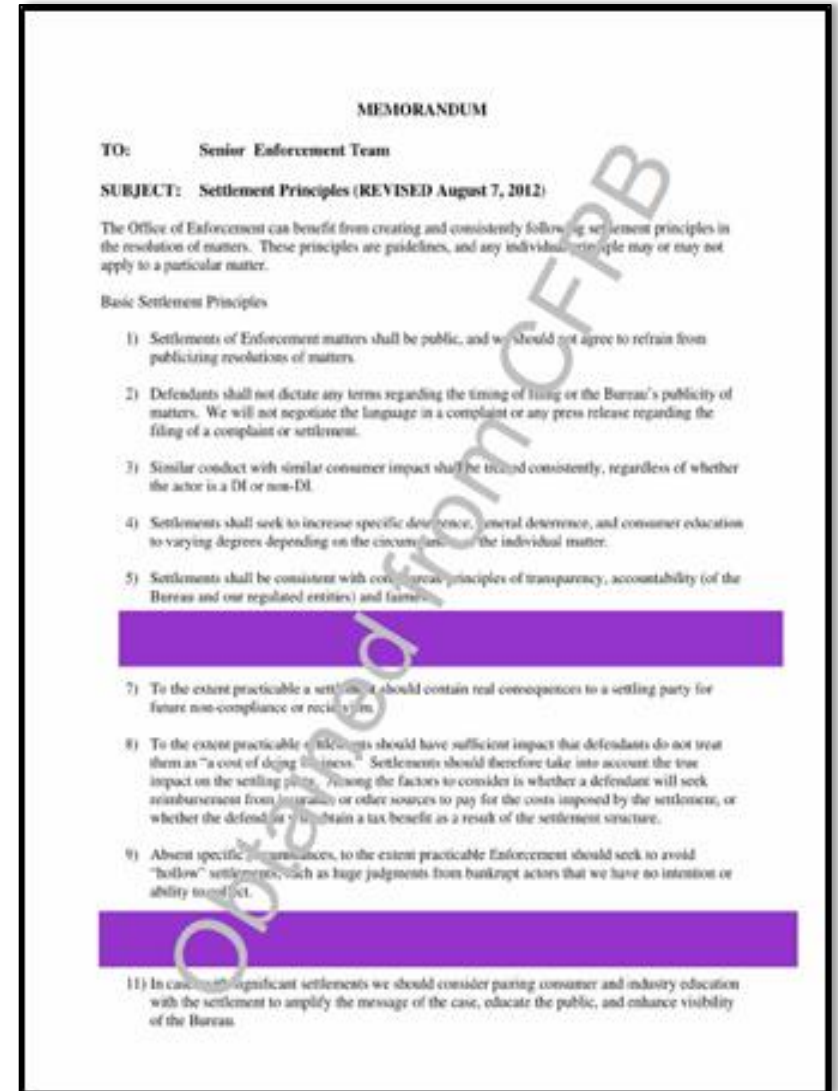
- Allow Persons under investigation the opportunity to be heard before the filing of a lawsuit in situations where delay will not unduly harm consumers;
- Help ensure that enforcement actions are based on sound policy, and that they effectively further CFPB priorities;
- Alerts CFPB to potential unintended 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.



From Investigation to Public Action

- 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.
- **Substantial Assistance** - *CFPB v. Universal Debt Solutions*, 2017 U.S. Dist. LEXIS 146222 (N.D. Ga. Aug. 25, 2017) – CFPB failed to articulate facts showing how payment processors aided and abetted an unlawful debt collection scheme. CFPB refused to participate in a court-ordered deposition of its employees. Result: CFPB sanctioned by court and all claims against payment processors were dismissed.
- **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.:

- **EFTA/Reg. E/Prepaid Card Rule Disclosures** - *PayPal, Inc. v. CFPB*, 512 F. Supp. 3d 1 (D.D.C. Dec. 30, 2020) – Court vacated CFPB’s rules relating to prepaid cards and digital wallets because CFPB exceeded its statutory authority.
- **RESPA Section 8** - *CFPB v. Borders & Borders*, No. 3:13-cv-01047 (W.D. Ky. July 13, 2017) – Law firm wins RESPA case on summary judgment.
- **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



Andrew Bigart

Partner
202.344.4323
aebigart@Venable.com



Michael Bresnick

Partner
202.344.4583
mjbresnick@Venable.com



Leonard Gordon

Partner
212.370.6252
lgordon@Venable.com



Alexandra Megaris

Partner
212.370.6210
amegaris@Venable.com



Jonathan Pompan

Partner
202.344.4383
jlpompan@Venable.com



For additional articles and presentations on consumer financial services topics, visit
www.Venable.com/cfs/publications



© 2021 Venable LLP.

This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.



VENABLE LLP