

The Future of the CFPB Post-Appeals Court Decision

CFPB Held Unconstitutionally Funded

October 28, 2022

Ellen T. Berge

Partner | ETBerge@Venable.com

Leonard L. Gordon

Partner | LLGordon@Venable.com

Jonathan L. Pompan

Partner | JLPompan@Venable.com

Michael J. Bresnick

Partner | MJBresnick@Venable.com

Joshua H. Raymond

Partner | JHRaymond@Venable.com

VENABLE LLP

Welcome

This presentation is being recorded and will be available at www.Venable.com and on YouTube.

Please follow the onscreen prompts for submitting questions. Contacting us does not create an attorney-client relationship. While Venable would like to hear from you, we cannot represent you, or receive any confidential information from you, until we know that any proposed representation would be appropriate and acceptable, and would not create any conflict of interest. Accordingly, do not send Venable (or any of its attorneys) any confidential information.

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 hour, of which 1 credit hour 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 through the Q&A chat section at the end of the program, and a CLE submission form will be sent to participants next week via email.

Today's Webinar

1. Introduction
2. CFSA v. CFPB
3. Impact on the Small Dollar Rule
4. What does this mean for other CFPB actions?
5. CFPB Investigations, and Active Litigation
6. What's next?
7. Q&A

Our Panelists

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



Ellen T. Berge
Partner



Leonard L. Gordon
Partner



Michael J. Bresnick
Partner



Joshua H. Raymond
Partner



Jonathan L. Pompan
Partner

CFSA v. CFPB

What Happened?



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

United States Court of Appeals
Fifth Circuit

FILED

October 19, 2022

Lyle W. Cayce
Clerk

No. 21-50826

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.*

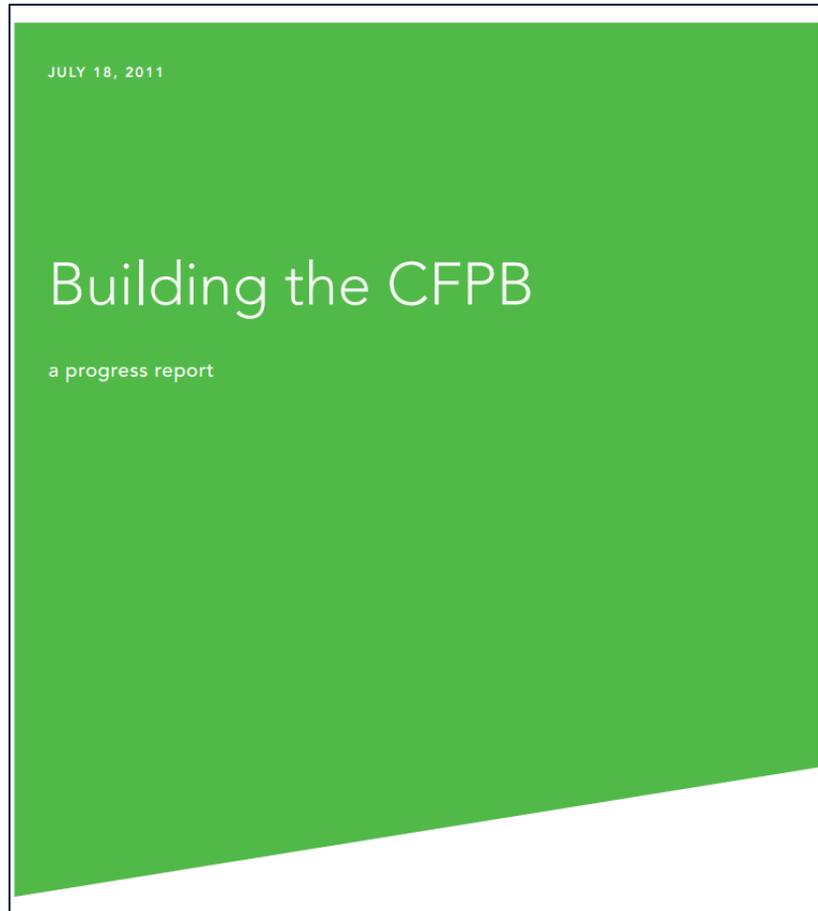
CORY T. WILSON, *Circuit Judge:*

“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
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 Baressi, 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.

SUPPLEMENTARY INFORMATION:
Summary of the Rule
 On November 17, 2017, the Bureau published a final rule (2017 Final Rule or Rule¹) 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).² 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.³ 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,⁴ establishing certain requirements and limitations with respect to attempts to withdraw payments on the loans from consumers’ checking or other accounts.⁵ 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, 2019.⁶ On January 18, 2018, the Bureau issued a statement announcing its intention to engage in rulemaking to reconsider the 2017 Final Rule.⁷ 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.⁸ 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.⁹
 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.¹⁰ 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;¹¹ (2) the “prevention” provision, which establishes specific underwriting requirements for these loans to prevent the unfair and abusive practice;¹² (3) the “principal step-down exemption” provision for certain covered short-term loans;¹³ (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;¹⁴ (5) those portions of the recordkeeping provisions related to the mandatory underwriting requirements;¹⁵ and (6) the portion of the compliance date provisions related to the mandatory underwriting requirements.¹⁶ 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.¹⁷ The Bureau also determines that, even if the Bureau had not revoked its reasonable avoidability finding, the countervailing benefits to

¹ 12 CFR 1041.4 through 1041.6, 1041.10, 1041.11, and portions of § 1041.12.
² The 2017 Final Rule refers to all three of these categories of loans together as covered loans. 12 CFR 1041.3(b).
³ 12 CFR 1041.7 through 1041.9, and portions of § 1041.12.
⁴ 82 FR 54472, 54814.
⁵ See Bureau of Consumer Fin. Prot., *Statement on Payday Rule* (Jan. 18, 2018), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/>.
⁶ *See* Bureau of Consumer Fin. Prot., *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).
⁷ 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/>.
⁸ *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).
⁹ 12 CFR 1041.4.
¹⁰ 12 CFR 1041.5.
¹¹ 12 CFR 1041.6.
¹² 12 CFR 1041.10 and 1041.11.
¹³ 12 CFR 1041.12(b)(1) through (3).
¹⁴ 12 CFR 1041.15(d).
¹⁵ 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.



Impact on the Small Dollar Rule

Will the Payday Lending Rule Make a Comeback?

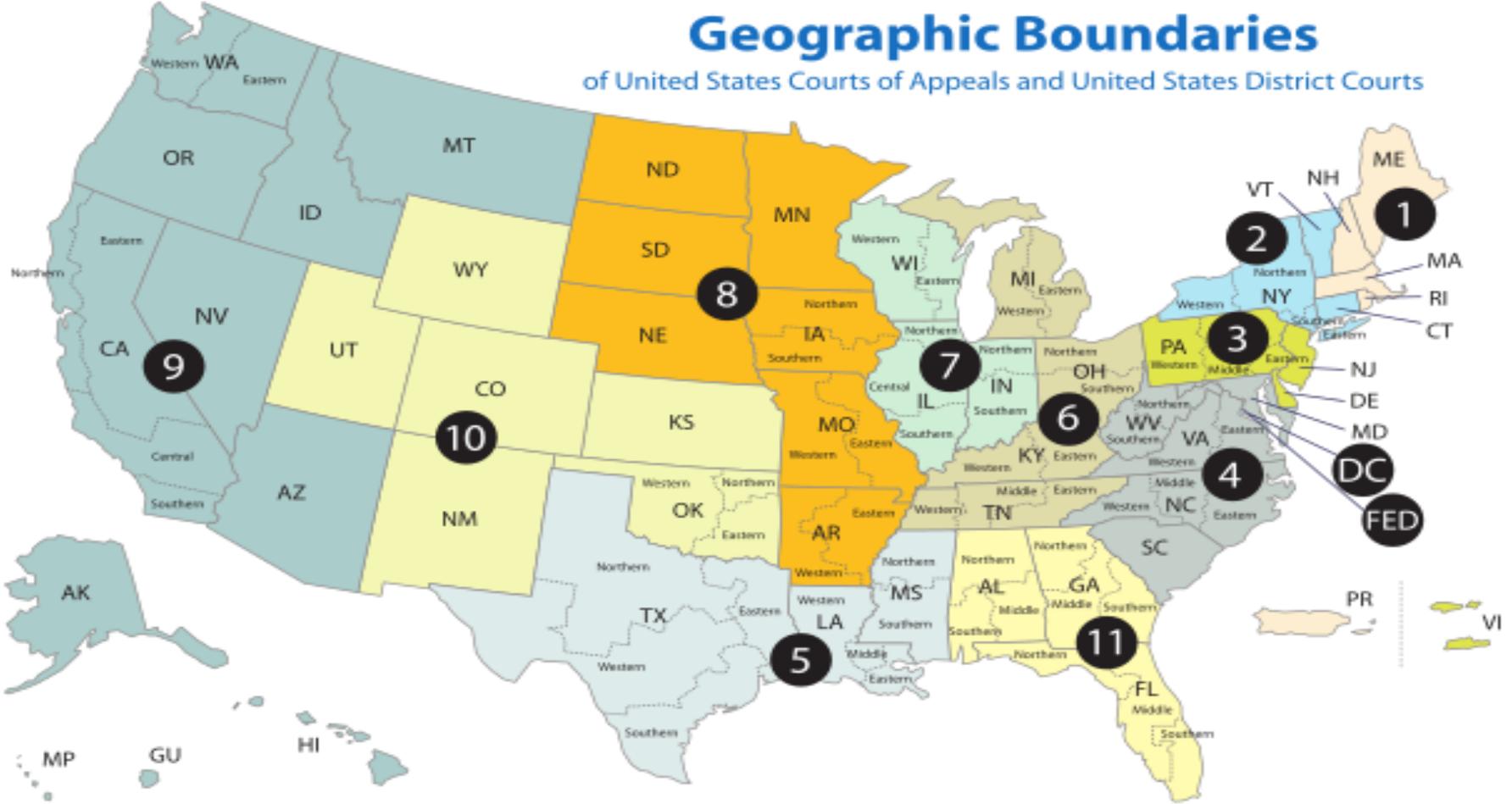
After the district court upheld the Payday Rule on summary judgment, the plaintiffs appealed on four principal grounds:

- ~~1. the Rule was outside the Bureau's authority and violated the Administrative Procedure Act;~~
- ~~2. it was promulgated by a director unconstitutionally insulated from presidential removal;~~
- ~~3. the Bureau's rulemaking violated the nondelegation doctrine; and~~
4. the Bureau's funding mechanism violated the Appropriations Clause.



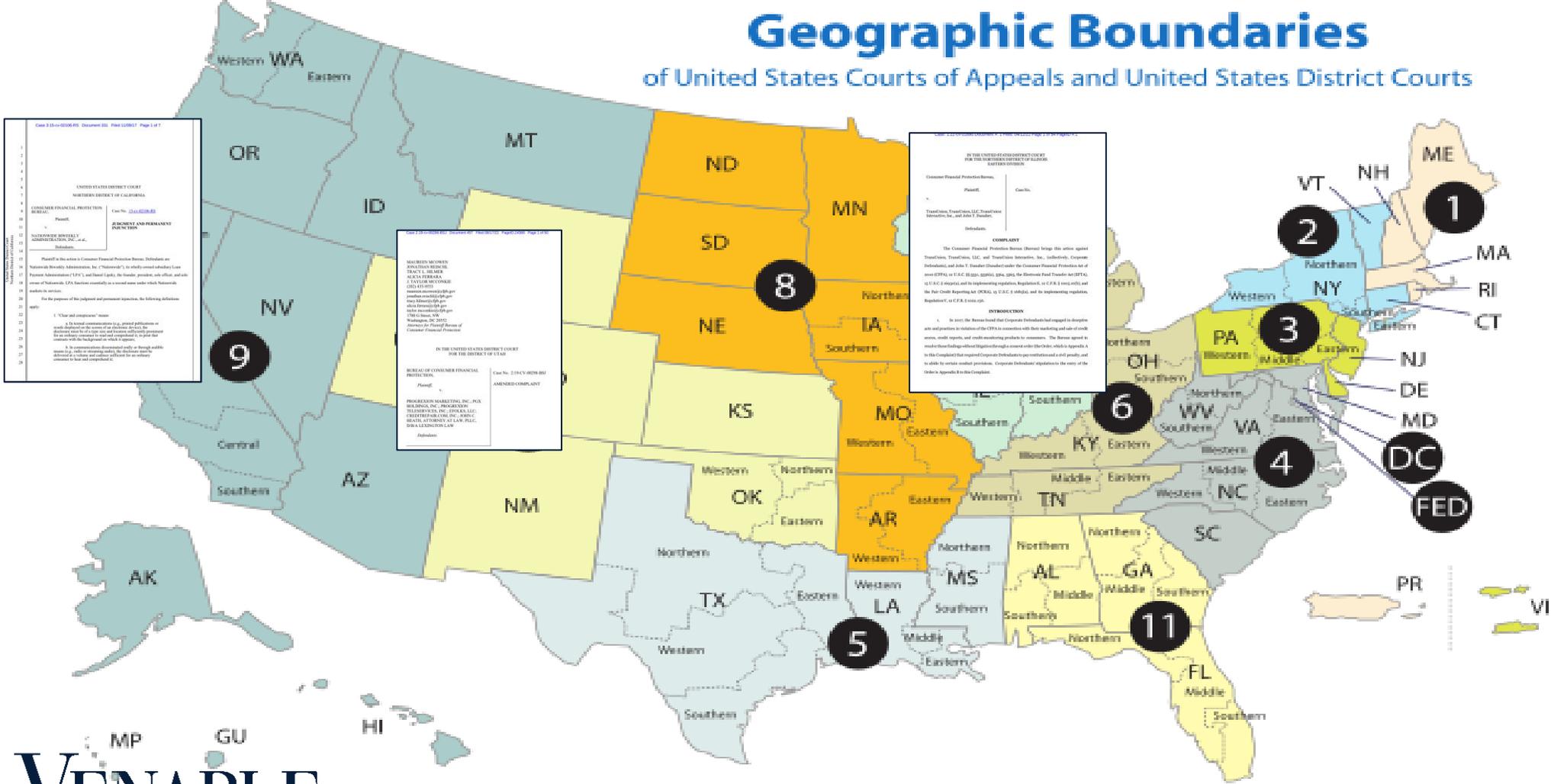
What Does This Mean for Other CFPB Actions?

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



Courts Are Already Being Asked to Consider the Holding

- ***CFPB v. TransUnion* (Illinois) (would appeal to 7th Circuit)**
- ***CFPB v. Progrexion Marketing, Inc.* (Utah) (would appeal to 10th Circuit)**
- ***CFPB v Nationwide Biweekly Administration* (9th Circuit)**

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.

CFPB Region: Choose an item.

CFPB Event ID: 0000
CFPB Supervision ID: 00000

Entity Type: Choose an item.

Review Type: Point-in-Time Examination

Prohibition of Disclosure or Release

This document is the property of the Consumer Financial Protection Bureau (CFPB), and the CFPB furnishes this document to the entity for its confidential use. The entity's directors, officers, or employees may not disclose the report or any portion of it except as provided in 12 CFR Part 1070.

If the entity receives a subpoena or other legal process calling for production of, or testimony regarding, this document, notify the Regional Director and the CFPB General Counsel immediately. Advise the party issuing the subpoena and, as appropriate, the court of the above prohibition and refer them to 12 CFR Part 1070.



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

<p>In the Matter of:</p> <p>JPay, LLC</p>	<p>CONSENT ORDER</p>
---	-----------------------------

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

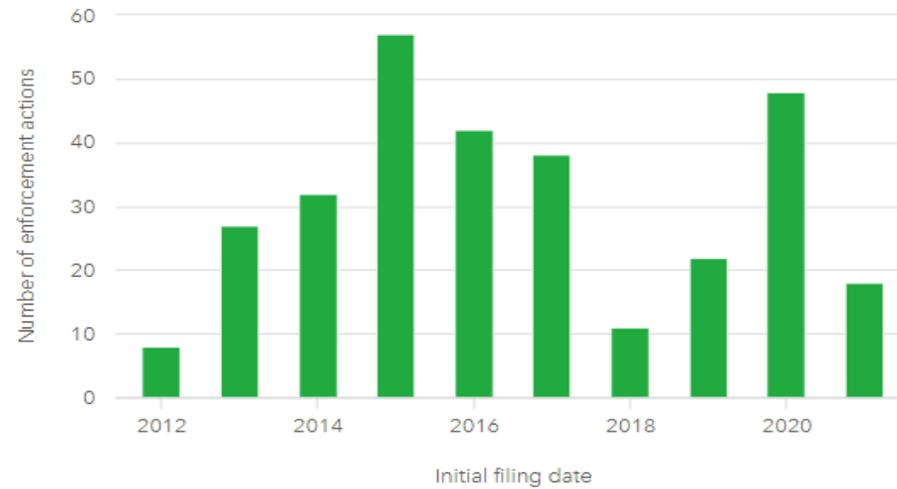


CFPB Investigations and Active Litigation

Impact on Enforcement Actions

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.



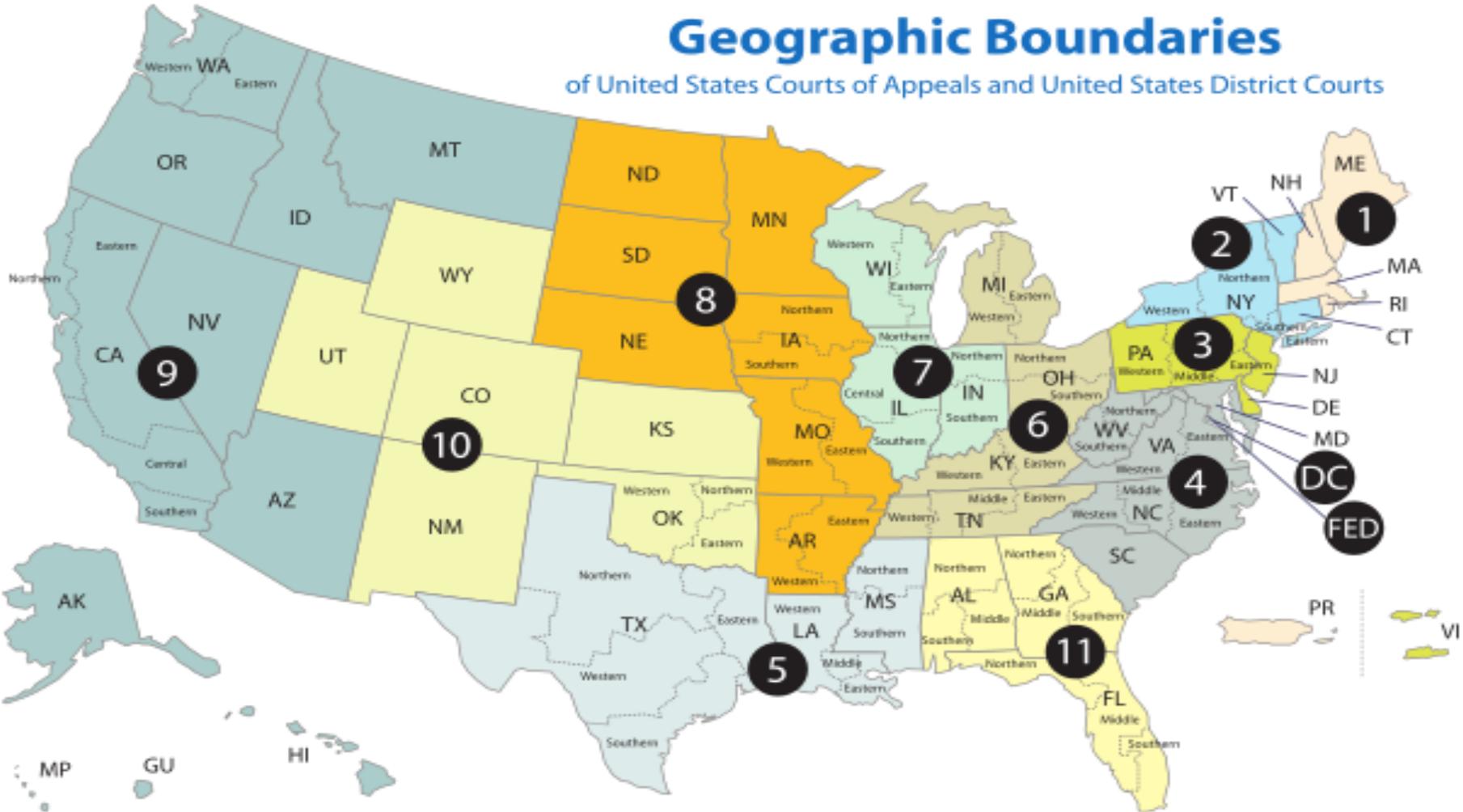
Date Published: July 2022

Download: [CSV file](#)

U.S. Court of Appeals

Geographic Boundaries

of United States Courts of Appeals and United States District Courts

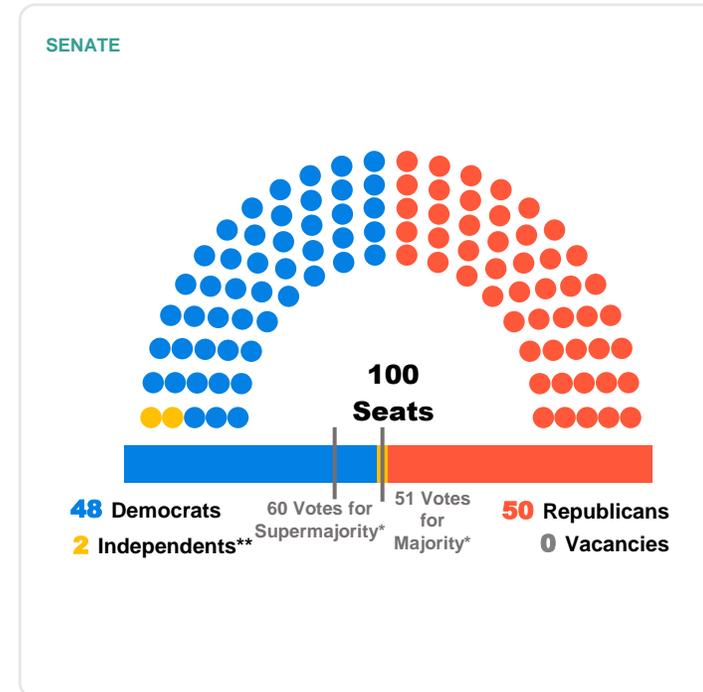
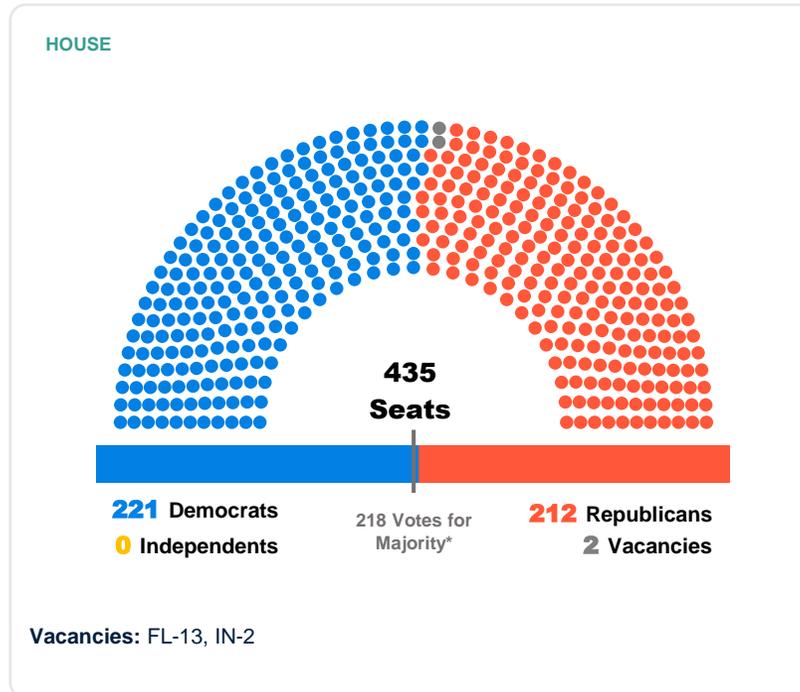


What's Next?

“The power of the purse is the only real power of government.”

- Senator Robert Byrd

Composition of the 117th Congress



*If no vacancies and all members vote **The two independent senators (Sanders - VT and King - ME) caucus with the Democrats

SOURCE US House Press Gallery United States Senate..

SLIDE LAST UPDATED ON 9/14/22

How Does This Get Resolved?

- The court's logic could extend to any rulemaking, or enforcement action, that the CFPB has engaged in thus far.
- If this decision stands without any fix from Congress, this could be the template to invalidate everything that the CFPB has done.
- This decision is binding on federal district courts in Louisiana, Mississippi, and Texas.
- Possible fix?
 - If Congress funds the CFPB in a constitutional manner, the CFPB might be able to ratify its prior actions, similar to what it did after the *Seila Law LLC* case.



Questions & Answers

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



Ellen T. Berge
Partner



Leonard L. Gordon
Partner



Michael J. Bresnick
Partner



Joshua H. Raymond
Partner



Jonathan L. Pompan
Partner



© 2022 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