

# Consumer Financial Services Outlook 2023

Thursday, January 12, 2023, 2:00 – 3:30 p.m. ET

**Ellen T. Berge**  
Partner

**Andrew E. Bigart**  
Partner

**Michael J. Bresnick**  
Partner

**Sarah B. Donovan**  
Senior Policy Advisor

**Leonard L. Gordon**  
Partner

**Alexandra Megaris**  
Partner

**Jonathan L. Pompan**  
Partner, *Moderator*

**Christopher M. Scribner**  
Senior Policy Advisor

**Christopher L. Boone**  
Counsel

**Harley L. Geiger**  
Counsel

**Kathryn B. Marshall**  
Associate

**VENABLE** LLP

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# Today's Discussion

- A Divided Congress and the Legislative Landscape
- The Future of the Consumer Financial Protection Bureau
- Hot Topics and Trends
- CFS Regulatory Agenda and Policy Developments
- Consumer Privacy and Data Security
- Supervision and Enforcement Outlook
- State Developments
- Q & A and Wrap-up

# Consumer Financial Services Outlook 2023

## Panelists



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# **A Divided Congress and the Legislative Landscape**

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

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

# Big Picture

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



# CFS Legislative Landscape

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



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# The Future of the Consumer Financial Protection Bureau

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# How Did We Get Here?

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

United States Court of Appeals  
for the Fifth Circuit

No. 21-50826

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

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

*Plaintiffs—Appellants,*

*versus*

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

*Defendants—Appellees.*

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

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

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

- Consumer Financial 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.

# Funding of the 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.”

# 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)

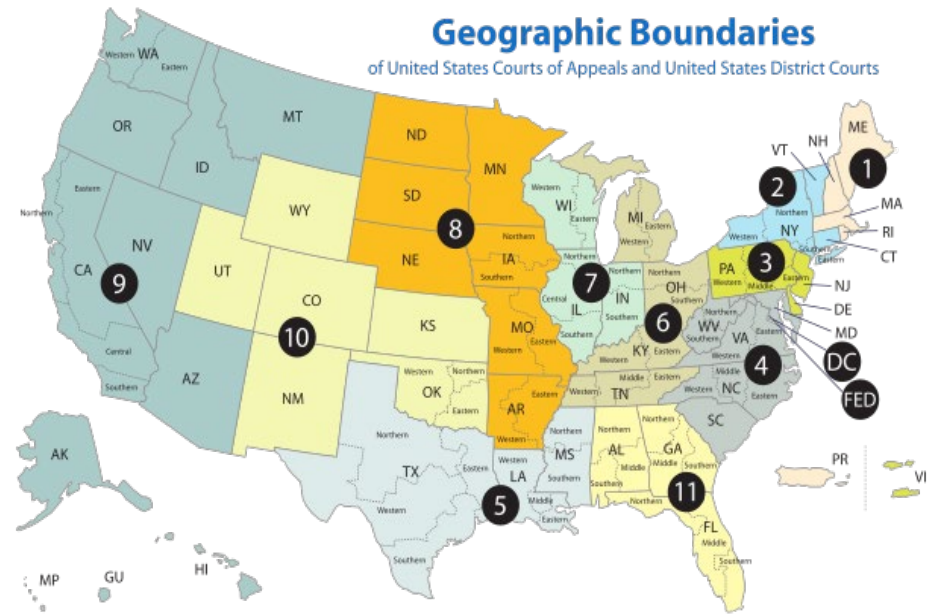
“Congress’s appropriations power, including the express exemption from congressional review of its funding, renders the Bureau ‘no longer dependent and, as a result, no longer accountable’ to Congress and, ultimately, to the people . . . . By abandoning its ‘most complete and effectual’ check on ‘the 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 of 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.

# Impact of Fifth Circuit Decision and What's Next



No.

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**In the Supreme Court of the United States**

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CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,  
PETITIONERS

v.

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF  
AMERICA, LIMITED, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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<p>SETH FROTMAN <i>General Counsel</i></p> <p>STEVEN Y. BRESSLER <i>Acting Deputy General Counsel</i></p> <p>KRISTIN BATEMAN <i>Acting Assistant General Counsel</i></p> <p>CHRISTOPHER DEAL KEVIN E. FRIEDL JUSTIN M. SANDBERG <i>Senior Counsel</i></p> <p>Consumer Financial Protection Bureau Washington, D.C. 20552</p>	<p>ELIZABETH B. PRELOGAR <i>Solicitor General</i> <i>Counsel of Record</i></p> <p>BRIAN H. FLETCHER <i>Deputy Solicitor General</i></p> <p>EPHRAIM A. MCDOWELL <i>Assistant to the Solicitor General</i></p> <p><i>Department of Justice</i> <i>Washington, D.C. 20530-0001</i> <i>SupremeCtBriefs@usdoj.gov</i> <i>(202) 514-2217</i></p>
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# CFS Hot Topics and Trends

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# **Bank Fintech Partnerships and Cost of Banking**

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# True Lender, Competition, Scale and Technology Under the Microscope

- **“True Lender”** – CA DFPI v. OppFi (and OppFi v. CA DFPI), putting the “predominate economic interest test” to the test.
- **CFPB scrutiny of competition, scale, and technology in the consumer finance infrastructure, and its connection to relationship banking**
  - “Local financial institutions depend on core services providers being agile, responsive, and cost-effective in order to compete and serve their clients and customers in their communities.” – CFPB Director Rohit Chopra, Opening Remarks to the Community Bank and Credit Union Advisory Councils (April 7, 2022)
- **Bank Partnerships Getting a Closer Look** – “Some lenders employing rent-a-bank schemes have unusually high default rates, which raise questions about whether their products set borrowers up for failure. And our complaints database reveals a range of other significant consumer protection concerns with certain loans associated with bank partnerships.” – CFPB Deputy Director Zixta Martinez’s Keynote Address at the Consumer Federation of America’s 2022 Consumer Assembly (June 15, 2022)

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# Payments and Cryptocurrency Developments

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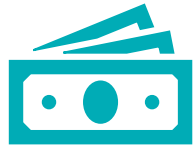
# Law Enforcement / Consumer Protection

- Concern about the “Payment Facilitator” model and other payment intermediaries
- FTC exploring/exhausting all enforcement tools since the *AMG Capital* case, which nullified FTC’s self-granted ability to seek monetary relief for past conduct deemed unfair or deceptive under Section 5 of the FTC Act
  - Notice of penalty offense letters
  - New rulemakings
  - Updates to existing rules
  - Creative applications of existing law (including ROSCA – Restore Online Shoppers Confidence Act)
  - Greater use of the Telemarketing Sales Rule’s “assisting and facilitating” provision against processors
  - Administrative actions instead of court actions (e.g., *FTC v. Electronic Payment Systems* (May 2022))
- FTC still waiting on a “fix” from Congress to restore FTC’s lost authority to obtain monetary relief.
- CFPB March 2022 Policy Statement: Processing payments for companies engaged in fraudulent activities is a UDAAP violation (**unfair**, deceptive, or abusive acts and practices)
  - Specifically referenced \$125 million Wachovia settlement from 2008

# CFPB Enforcement against Payments Companies

- *CFPB v. Brightspeed Solutions* (Jan. 2022)
  - Processed payments for fraudulent tech support services, notwithstanding knowledge of nearly 1,000 consumer complaints and 20% return rate
  - Brightspeed and its owner banned from payment processing, consumer lending, deposit taking, debt collection, and telemarketing + \$500,000 civil penalty
- *CFPB v. RAM Payments and Account Management Systems (AMS)* (May 2022)
  - Debt relief payment processor (RAM) assisted AMS in collecting debt relief fees from consumers in violation of Telemarketing Sales Rule's advance fee ban
  - \$8.7 million refund to consumers; industry ban for AMS; RAM Payments banned from assisting debt-relief companies in violating rules and is now under CFPB supervisory authority

# CFPB Report, *The Convergence of Payments and Commerce: Implications for Consumers* (Aug. 2022)



## Integrated “super apps”

Provide users with a wide array of financial, payments, and commerce functions within a single app; nearly every capability needed to conduct their online life

May be convenient, but may limit consumer product and service choice



## Embedded commerce

Purchase options ranging from QR code payments on a restaurant check or screen to contactless transactions at the points of sale and payments fully embedded in a social media feed

Transaction is enabled with very little activity from the consumer, increasing the risk of an unwanted purchase



## Buy Now, Pay Later (BNPL)

Four-payment, no interest loans; now have their own apps with rewards and social media platforms

Hidden charges (late fees), potential overextension of credit, concern over data use highlight the discussion

# Faster Payments

- Instant payments allow the sending / receiving of payments 24/7/365
  - FedNow
    - Expected to launch summer 2023.
    - Uses ISO 20022, a global standard for payment message specifications to ensure interoperability across U.S. financial institutions and increase adoption.
    - At first, functionality will support market needs for a range of use cases, including account-to-account transfers and bill pay. Subsequent support for the use of service providers and correspondents and an option to enroll as a “receive-only” participant.
  - RTP Network
    - Payments sent through the RTP network established by The Clearing House.
    - Uses ISO 20022, a global standard for payment message specifications to ensure interoperability across U.S. financial institutions and increase adoption.
  - Push-to-Card (Visa Direct and Mastercard Send)
    - Allow businesses or individuals to push funds into an eligible cardholder’s account (e.g., credit, debit, and prepaid)
    - Continues to grow at a fast pace.

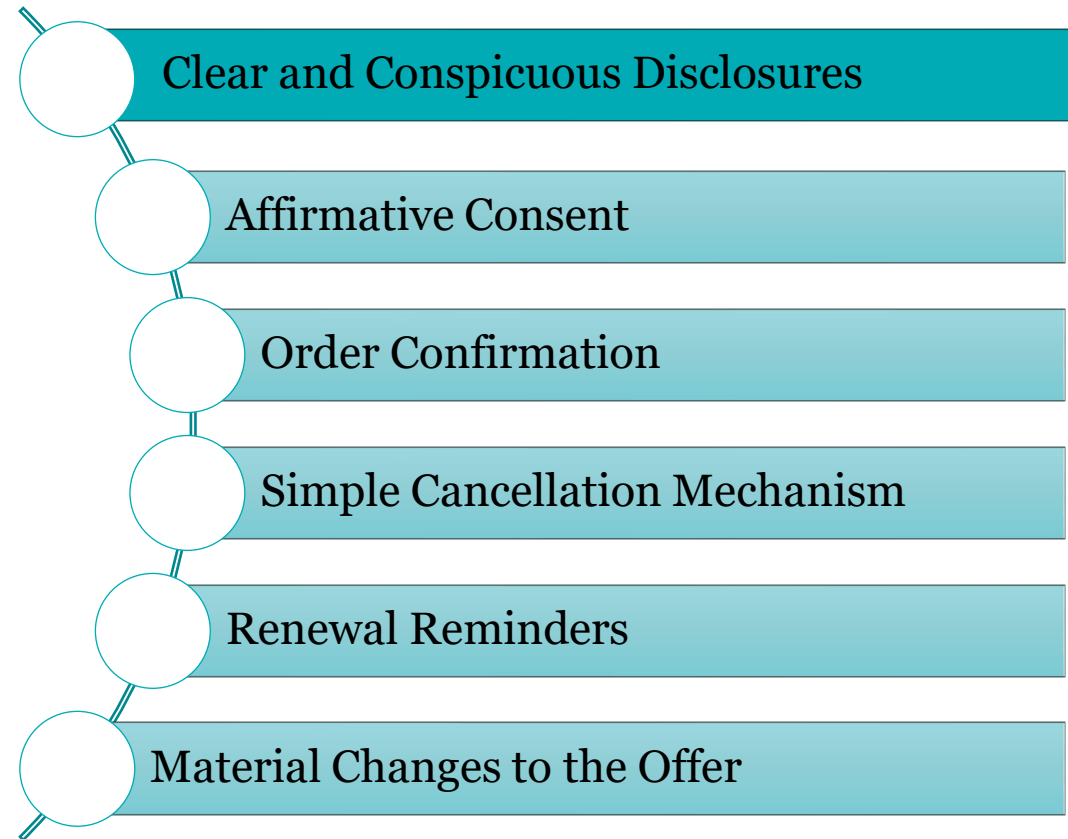


# Scrutiny of P2P Payments

- Six U.S. senators wrote the CFPB requesting action to protect consumers from frauds and scams on instant payment services.
  - Raised concern that operators and owners of P2P and similar instant payment services have not worked sufficiently to safeguard consumers and seek to avoid providing reimbursement when customers are defrauded.
  - Letter notes that under Regulation E a consumer is protected if they are tricked into handing over account information to a fraudster who then initiates a transfer. But a consumer is not protected if they are tricked into opening an application to transfer funds directly to the fraudster.
- Senator Warren has launched her own investigations into P2P fraud and recently issued a report (October 2022) outlining purported findings from that investigation.

# Subscriptions and Recurring Billing

- Federal and state law governs automatic renewal programs
- Dozens of cases filed by the FTC under the Restore Online Shoppers Confidence Act (ROSCA)
  - Recent cases involving movie theater subscriptions, child education products, stock and options trading services, personal care products, cooking and golfing products, monthly box subscriptions, dating apps, credit monitoring, multi-channel video programming
- Various state laws with differing requirements, more specific than ROSCA
- Subscription programs and automatic renewals becoming more prevalent
- Plaintiffs' attorneys trolling new ground for cases
- Class action lawsuits and state attorney general lawsuits abound



# Cryptocurrency Developments

- Collapse of prominent cryptocurrency exchanges drives increased regulatory scrutiny
  - SEC Crypto Assets and Cyber Unit signals ramp up in crypto enforcement
  - FinCEN and OFAC enforcement of Bank Secrecy Act and trade sanctions violations
- Banking regulators warn of key risks associated with crypto-assets
  - The Federal Reserve, FDIC, and OCC issued a joint statement on January 3, stating that issuing or holding as principal crypto-assets is highly likely to be inconsistent with safe and sound banking practices.
- Cryptocurrency legislation likely to be introduced in 2023, but unclear if a consensus on the direction of cryptocurrency regulation can be reached.
  - Ex. Responsible Financial Innovation Act, Digital Commodities Consumer Protection Act, and stablecoin regulation, etc.
- Federal Reserve continues to explore risk, benefits, and challenges of Central Bank Digital Currencies (CBDCs).
  - Does not intend to proceed with issuance of a CBDC without clear support from the executive branch and from Congress.

# What to Expect in 2023?

- “Banking as a service” and “payments as a service” will continue to grow, which will allow additional fintechs and services providers to offer bundled services to customers.
- Growth of digital wallets and use as broader payment devices
- Continued growth of real-time payments
- Continued expansion of buy now, pay later, along with heightened regulatory scrutiny
- Continued enforcement against companies that engage in UDAAP affecting consumers and small businesses

# Junk Fees

- “Unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value.” (FTC, Oct. 20, 2022)
  - Cramming hidden fees to which consumers did not consent
  - Misrepresenting optional services or upgrades as mandatory
  - Charging for products or services with little or no value
- Examples:
  - Add-on fees for telecommunications services and live entertainment
  - Booking a hotel room or purchasing tickets and finding a surprise fee at checkout (e.g., “resort fee”)
  - Ancillary products in conjunction with loans, auto financing, or another complicated transaction, ending up on the final bill without the consumer’s awareness or consent
- Consumer Reports Survey (2019): 82% of consumers spent money on hidden fees

# Junk Fees

The screenshot shows the CFPB website with a navigation bar and a main content area. The main heading is 'Junk fees' with a sub-headline: 'The CFPB launched an initiative to save households billions of dollars a year by reducing exploitative junk fees charged by banks and financial companies.' Below this are three video thumbnails: 'THE HIDDEN COST OF JUNK FEES', 'EXPLORING JUNK FEES: SURPRISE DEPOSITOR FEES', and 'EXPLORING JUNK FEES: SURPRISE OVERDRAFT FEES'. Each video has a short description and a 'Watch the video' link. At the bottom, there are sections for 'Latest news' and 'Research and Reports' with several links to related articles.

The screenshot shows the FTC press release page. The main heading is 'Federal Trade Commission Explores Rule Cracking Down on Junk Fees' with a sub-headline: 'Agency seeks comment on harms from unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value'. The date is 'October 20, 2022' and there are social media icons for Facebook, Twitter, and LinkedIn. The 'Tags' section includes 'Consumer Protection', 'Bureau of Consumer Protection', 'Advertising and Marketing', and 'Advertising and Marketing Basics'. The main text states: 'The Federal Trade Commission announced today that it is exploring a rule to crack down on junk fees proliferating throughout the economy. Junk fees are unnecessary, unavoidable, or surprise charges that inflate costs while adding little to no value. Consumers can get hit with junk fees at any stage of the purchase or payment process. Companies often harvest junk fees by imposing them on captive consumers or by deploying digital dark patterns and other tricks to hide or mask them. The agency is seeking public comment on the harms caused by junk fees and the unfair or deceptive tactics companies use to impose them.' A quote from FTC Chair Lina M. Khan is included: 'It's beyond frustrating to end up spending more than you budgeted because of random, arbitrary fees,' said FTC Chair Lina M. Khan. 'No one has ever felt that a 'convenience fee' was convenient. Companies should compete to provide the best quality at the best price, not to see who can squeeze the most added expenses out of consumers. That's especially true at a time when families are struggling with the effects of inflation.' A final paragraph states: 'Companies charge junk fees in a wide range of contexts, including cramming in hidden fees to which consumers did not consent, misrepresenting optional services or upgrades as mandatory, and charging for products or services with little or no value. For example, consumers purchasing tickets or' The 'Related actions' section lists several documents: '16 CFR Part 464: Unfair or Deceptive Fees Trade Regulation Rule (ANPR)', 'Statement of Chair Lina M. Khan Regarding the Advanced Notice of Proposed Rulemaking on Unfair or Deceptive "Junk" Fees', 'Dissenting Statement of Commissioner Christine S. Wilson Regarding the Advance Notice of Proposed Rulemaking on Junk Fees', 'Commissioner Wilson Oral Remarks - Open Commission Meeting October 20, 2022', and 'Commissioner Slaughter Oral Remarks Regarding Advance Notice of Proposed Rulemaking for Unfair or Deceptive Fees'.



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# Digital Technology, UDAAPs and Discrimination

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# Focus on Dark Patterns and User Interfaces

- What are “Dark Patterns”?
  - Manipulative tactics that induce consumers to complete an action they would not have otherwise completed if they had understood what they were acting on at the time
  - Drive unwitting consumers to purchase items, share information, and agree to legal terms without intending to do so

## ***Bringing Dark Patterns to Light – FTC Staff Report, September 2022***

1. Design Elements That Induce False Beliefs
2. Design Elements That Hide or Delay Disclosure of Material Information
3. Design Elements That Lead to Unauthorized Charges
4. Design Elements That Obscure or Subvert Privacy Choices



## ***CFPB v. TransUnion (N.D. Illinois 2022)***

- In a 2017 settlement, TransUnion agreed to pay \$13.9 million for alleged deceptive marketing practices, as well as \$3 million in civil penalties. The credit reporting agency also agreed to warn consumers that lenders are likely not using the exact scores TransUnion provided the consumers.
  - TransUnion agreed to get consumers' informed consent before they sign up for recurring payments for subscription services and provide them an easy way to opt out of such services.
- CFPB filed a lawsuit alleging that the company violated the order and “deceived customers through digital dark patterns.”
- CFPB challenged TransUnion with violating the Consumer Financial Protection Act, the Fair Credit Reporting Act, and the Electronic Fund Transfer Act.

# CFPB v. TransUnion (N.D. Illinois 2022)

- The settlement required “express informed consent” in connection with a negative option feature, which requires “a check box on the final order page that consumers must affirmatively check to select the Negative Option feature (i.e., it cannot be pre-checked), and which clearly and conspicuously states that the consumer agrees to be billed for the product unless the consumer cancels before the trial period expires[.]”

Apply 1 | Verify 2 | View 3

### Let's Get Started

See your Free Credit Score & \$1 Credit Report in minutes

First Name  Last Name

Street Address  Zip

State  City

Have you lived here for more than 6 months?  Yes  No

Email  Phone

Your Social Security Number is required to match your credit score & report. It is secure and will not be stored.

Social Security Number Last 4 Digits  Date of Birth Month  Day  Year

Do you have a credit card or debit card?  Yes  No

**Submit & Continue**

By clicking "Submit & Continue" above, I have read and agree to GOFreeCredit.com's Privacy Policy & Terms of Use and to receive marketing communications via an automated telephone dialing system, pre-recorded calls, text messages, and emails from GOFreeCredit.com and its marketing partners at the info I have provided above. I understand that my consent is not a condition of my receipt of products and/or services, and that alternatively I may email info@GOFreeCredit.com.

**12 MILLION**

Did you know?

**It never hurts to check your score.**

Monitoring your Credit Score and understanding your financial history will help you when it's time to apply for a loan or credit card, buy a car or rent a home. It's easy to track changes in your score. Checking your own credit will not impact your Credit Score.

**Offer Details**

Your FREE TransUnion credit score & \$1 Credit Report are available as part of a 7-day trial of our subscription-based credit monitoring service. You may cancel at any time during the trial period. At the end of your 7-day trial, you will be billed at a low cost of only \$24.95 per month (plus tax where applicable).

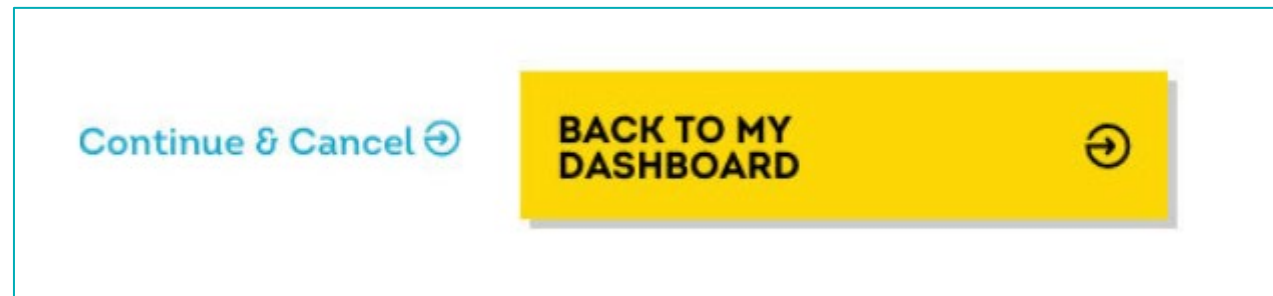
**VantageScore 3.0**

There are various types of credit scores, and lenders use a variety of different types of credit scores to make lending decisions. The credit score you receive is based on the VantageScore 3.0 model and may not be the credit score model used by your lender.

**Featured On:**


## ***CFPB v. TransUnion* (N.D. Illinois 2022)**

- Consumers who tried to cancel these recurring charges found there was no simple way to do so. For consumers looking for a way out of their subscriptions, TransUnion not only failed to offer a simple mechanism for cancellation; it made it arduous for consumers to cancel through uses of font and color on its website.
- Consumers who attempted to cancel were presented with additional information about product benefits and what the consumer would “lose” by canceling credit monitoring.
- Alleged that at the bottom of the product benefits screen, defendants present the consumer with a confusing choice:



# Use of AI by CFS Providers

- CFPB Circular on Adverse Action Notification Requirements in Connection with Credit Decisions based on Complex Algorithms.
  - “ECOA and Regulation B require creditors to provide statements of specific reasons to applicants against whom adverse action is taken.”
  - “Some creditors may make credit decisions based on certain complex algorithms, sometimes referred to as uninterpretable or “black-box” models, that make it difficult—if not impossible—to accurately identify the specific reasons for denying credit or taking other adverse actions.”
  - “The adverse action notice requirements of ECOA and Regulation B, however, apply equally to all credit decisions, regardless of the technology used to make them.”
  - “ECOA and Regulation B do not permit creditors to use complex algorithms when doing so means they cannot provide the specific and accurate reasons for adverse actions.”

 Consumer Financial  
Protection Bureau

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

Circular 2022-03  
May 26, 2022

## Consumer Financial Protection Circular 2022-03

Adverse action notification requirements in connection with credit decisions based on complex algorithms

May 26, 2022

### Question presented

When creditors make credit decisions based on complex algorithms that prevent creditors from accurately identifying the specific reasons for denying credit or taking other adverse actions, do these creditors need to comply with the Equal Credit Opportunity Act’s requirement to provide a statement of specific reasons to applicants against whom adverse action is taken?

### Response

Yes. ECOA and Regulation B require creditors to provide statements of specific reasons to applicants against whom adverse action is taken. Some creditors may make credit decisions based on certain complex algorithms, sometimes referred to as uninterpretable or “black-box” models, that make it difficult—if not impossible—to accurately identify the specific reasons for denying credit or taking other adverse actions.<sup>1</sup> The adverse action notice requirements of ECOA and Regulation B, however, apply equally to all credit decisions, regardless of the technology used to make them. Thus, ECOA and Regulation B do not permit creditors to use complex algorithms when doing so means they cannot provide the specific and accurate reasons for adverse actions.

### Analysis

ECOA makes it unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of race, color, religion, national origin, sex or

# CFPB Targets Unfair Discrimination in Consumer Finance

- Changes to supervisory operations to better protect families and communities from illegal discrimination, including in situations where fair lending laws may not apply.
- “In the course of examining banks’ and other companies’ compliance with consumer protection rules, the CFPB will scrutinize discriminatory conduct that violates the federal prohibition against unfair practices. The CFPB will closely examine financial institutions’ decision-making in advertising, pricing, and other areas to ensure that companies are appropriately testing for and eliminating illegal discrimination.”
- Controversial and subject of litigation – *U.S. Chamber of Commerce et al. v. CFPB et al.*, case number 6:22-cv-00381, in the U.S. District Court for the Eastern District of Texas

<b>CFPB Consumer Laws and Regulations</b>	<b>UDAAP</b>
<b>Unfair, Deceptive, or Abusive Acts or Practices</b>	
<p>Unfair, deceptive, or abusive acts and practices (UDAAPs) can cause significant financial injury to consumers, erode consumer confidence, and undermine the financial marketplace. Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive or abusive act or practice.<sup>1</sup> The Act also provides CFPB with rule-making authority and, with respect to entities within its jurisdiction, enforcement authority to prevent unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.<sup>2</sup> In addition, CFPB has supervisory authority for detecting and assessing risks to consumers and to markets for consumer financial products and services.<sup>3</sup></p> <p>As examiners review products or services, such as deposit products or lending activities, they generally should identify the risks of harm to consumers that are particular to those activities. Examiners also should review products that combine features and terms in a manner that can increase the difficulty of consumer understanding of the overall costs or risks of the product and the potential harm to the consumer associated with the product.</p> <p>These examination procedures provide general guidance on:</p> <ul style="list-style-type: none"><li>• The principles of unfairness, deception, and abuse in the context of offering and providing consumer financial products and services;</li><li>• Assessing the risk that an institution’s practices may be unfair, deceptive, or abusive;</li><li>• Identifying unfair, deceptive or abusive acts or practices (including by providing examples of potentially unfair or deceptive acts and practices); and</li><li>• Understanding the interplay between unfair, deceptive, or abusive acts or practices and other consumer protection and antidiscrimination statutes.</li></ul> <p><b>Unfair Acts or Practices</b></p> <p>The standard for unfairness in the Dodd-Frank Act is that an act or practice is unfair when:</p> <ol style="list-style-type: none"><li>(1) It causes or is likely to cause substantial injury to consumers;</li><li>(2) The injury is not reasonably avoidable by consumers; and</li></ol>	
<small><sup>1</sup> Dodd-Frank Act, Title X, Subtitle C, Sec. 1036; PL 111-203 (July 21, 2010).</small>	
<small><sup>2</sup> Sec. 1031 of the Dodd-Frank Act. The principles of “unfair” and “deceptive” practices in the Act are similar to those under Sec. 5 of the Federal Trade Commission Act (FTC Act). The Federal Trade Commission (FTC) and federal banking regulators have applied these standards through case law, official policy statements, guidance, examination procedures, and enforcement actions that may inform CFPB.</small>	
<small><sup>3</sup> Dodd-Frank Act, Secs. 1024; 1025(b)(1); 1026(b) of the Act.</small>	
<small>CFPB</small>	<small>Manual V.3 (March 2022) UDAAP 1</small>



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# **CFS Regulatory Agenda and Policy Developments**

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# CFPB Fall Regulatory Agenda (as of September 30, 2022)

Agency	Agenda Stage of Rulemaking	Title	RIN
CFPB	Prerule Stage	Overdraft Fees	<a href="#">3170-AA42</a>
CFPB	Prerule Stage	Fair Credit Reporting Act Rulemaking	<a href="#">3170-AA54</a>
CFPB	Prerule Stage	Required Rulemaking on Personal Financial Data Rights	<a href="#">3170-AA78</a>
CFPB	Prerule Stage	Fees for Insufficient Funds	<a href="#">3170-AB16</a>
CFPB	Proposed Rule Stage	Amendments to FIRREA Concerning Automated Valuation Models	<a href="#">3170-AA57</a>
CFPB	Proposed Rule Stage	Property Assessed Clean Energy Financing	<a href="#">3170-AA84</a>
CFPB	Proposed Rule Stage	Nonbank Registration – Nonbank Covered Persons Subject to Certain Enforcement Orders	<a href="#">3170-AB13</a>
CFPB	Proposed Rule Stage	Nonbank Registration – Terms and Conditions	<a href="#">3170-AB14</a>
CFPB	Proposed Rule Stage	Credit Card Penalty Fees	<a href="#">3170-AB15</a>
CFPB	Final Rule Stage	Small Business Lending Data Collection Under the Equal Credit Opportunity Act	<a href="#">3170-AA09</a>

# Fair Credit Reporting Act Rulemaking

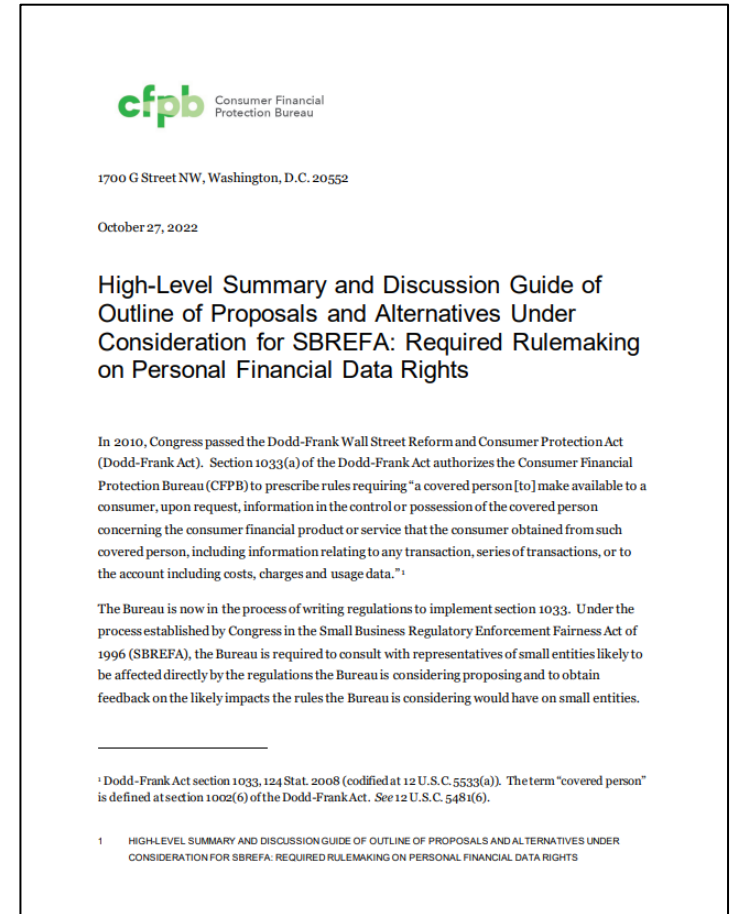
- Congress enacted the Fair Credit Reporting Act (FCRA) to ensure fair and accurate credit reporting, promote efficiency in the banking system, and protect consumer privacy.
- The law and its implementing regulation (Regulation V) impose legal duties on consumer reporting agencies, data furnishers, and users of consumer reports.
- The CFPB is considering whether to amend Regulation V.
- Status: Prerule Stage (November 2023)

<small>REGULATIONS US GOVERNMENT PRINTING OFFICE GPO</small>	
<p><b>Bur. of Consumer Financial Protection</b></p> <p>(1) If it shares with nonaffiliated third parties, state, as applicable: "Nonaffiliates we share with can include [list categories of companies such as mortgage companies, insurance companies, direct marketing companies, and nonprofit organizations]."</p> <p>(3) <i>Joint Marketing</i>. As required by §1016.13 of this part, where [joint marketing] appears, the financial institution must:</p> <p>(i) If it does not engage in joint marketing, state: "[name of financial institution] doesn't jointly market"; or</p> <p>(ii) If it shares personal information for joint marketing, state, as applicable: "Our joint marketing partners include [list categories of companies such as credit card companies]."</p> <p>(c) <i>General instructions for the "Other important information box."</i> This box is optional. The space provided for information in this box is not limited. Only the following types of information can appear in this box.</p> <p>(1) State and/or international privacy law information; and/or</p> <p>(2) Acknowledgment of receipt form.</p> <p><b>PART 1022—FAIR CREDIT REPORTING (REGULATION V)</b></p> <p><b>Subpart A—General Provisions</b></p> <p>Sec. 1022.1 Purpose, scope, and model forms and disclosures. 1022.2 Examples. 1022.3 Definitions.</p> <p><b>Subpart B [Reserved]</b></p> <p><b>Subpart C—Affiliate Marketing</b></p> <p>1022.20 Coverage and definitions. 1022.21 Affiliate marketing opt-out and exceptions. 1022.22 Scope and duration of opt-out. 1022.23 Contents of opt-out notice; consolidated and equivalent notices. 1022.24 Reasonable opportunity to opt out. 1022.25 Reasonable and simple methods of opting out. 1022.26 Delivery of opt-out notices. 1022.27 Renewal of opt-out.</p> <p><b>Subpart D—Medical Information</b></p> <p>1022.30 Obtaining or using medical information in connection with a determination of eligibility for credit. 1022.31 Limits on redisclosure of information. 1022.32 Sharing medical information with affiliates.</p> <p><b>Subpart E—Duties of Furnishers of Information</b></p> <p>1022.40 Scope. 1022.41 Definitions.</p>	<p style="text-align: right;"><b>Pt. 1022</b></p> <p>1022.42 Reasonable policies and procedures concerning the accuracy and integrity of furnished information. 1022.43 Direct disputes.</p> <p><b>Subpart F—Duties of Users Regarding Obtaining and Using Consumer Reports</b></p> <p>1022.50-1022.53 [Reserved] 1022.54 Duties of users making written firm offers of credit or insurance based on information contained in consumer files.</p> <p><b>Subpart G [Reserved]</b></p> <p><b>Subpart H—Duties of Users Regarding Risk-Based Pricing</b></p> <p>1022.70 Scope. 1022.71 Definitions. 1022.72 General requirements for risk-based pricing notices. 1022.73 Content, form, and timing of risk-based pricing notices. 1022.74 Exceptions. 1022.75 Rules of construction.</p> <p><b>Subpart I—Duties of Users of Consumer Reports Regarding Identity Theft</b></p> <p>1022.80-1022.81 [Reserved] 1022.82 Duties of users regarding address discrepancies.</p> <p><b>Subparts J-L [Reserved]</b></p> <p><b>Subpart M—Duties of Consumer Reporting Agencies Regarding Identity Theft</b></p> <p>1022.120 [Reserved] 1022.121 Active duty alerts. 1022.122 [Reserved] 1022.123 Proof of identity.</p> <p><b>Subpart N—Duties of Consumer Reporting Agencies Regarding Disclosures to Consumers</b></p> <p>1022.130 Definitions 1022.131-1022.135 [Reserved] 1022.136 Centralized source for requesting annual file disclosures from nationwide consumer reporting agencies. 1022.137 Streamlined process for requesting annual file disclosures from nationwide specialty consumer reporting agencies. 1022.138 Prevention of deceptive marketing of free credit reports.</p> <p><b>Subpart O—Miscellaneous Duties of Consumer Reporting Agencies</b></p> <p>1022.140 Prohibition against circumventing or evading treatment as a consumer reporting agency. 1022.141 Reasonable charges for certain disclosures.</p> <p style="text-align: center;">517</p>



# 1033 Rulemaking – Required Rulemaking on Personal Financial Data Rights

- Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provides that, subject to rules prescribed by the CFPB, a covered entity (for example, a bank) must make available to consumers, upon request, transaction data and other information concerning a consumer financial product or service that the consumer obtains from the covered entity.
- Section 1033 also states that the CFPB must prescribe standards to promote the development and use of standardized formats for information made available to consumers.
- In November 2020, the CFPB published an Advance Notice of Proposed Rulemaking (ANPRM) concerning implementation of Section 1033.
- In October 2022, the CFPB released a High-Level Summary and Discussion Guide in advance of convening a panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA).
- The CFPB’s next step is to convene the SBREFA panel and issue a report summarizing feedback received from the panel.



# 1033 Rulemaking (Cont'd)

The proposed rule addresses the following:

- Coverage of data providers who would be subject to the rule;
    - Entities that meet the definition of “financial institution” as set forth in §1005.2(i) of Regulation E (12 CFR part 1005) or “card issuer” as set forth in §1026.2(a)(7) of Regulation Z (12 CFR part 1026)
  - Recipients of information, including consumers and authorized third parties;
  - The types of information that would need to be made available;
  - How and when information would need to be made available, including to consumers and to third parties authorized to access information on their behalf;
  - Third party obligations;
  - Record retention obligations; and
  - Implementation period.
- “Data provider” means a covered person with control or possession of consumer financial data.
  - “Third party” refers, generally, to data recipients or data aggregators.
  - “Data recipient” means a third party that uses consumer-authorized information access to provide (1) products or services to the authorizing consumer, or (2) services used by entities that provide products or services to the authorizing consumer.
  - “Data aggregator” means an entity that supports data recipients and data providers in enabling consumer-authorized information access.
  - The term “authorized third party” means a third party who has followed certain procedures for authorization described in the Outline.

# 1033 Rulemaking (Cont'd)

**cfpb** Consumer Financial Protection Bureau

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

October 27, 2022

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

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

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

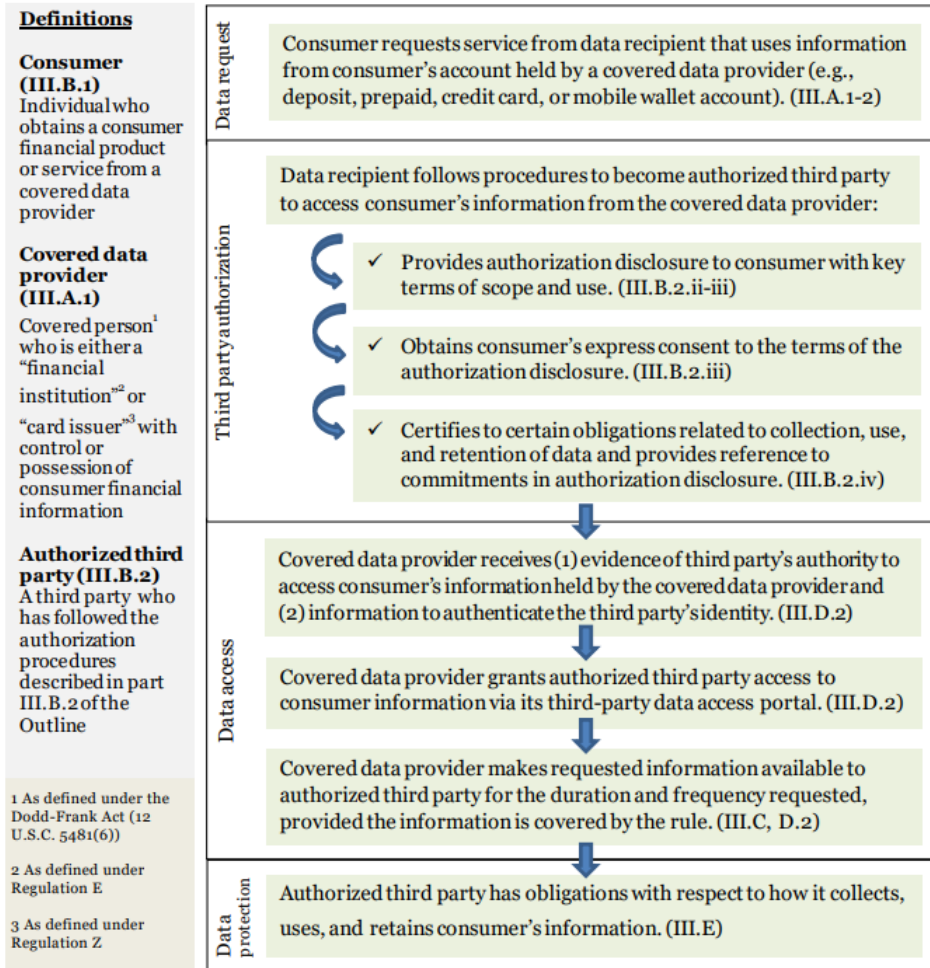
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<sup>1</sup> Dodd-Frank Act section 1033, 124 Stat. 2008 (codified at 12 U.S.C. 5533(a)). The term "covered person" is defined at section 1002(6) of the Dodd-Frank Act. See 12 U.S.C. 5481(6).

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

## Appendix: Illustration of Interaction of Proposals Under Consideration (Third-Party Access)

The graphic below illustrates how the CFPB's proposals under consideration described in the Outline would apply to a hypothetical transaction involving consumer-authorized information access through a third-party data access portal. See references to sections of the Outline (in parentheses) to read the proposals under consideration in greater detail.



# Nonbank Registration for “Repeat Offenders”

- The CFPB is developing a rule under its authorities at 12 U.S.C. 5512(b) and (c) and 5514(b) that would require nonbanks that are under certain final enforcement orders
  - to register with the CFPB via a public registry that the CFPB would create for such purposes;
  - to submit copies of public orders to the same; and, where such persons are supervised by the CFPB,
  - to prepare and submit annual reports and other statements regarding such orders for use in connection with the CFPB’s supervisory functions.
- The public registry created by the CFPB would identify institutions subject to registration and include public enforcement orders and information regarding those orders.
- Status: NPRM

## CFPB Proposes Registry to Detect Repeat Offenders

Registry of company and court order information will help the agency identify and mitigate risks to American households

DEC 12, 2022

**WASHINGTON, D.C.** – Today, the Consumer Financial Protection Bureau (CFPB) proposed requiring certain nonbank financial firms to register with the CFPB when they become subject to certain local, state, or federal consumer financial protection agency or court orders. The CFPB has further proposed to publish the orders and company information via an online registry. Larger companies subject to the CFPB’s supervisory authority would be required to designate an individual to attest whether the firm is adhering to registered law enforcement orders. The CFPB’s proposed rule would help the agency identify and mitigate risks to American households and ensure that supervised companies perform their obligations to consumers.

“Protecting American households is a shared effort across local, state, and federal authorities,” said CFPB Director Rohit Chopra. “The proposed registry will help the CFPB, the law enforcement community, and the public limit the harms from repeat offenders.”

Congress, in creating the CFPB, tasked it with monitoring for risks to consumers in the offering or provision of consumer financial products and services and supervising the activities of certain nonbanks. Because the issuance of agency and court orders serves as one of the most important tools to pursue lawbreakers in these markets, it is important that the CFPB maintain a central repository of nonbanks subject to agency and court orders. The repository will allow the CFPB to track and mitigate the risks posed by repeat offenders, while also being able to monitor all lawbreakers subject to agency and court orders. The CFPB will share this powerful source of information with others, including with fellow regulators and law enforcement agencies, by making the registry public.

The registry will help unify the efforts of consumer financial protection enforcers, as well as provide the increased transparency and coordination that are critical to ensuring accountability and fairness in the marketplace. The CFPB’s proposal will enhance market monitoring and risk-based supervision

# Nonbank Registration of Consumer Terms and Conditions

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

## BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1092

[Docket No. CFPB-2023-0002]

RIN 3170-AB14

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

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

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

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

# Small Business Lending Data Collection Under the Equal Credit Opportunity Act

- Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act (ECOA) to require, subject to rules prescribed by the CFPB, financial institutions to report information concerning credit applications made by women-owned, minority-owned, and small businesses.
- September 2020, the CFPB released an Outline of proposals under consideration in advance of convening a panel under SBREFA.
- The SBREFA panel convened in October 2020 and received feedback from representatives of small entities on the impacts of the rule. The panel's report was released in December 2020.
- On October 8, 2021, a NPRM was published in the *Federal Register*.
  - CFPB proposes to require covered financial institutions to collect and report data on applications for credit for small businesses, including those that are owned by women or minorities.
  - NPRM addresses: privacy interests and the publication of Section 1071 data; shielding certain demographic data from underwriters and other persons; recordkeeping requirements; enforcement provisions; and the proposed rule's effective and compliance dates.
- The CFPB's next action for the Section 1071 rulemaking is the issuance of a final rule.

## Summary of Proposed Rulemaking: September 2021 Proposal Regarding Small Business Lending Data Collection

On September 1, 2021, the Consumer Financial Protection Bureau (Bureau) issued a notice of proposed rulemaking (NPRM) inviting the public to comment on its proposal to implement the small business lending data collection requirements set forth in section 1071 of the Dodd-Frank Act (Section 1071). The Bureau is proposing to add a new subpart B to Regulation B to implement Section 1071's requirements. Some background information and a summary of key aspects of the Bureau's NPRM are provided below.

The NPRM, which includes information on submitting comments, is available at <https://www.consumerfinance.gov/1071-rule>. The NPRM has a comment period of 90 days following publication in the *Federal Register*.

### Background

Section 1071 amended the Equal Credit Opportunity Act (ECOA) to require that financial institutions collect and report to the Bureau certain data regarding certain business credit applications. Section 1071's purposes are to facilitate enforcement of fair lending laws and to enable the identification of business and community development needs and opportunities for women-owned, minority-owned, and small businesses.

Section 1071 specifies several data points that financial institutions are required to collect and provides authority for the Bureau to require collection of additional data that the Bureau determines would aid in fulfilling Section 1071's purposes. Section 1071 also contains a number of other requirements regarding information collected pursuant to Section 1071, including a requirement that financial institutions restrict certain persons' access to certain information, requirements regarding maintaining certain information, and requirements regarding publication

# Automated Valuation Models

- The FRB, OCC, FDIC, NCUA, FHFA, and CFPB are developing a rule to implement Section 1473 of the Dodd-Frank Act concerning quality control standards for automated valuation models (AVMs).
- Amendments to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) require implementing regulations for quality control standards for AVMs. The stated goal of AVM standards is to ensure confidence in the estimates produced by the valuation models, protect against the manipulation of data, avoid conflicts of interest, and require random sample testing and reviews.
- Final Report issued May 2022

Final Report of the Small Business Review Panel on the  
CFPB's Proposals and Alternatives Under  
Consideration for the Automated Valuation Model  
(AVM) Rulemaking

May 13, 2022

# FTC Telemarketing Sales Rule

- On June 3, 2022, the FTC issued a NPRM seeking public comment on proposed amendments to the Rule. 87 FR 33677 (June 3, 2022).
  - Would require telemarketers and sellers to maintain additional records of their telemarketing transactions and would prohibit material misrepresentations and false or misleading statements in business to business (B2B) telemarketing transactions
- The comment period closed on August 2, 2022.
- On June 3, 2022, the FTC simultaneously issued an ANPRM seeking public comment on whether the TSR should continue to exempt telemarketing calls to businesses, whether the TSR should require a notice and cancellation mechanism with negative option sales, and whether to extend the Rule to apply to telemarketing calls to a telemarketer that consumers initiate (i.e., inbound telemarketing calls) regarding computer technical support services. 87 FR 33662 (June 3, 2022). The comment period closed on August 2, 2022.
- Staff is reviewing the comments and will provide a recommendation to the Commission regarding both rulemakings by spring 2023.



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# Consumer Privacy and Data Security

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# Notable Recent Events

- **CFPB Rulemakings:** Recent rulemakings by the CFPB demonstrate an increased focus on digital marketing and consumer data rights—topics of key interest to privacy advocates.
- **New State Privacy Laws:** Comprehensive state privacy laws in California, Virginia, Colorado, Connecticut, and Utah have already gone, or will go, into effect in 2023. All five laws have exemptions relevant to financial institutions.
  - Financial institutions should continue to comply with state privacy laws for any consumer data that is not exempted.
  - Additionally, financial institutions should be prepared to comply with obligations under the California Privacy Rights Act related to personnel and business contacts.
- **Federal Privacy Activity:** Both Congress and the Federal Trade Commission actively took steps to develop new privacy frameworks in 2022, and it is likely such efforts will continue this year.

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

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

# Proposed Rulemaking on Personal Financial Data Rights

- This past fall, the CFPB continued its rulemaking process to implement Section 1033 of the Dodd Frank Act, which relates to consumer access to information.
- As part of this rulemaking process, the CFPB released an **Outline of Proposals and Alternatives Under Consideration**, which describes provisions under consideration for the CFPB’s data rights rulemaking. Such proposals include:
  - Requiring firms to make consumer’s financial information available to the consumer or a third party when directed by the consumer
  - Providing greater flexibility for consumers to transfer account history when switching providers
  - Offering privacy options for authorized third-party use of personal financial data, including limits preventing third parties from reselling authorized data for other uses
- Director Chopra stated that this rulemaking aims to fuel greater competition in the financial marketplace by preventing monopolization of personal financial data, while also providing consumers with specific data rights that may give individuals greater “bargaining leverage.”
- **Next Steps:** Comments on the Outline are due by January 25, 2023.

# State Privacy Laws

- California, Virginia, Colorado, Connecticut, and Utah have each enacted “rights-based” consumer privacy laws that have gone, or will go, into effect in 2023.
- Notably, these laws largely exempt data subject to GLBA or FCRA.
  - However, two of the laws – California and Colorado – do not fully exempt financial institutions. Therefore, these laws may apply when financial companies collect personal data not subject to GLBA or the FCRA, such as on a marketing website.
- The California Privacy Rights Act (CPRA) is a significant outlier because it also applies to personal data collected about personnel and business contacts that typically is *not* subject to GLBA or FCRA exemptions.
  - Therefore, financial institutions that meet certain thresholds should be prepared to comply with the CPRA with respect to personnel and business contact data.
    - For instance, financial institutions will need to offer personnel who are California residents rights to access, delete, and correct personal data, as well as potentially offer certain opt-out rights.
- **Key Date:** The CPRA is in effect but will not be enforced until **July 1, 2023**—giving companies some months to come into compliance.

# Federal Activity

- **Congress.** The 117<sup>th</sup> Congress took meaningful steps to advance a federal privacy framework through the American Data Privacy and Protection Act (ADPPA) last year.
  - While the bill failed, at least some members of the 118<sup>th</sup> Congress have publicly stated that privacy remains a priority.
  - However, given new leadership in the House and Senate, the ADPPA may not be the starting point for future discussions.
- **Federal Trade Commission.** In August 2022, the FTC issued an Advance Notice of Proposed Rulemaking (ANPR) to explore rules on “harmful commercial surveillance and lax data security.”
  - The rulemaking is expected to continue for years, but non-bank financial institutions subject to the FTC’s jurisdiction should stay apprised of updates and take advantage of opportunities for public comment.

# Cybersecurity: GLBA Safeguards Rule

**New rule:** Upgraded Safeguards Rule for non-bank financial institutions (some exceptions for entities with info for less than 5k customers)

**Timeline:** June 9, 2023

**Highlights:** Customer information safeguards include:

- Risk assessment and incident response plans – now more comprehensive and in writing
- Safeguards testing to include continuous monitoring *or* annual pentesting *and* semi-annual vulnerability scans
- Access controls, including least privilege
- Monitor unauthorized users of, access to, and use of customer info
- Encrypt customer info at rest and transmitted externally (i.e., to cloud), or approved alternative
- Implement multi-factor authentication, secure development practices...and more.

# Cybersecurity: Incident reporting

**New rules:** Several cyber incident reporting rules recently enacted or soon coming into force

**GLBA (FTC):** Non-banking financial institutions. Status – *Proposed*.

- Misuse of customer info reasonably likely, affecting 1k+ customers. Report within 30 days.

**FDIC, Fed, OCC:** Banking organizations. Status – *Entered into force in 2022*.

- Actual compromise to information or systems causing material disruption. Report within 36 hours.

**CFTC:** Derivatives clearing organization. Status – *Proposed*.

- Any security incident “or threat” that “could compromise” information and systems. Report “promptly.”

**NCUA:** Federally insured credit unions. Status – *Proposed*.

- Misuse of customer info reasonably likely, affecting 1k+ customers. Report to FTC within 30 days.

**NYDFS:** NYDFS-regulated or licensed orgs. Status – *Proposed update*.

- Report extortion payments within 24 hours; report due diligence updates within 30 days after payment.



# Cybersecurity: NYDFS

**New rule:** Upgraded cybersecurity requirements for NYDFS-regulated or licensed companies

**Timeline:** Q2 2023

## **Highlights:**

- Enhanced cybersecurity governance
  - CEO and CISO must certify compliance annually and explain any noncompliance
  - Board must approve cyber policies annually; must report material cyber issues to Board
  - Board or equivalent must have adequate cybersecurity expertise
- Mandatory policies and procedures to protect against common attacks and vulnerabilities
  - Phishing training, patch management, disable remote remote access
  - Provide least privilege, limit privileged accounts, password management, MFA
- Additional requirements for larger companies



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# Supervision and Enforcement Outlook

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# Expanded Supervision / Focus on Repeat Offenders

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

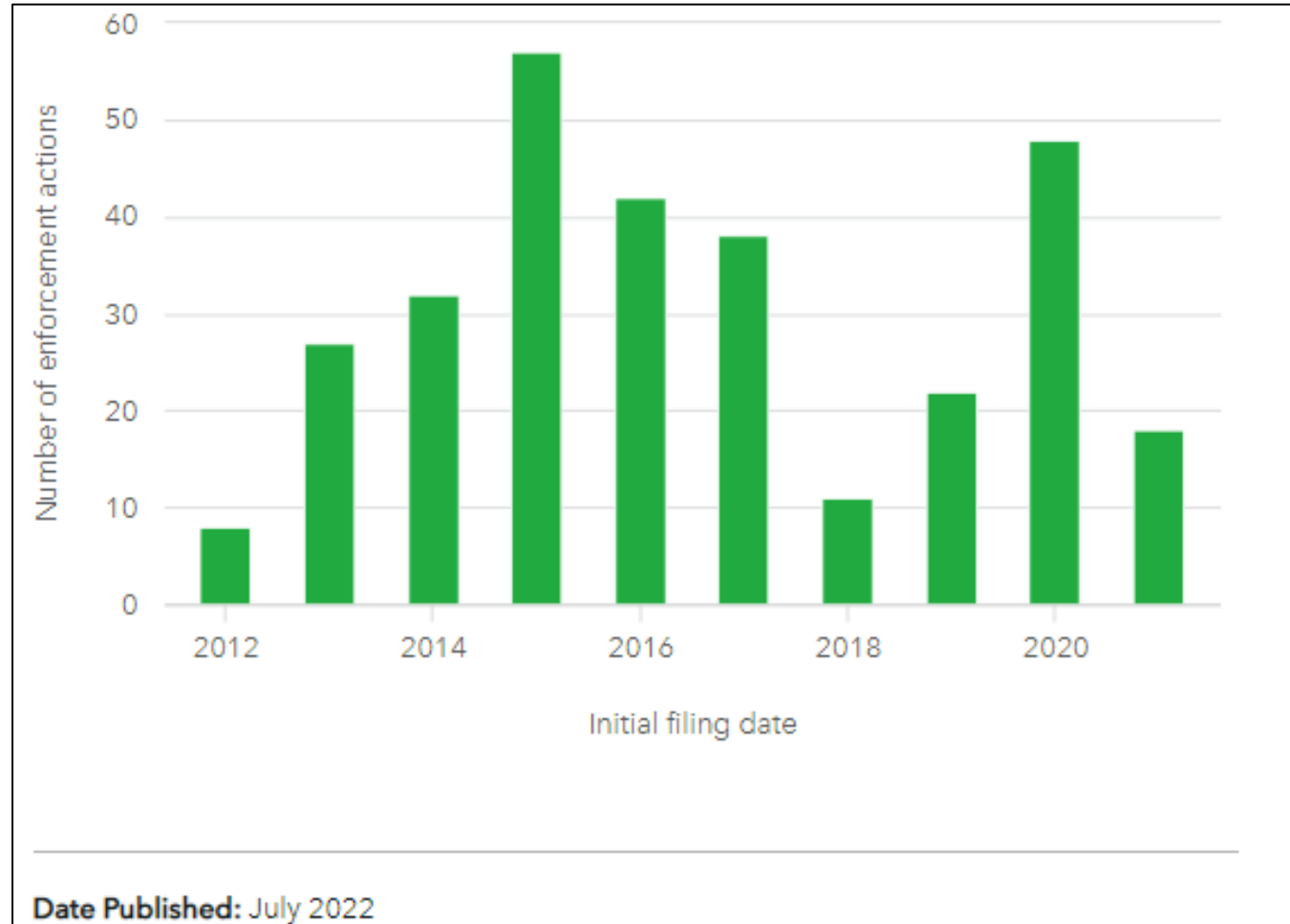
“Supervision is **increasing its focus on repeat offenders**, particularly those who violate agency or court orders.

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

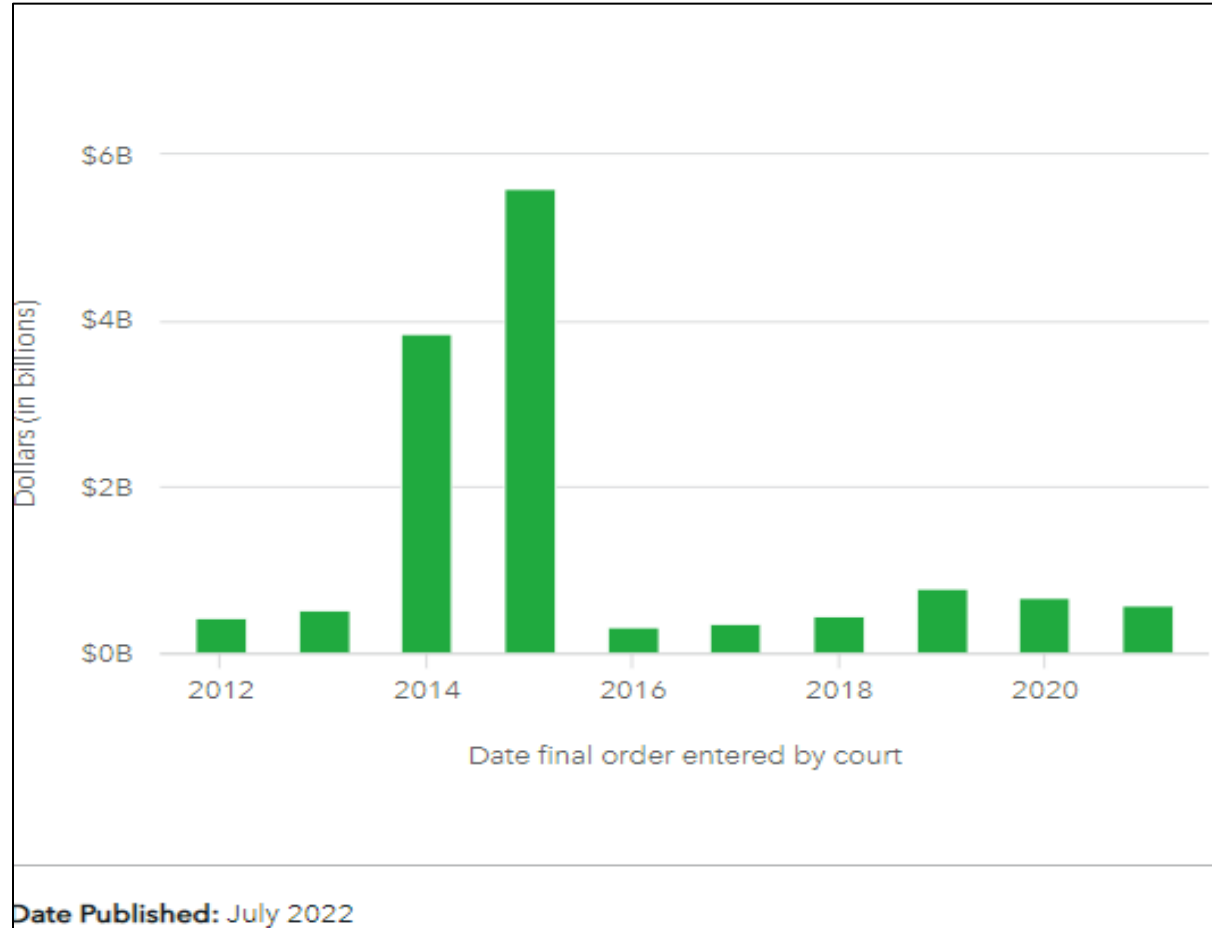
- reviewing and monitoring the activities of repeat offenders;
- identifying the root cause of recurring violations;
- pursuing and recommending solutions and remedies that hold entities accountable for
- failing to consistently comply with Federal consumer financial law; and
- designing a model for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

Source: CFPB Supervisory Highlights Fall 2022

# CFPB Enforcement Actions by Year (as of July 2022)



# CFPB Consumer Relief by Year



# 2022 Enforcement Actions

- Credit Acceptance Corporation – On January 4, 2023, the CFPB and NYAG Letitia James filed a joint lawsuit in federal district court against Credit Acceptance Corporation, an indirect auto lender that funds and services car loans for subprime and deep-subprime consumers.
- Servicio UniTeller, Inc. – On December 22, 2022, the CFPB issued an order against Servicio UniTeller, Inc. (UniTeller), a nonbank remittance transfer provider headquartered in New Jersey.
- Wells Fargo Bank, N.A. – On December 20, 2022, the CFPB issued an order against Wells Fargo Bank, N.A., a national bank headquartered in Sioux Falls, South Dakota.
- Carrington Mortgage Services, LLC – On November 17, 2022, the CFPB issued an order against Carrington Mortgage Services, LLC, a California-based mortgage servicer operating in all 50 states.
- ACTIVE Network, LLC – On October 18, 2022, the CFPB filed a lawsuit in federal district court against ACTIVE Network, LLC, a payment processor owned by Global Payments, Inc., with its headquarters in Plano, Texas.
- Choice Money Transfer, Inc. d/b/a Small World Money Transfer – On October 4, 2022, the CFPB issued an order against Choice Money Transfer, Inc., which does business as Small World Money Transfer.
- MoneyLion Technologies Inc., ML Plus, LLC, and other subsidiaries – On September 29, 2022, the CFPB filed a lawsuit in federal district court against MoneyLion Technologies Inc. and its lending subsidiaries.
- Regions Bank – On September 28, 2022, the CFPB issued an order against Regions Bank, a bank headquartered in Birmingham, Alabama with consolidated assets of more than \$163 billion.
- Hello Digit, LLC – On August 10, 2022, the CFPB issued an order against Hello Digit, LLC, a financial-technology company that offers consumers an automated-savings tool.
- U.S. Bank National Association – On July 28, 2022, the CFPB issued an order against U.S. Bank National Association, a national bank headquartered in Minneapolis, Minnesota.

# 2022 Enforcement Actions, Cont'd

- Trident Mortgage Company, LP – On July 27, 2022, the CFPB, together with the DOJ, filed a complaint and proposed consent order in federal district court for the Eastern District of Pennsylvania to resolve their allegations against Trident Mortgage Company, LP.
- Hyundai Capital America – On July 26, 2022, the CFPB issued a consent order against Hyundai Capital America, a nonbank automotive finance company based in Irvine, California.
- Bank of America, N.A. – On July 14, 2022, the CFPB issued an order against Bank of America, N.A., which is a national bank headquartered in Charlotte, North Carolina with branches and ATMs in 38 states and the District of Columbia.
- Populus Financial Group, Inc., d/b/a ACE Cash Express, Inc. – On July 12, 2022, the CFPB filed a lawsuit in the U.S. District Court for the Northern District of Texas against Populus Financial Group, Inc., which does business as ACE Cash Express, Inc. (ACE).
- RAM Payment, LLC, also dba Reliant; Account Management Systems, LLC, fka Reliant Account Management; Gregory Winters; and Stephen Chaya – On May 11, 2022, the CFPB issued an order against Tennessee-based RAM Payment, LLC and Account Management Systems, LLC and AMS's co-founders.
- Bank of America, N.A. – On May 4, 2022, the CFPB issued a consent order against Bank of America, N.A., an insured depository institution, to address Bank of America's processing of garnishment notices.
- MoneyGram International, Inc. and MoneyGram Payment Systems, Inc. – On April 21, 2022, the CFPB filed a lawsuit jointly with the NYAG against MoneyGram International, Inc. and MoneyGram Payment Systems, Inc., nonbank remittance transfer providers headquartered in Dallas, Texas.
- TransUnion Interactive, Inc., TransUnion, LLC, TransUnion, and John T. Danaher – On April 12, 2022, the CFPB filed a lawsuit in the federal district court against TransUnion, parent company of one of the three nationwide consumer reporting agencies, and two of its subsidiaries, TransUnion, LLC and TransUnion Interactive, Inc., which are headquartered in Chicago, Illinois, as well as former executive John Danaher.
- Edfinancial Services – On March 30, 2022, the CFPB issued an order against Edfinancial Services, LLC. Edfinancial, headquartered in Knoxville, Tennessee, is a student loan servicer that services both FFELP loans, which are loans from private companies, and Direct Loans, which are loans directly from the Department of Education.
- Craig Manseth, Jacob Adamo, Darren Turco, United Debt Holding LLC, JTM Capital Management, LLC, and United Holdings Group, LLC – On January 10, 2022, the CFPB filed a lawsuit in federal district court against several individual debt collectors and buyers, and their companies.

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# State Developments

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# State Developments: Hot Topics and Compliance Challenges

- State AGs to remain active on consumer protection matters related to economic distress and vulnerable consumers.
- CFPB reminder to states to utilize Consumer Financial Protection Act / UDAAP.
- Alleged violations of law and regulations involving advertisements, websites, and social media sites utilized by mortgage companies, and lenders.
- NMLS Modernization in process
  - single source of standardized data that all regulators require; supports interdependent reviews by state agencies based on uniform standards that allow agencies to rely on one another's work, eliminating redundancies.
  - Piloted with MSB licenses.
- California Debt Collection Licensing (up and running?)
- Legislative reactions to the economy, enforcement, and consumer protection issues.
- Change in Control filings, approvals, and advance notice requirements continue in certain jurisdictions depending on license category, and require careful consideration in M&A.

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## Q & A and Wrap-up

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# Consumer Financial Services Outlook 2023

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



**Ellen T. Berge**  
Partner



**Andrew E. Bigart**  
Partner



**Michael J. Bresnick**  
Partner



**Sarah B. Donovan**  
Senior Policy Advisor



**Leonard L. Gordon**  
Partner



**Alexandra Megaris**  
Partner



**Jonathan L. Pompan**  
Partner, Moderator



**Christopher M. Scribner**  
Senior Policy Advisor



**Christopher Boone**  
Counsel



**Harley L. Geiger**  
Counsel



**Kathryn B. Marshall**  
Associate



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