Consumer Financial Services Outlook 2022

Wednesday, January 12, 2022, 2:00-3:30 pm ET

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Panelists

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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.

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Today's Discussion

- Legislative & Regulatory Landscape
- Hot Topics & Notable Trends
  - CFPB Enforcement Through "Market Monitoring": Tech, BNPL, & Data Harvesting
  - Fair Lending Scrutiny Heating Up
  - Traps of and Misconceptions about Alternative Data, Machine Learning, and AI
  - Payment and Cryptocurrency Developments
- Noteworthy Regulatory Agenda Items and New Developments
- Consumer Privacy & Data Security
- Supervision, Examination, and Enforcement Outlook
- State Regulatory Update
- Wrap-up and Closing Observations

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The Legislative and Regulatory Landscape

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Congress & the President

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Biden-Harris Administration:
Economic and Financial Services Priorities

- The Big Picture Remains Unchanged
  - Environmental, Social and Governance (ESG) Goals
    - Climate: Executive Orders and Agency Actions (SEC)
    - Diversity and Inclusion, Access and Economic Inequality
  - Economic Power/Concentration
    - Anti-Trust/Merger & Acquisitions
  - Cryptocurrency
    - Stablecoins/CBDC
    - Trading/Exchanges
  - Infrastructure/Pandemic Relief
- Personnel Is Policy
  - Divisions among Democrats
  - Reversal of Trump Administration Policies

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Democratic-Controlled Congress

- 2021 Actions: big picture economic issues policy vs. financial services legislation
  - Nominations
  - Hearings focused on pushing agencies to act
    - Pandemic relief, housing, fair lending, inclusion, and bank/non-bank regulation
  - Market-driven hearings: GameStop/cryptocurrency
- 2022 Priorities: more core bank issues, less COVID-19/pandemic
  - Cryptocurrency: hearings and legislation to follow (jurisdictional issues)
  - Consumer issues: overdraft, "buy now pay later" and other consumer products, including credit cards, and credit reporting
  - Fair lending: algorithms; defer to CFPB
  - Housing: private equity/hedge fund investments and impact on price/availability
  - Regional bank M&A
  - Small business lending, especially MDIs and CDFIs
- Senate Banking and House Financial Services: coordination for hearings and issues

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Looking Ahead to 2022 and Beyond

- Now in an election year, Congress will effectively wrap up by spring (early summer at latest) so members can focus on campaigning
  - Primary season begins March 1 (Texas); most have occurred by June
  - From a practical standpoint, the window for significant action is Q1 and early Q2
- What does that mean for legislation?
  - BBB – no current negotiations, but may be effort for slimmed-down bill
  - Appropriations – CR runs out mid-February, may pass a full year CR to Sept. 30 with anomalies
    - Deal on appropriations (and anything that would ride, e.g., COVID-19 funding) inversely tied to progress on other Biden agenda items
    - Another CR from Oct. 1 until after the November elections
  - Filibuster and voting rights – currently no deal; could see action this week

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2022 Election and Its Implications

- What could the next Congress look like?
- Expected Republican control of House; Senate more uncertain
    - Since WWII, the president's party has lost 26 House seats in midterms on average
        - Republicans need 5 to take the majority
    - Republicans need to pick up just one seat for outright Senate majority BUT must hold on to seats in competitive states, including some with unsettled primary contests
        - Republican targets: GA, AZ, NH, NV
        - Democratic targets: PA, NC, WI, OH (plus MO and FL, but VA election has shifted expectations)
- Divided government returns: importance of regulatory agencies

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Catching up with the Agencies and State Attorneys General

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CFPB and Bank Regulators

- **CFPB**
  - New Director Rohit Chopra and staffing changes at the Bureau
  - Big announcements, taking on tech, taking on FDIC, promoting competition, and more
  - Guidance to staff re engaging with former employees, and heightened scrutiny
- **Bank Regulators (FRB, OCC, FDIC, NCUA)**
  - Focus on fintech integrations
  - Third-party risk management
  - Fair lending/redlining initiatives

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FTC, State Attorneys General, & State Regulators

- FTC
  - New Chair Lina Kahn
  - Negative Option Marketing Enforcement Policy
  - FTC Safeguards Rule
  - Resurrection of its penalty offense authority? (education/student loans, endorsements and testimonials)
  - A focus on growing role of private equity and other investors
  - Confluence of consumer protection and antitrust (echoed by Chopra)
- State AGs
  - Debt collection practices
  - Installment lending
  - Buy now/ pay later and lease-to-own
  - Privacy and data security
- CA Department of Financial Innovation and Protection: UDAAP authority, active investigations, registration, and more – a "mini-CFPB"
- NY Department of Financial Services

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January 12 / 8:00 a.m. - January 13 / 1:00 p.m.

2022 NAAG Legislative Conference

The conference has been postponed. Attendees will receive an email with rescheduled dates. Please contact Cecilia Dakers at cdakers@naag.org if you have any questions.   January 12-13, 2022 Washington, D.C. The…

CONSUMER PROTECTION

Consumer Protection

Straight Ahead

NAAG Consumer Protection Fall Conference
November 8, 2021 – November 10, 2021

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Hot Topics and Notable Trends

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CFPB Enforcement Through "Market Monitoring": Tech, BNPL, & Data Harvesting

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CFPB Orders Tech Giants to Turn Over Information on Their Payment System

Focus on payments systems, data harvesting, consumer choice/access restrictions, and more (e.g., EFTA, GLBA, etc.)

"Big Tech on Notice" information requests:

> "The orders are issued pursuant to Section 1022(c)(4) of the Consumer Financial Protection Act. The CFPB has the statutory authority to order participants in the payments market to turn over information to help the Bureau monitor for risks to consumers and to publish aggregated findings that are in the public interest. The CFPB's work is one of many efforts within the Federal Reserve System to make payments safer, faster, and more competitive. The initial orders were sent to Amazon, Apple, Facebook, Google, PayPal, and Square. The Bureau will also be studying the payment system practices of Chinese tech giants, including Alipay and WeChat Pay." CPFB Press Release (Oct. 21, 2021)

product
- Consumer protection policies, fraud detection, etc.
- Metrics, complaint handling, and other data
- Response was due December 15, 2021.

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

Who's next? What other "covered product" markets are not presently subject to supervision?

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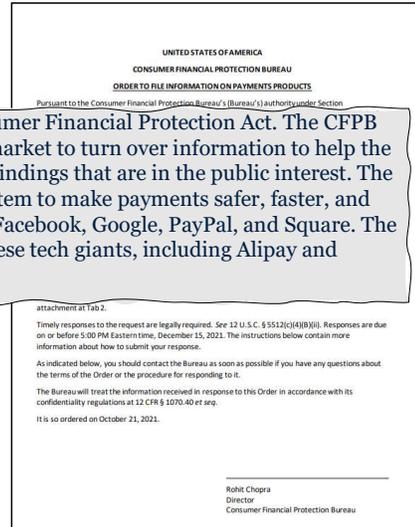
Where Is the CFPB Headed with Its Focus on Tech and Payment Systems?

Denial of Credit / Access: The CFPB is more closely scrutinizing the use of big data when it is used to deny credit (or access to financial services); less likely to object to the use of big data by creditors to reconsider credit applications that would otherwise be denied.

> ➢ FTC Report, Big Data: A Tool for Inclusion or Exclusion (2016)

FCRA Disparate Impact: One concern with using big data is that it may present fair lending issues if its use causes a disparate impact. When a creditor determines that a big data factor may be leading to a discriminatory impact, the creditor should determine whether:

1) the factor is highly correlated with the discriminatory impact,

2) there is a good basis for continuing to use that factor, and

3) there is a better variable that could be used for the same purpose that does not lead to a discriminatory impact.

Third Party Vendor Management Policy, CFPB Bulletin 2012-03 (April 13, 2012) - CFPB will focus on primary providers of financial service and service providers. If the CFPB believes that service providers are not complying with a consumer financial services law, or are committing a UDAAP violation when interacting with the institution's customers, the CFPB plans to hold both companies accountable. May include exams/investigations.

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FTC REPORT

FEDERAL TRADE COMMISSION
JANUARY 2016

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CFPB Focus on Buy Now, Pay Later (BNPL)

- December 16, 2021: Sent to five BNPL providers
- CFPB is concerned about:
  - accumulating debt,
  - regulatory arbitrage, and
  - data harvesting in a consumer credit market already quickly changing with technology.
- Issued pursuant to Section 1022(c)(4) of CFPA
- CFPB is working with international partners in Australia, Sweden, Germany, and the UK
- Coordinating with the rest of the Federal Reserve System, as well as state partners
- Response due March 1, 2021

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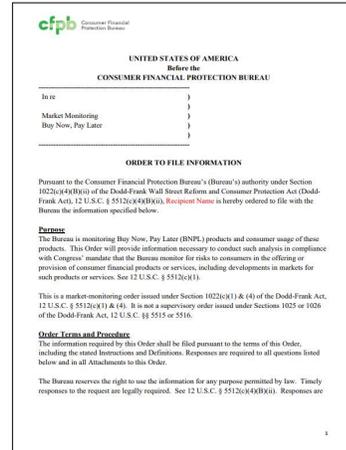
Where Is the CFPB Headed with Its Focus on BNPL?

- **Accumulating debt:** Concerns about multiple BNPLs; when there is not enough money in a consumer's bank account; with regard to the ease of getting BNPL, consumers can end up spending more than anticipated.

- **Regulatory arbitrage:** "Some BNPL companies may not be adequately evaluating what consumer protection laws apply to their products."

  - Some BNPL products do not provide certain disclosures, which could be required by some laws.

  - BNPL application may look similar to a standard checkout with a credit card; protections that apply to credit cards may not apply to BNPL products.

  - Many BNPL companies do not provide dispute resolution protections available to users of other forms of credit, like credit cards.

  - Depending on what rules the lender is following, different late fees and policies apply.

- **Data harvesting:** "The Bureau would like to better understand practices around data collection, behavioral targeting, data monetization and the risks they may create for consumers."

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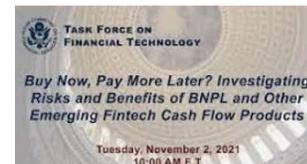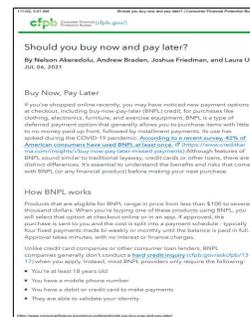
Fair Lending Scrutiny Heating Up

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Combatting Redlining Initiative

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

- Takeaways:

  - Use U.S. attorneys' offices to ensure that fair lending enforcement takes advantage of local expertise on housing markets and credit needs;

  - Extend DOJ's analyses of potential redlining to non-depository institutions that DOJ indicated are originating the majority of mortgage loans;

  - Strengthen DOJ's partnership with financial regulatory agencies to ensure identification and referral of fair lending violations to DOJ; and

  - Increase coordination with state attorneys general on fair lending matters.

- All types of loans, and all types of lenders

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

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Combatting Redlining Initiative, Cont.

- CFPB has stated repeatedly that racial equity is a priority and fair lending will be key.
- DOJ Task Force – New Combatting Redlining Initiative (Oct. 22, 2021)
    - AG Garland: "We will spare no resource to ensure that federal fair lending laws are vigorously enforced and that financial institutions provide equal opportunity for every American to obtain credit."
    - **American Trustmark National Bank** settlement (approved Oct. 27, 2021) was the first under the initiative.
        - Consent Order – Create $3.85m loan subsidy program for majority-Black and Hispanic neighborhoods in Memphis; open new lending office in such a neighborhood; $5m civil penalty
        - Broader view of what constitutes redlining.
    - Several fair lending probes already open, more to come.

> "Technology companies and financial institutions are amassing massive amounts of data and using it to make more and more decisions about our lives, including loan underwriting and advertising.
>
> While machines crunching numbers might seem capable of taking human bias out of the equation, that's not what is happening."
>
> Source: Remarks of Director Rohit Chopra at a Joint DOJ, CFPB, and OCC Press Conference on the Trustmark National Bank Enforcement Action (Oct. 22, 2021)

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CFPB, DOJ, and OCC v. Trustmark National Bank

Complaint alleges that Trustmark violated the Fair Housing Act (FHA), the Equal Credit Opportunity Act (ECOA) and its implementing regulation, Regulation B, and the Consumer Financial Protection Act of 2010 (CFPA).

Allegations

- ECOA and Regulation B prohibit creditors from discriminating against applicants and prospective applicants in credit transactions on the basis of characteristics such as race, color, and national origin, including by redlining or engaging in conduct that would discourage on a prohibited basis a prospective applicant from applying for credit.
- **Avoided locating branches in majority-Black and Hispanic communities**
- **Avoided assigning loan officers to majority-Black and Hispanic communities**
- **Failed to monitor its fair lending compliance**
- **Discouraged applicants and prospective applicants in majority-Black and Hispanic neighborhoods**

Enforcement Action

Congress entrusted the Bureau to enforce the CFPA, ECOA, and ECOA's implementing Regulation B. The proposed consent order, if entered by the court, would require Trustmark to:

- **Invest $3.85 million via a loan subsidy program**
- **Increase physical presence in and outreach to majority-Black and Hispanic neighborhoods**
- **Comply with fair lending requirements**
- $5 million penalty to the CFPB, and will credit the $4 million penalty collected by the OCC

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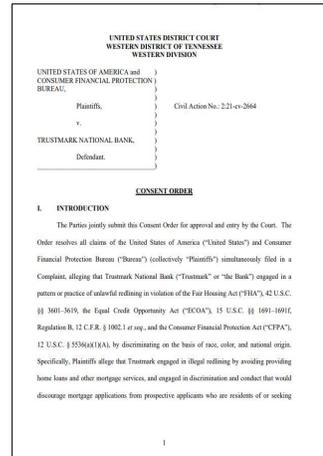
Traps of and Misconceptions about Alternative Data, Machine Learning, and AI

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Lender Innovation: Alternative Data in Underwriting

- Information not traditionally used by national consumer reporting agencies in calculating a credit score:
  - On-time utility, cable, or mobile phone bill payments;
  - Cash flow data from bank statements; or
  - Data related to consumer behavior on the Internet (e.g., time spent on social media).
- Could be even more predictive than traditional data.
- Potential to expand credit access to "credit invisibles" and those with low credit scores under traditional model – disproportionately low-income, people of color, women, immigrants, and the elderly.

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Lender Innovation: Artificial Intelligence in Underwriting

Using an algorithm, rather than a human, to analyze a variety of factors to more accurately assess credit applicants.

Beware of unwitting discrimination

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

AI algorithms can be compatible with ECOA/Reg. B; "a creditor may disclose a reason for a denial even if the relationship of that disclosed factor to predicting creditworthiness may be unclear to the applicant."

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Regulator Innovation

- **CFPB**
  - Stretching limits of its fair lending enforcement authority
  - Allowing some experimentation and innovation
- **Federal Reserve/CFPB/FDIC/NCUA/OCC**
  - Request for Information and Comment on Financial Institutions' Use of Artificial Intelligence, Including Machine Learning, 86 *Fed. Reg.* 16,837 (Mar. 31, 2021)
- **Federal Trade Commission**
  - *FTC v. Liberty Chevrolet, Inc., d/b/a Bronx Honda* (S.D.N.Y. May 21, 2020) – Dealership charged higher financing markups and fees to Black and Hispanic consumers, but not to non-Hispanic white consumers.
  - Blog Post: "Using Artificial Intelligence and Algorithms" (Apr. 8, 2020) – **"[Y]ou must know *what* data is used in your model and *how* that data is used to arrive at a decision. And you must be able to explain that to the consumer. . . . You can save yourself a lot of problems by rigorously testing your algorithm, both before you use it and periodically afterwards, to make sure it doesn't create a disparate impact on a protected class."**

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DC Legislation to Stop Discrimination in Automated Decision-Making Tools (Proposed)

- Would prohibit companies and organizations from using algorithms that produce biased and unfair results.

- Would prohibit companies from auditing their algorithms for discriminatory patterns.

- Purpose is to increase transparency for consumers.

- The legislation would set a civil penalty of up to $10,000 for each individual violation of the law.

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Use of Artificial Intelligence Targeted by DC Legislation
December 27, 2021
Jonathan L. Pompan and Andrew E. Bigart

The use of artificial intelligence to determine access to credit and other important life opportunities has been targeted by legislation under consideration by the District of Columbia City Council. On December 9, 2021, DC Attorney General Karl Racine introduced the "Stop Discrimination by Algorithms Act of 2021." "Not surprisingly, algorithmic decision-making computer programs have been convincingly proven to replicate and, worse, exacerbate racial and other illegal bias in critical services that all residents of the United States require to function in our treasured capitalistic society," said AG Racine. "This so-called artificial intelligence is the engine of algorithms that are, in fact, far less smart than they are portrayed, and more discriminatory and unfair than big data wants you to know. Our legislation would end the myth of the intrinsic egalitarian nature of AI." The DC City Council is in session year-round, and the bill may be considered through January 1, 2023.

Big Picture: Recent public statements and enforcement actions by federal regulators have shown a focus on consumer protection and access to credit and payment systems, fair lending law enforcement, and the use of AI and machine learning in financial services. The Consumer Financial Protection Bureau (CFPB), Department of Justice (DOJ), and Office of the Comptroller of the Currency (OCC) announced on October 22, 2021 a new interagency (federal and state) initiative to target redlining. CFPB Director Rohit Chopra warned that "algorithms are black boxes behind brick walls." "When consumers and regulators do not know how decisions are made by the algorithms, consumers are unable to participate in a fair and competitive market free from bias. Algorithms can help remove bias, but black box underwriting algorithms are not creating a more equal playing field and only exacerbate the biases fed into them." Noting past consumer protection issues caused by robosigning and automation, Chopra noted that the "speed with which banks and lenders are turning lending and advertising decisions over to algorithms is concerning." In addition, the CFPB staff previously issued guidance on the use of AI and machine learning models and adverse action notices. The CFPB also has active market monitoring initiatives targeting "big tech" payment systems and buy now, play later ("BNPL") credit. The FTC has highlighted the laws it (and others, including the CFPB and banking agencies) enforces relevant to developers and users of AI, to report on big data analytics and machine learning. The FTC has also conducted a hearing on algorithms, AI and predictive analytics; and issued business guidance on AI and algorithms. Additionally, the SEC has indicated interest in scrutinizing and studying the use of AI in financial services.

What's Included in the Proposed Legislation?

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Payments and Cryptocurrency Developments

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Visa Rule Updates for Payment Facilitators / Marketplaces

- Visa recently updated its rules to provide payment facilitators with additional flexibility for signing up sub-merchant customers. With these changes, expect the payment facilitator model to continue to grow, particularly as a service for marketplaces, ISVs, and other online platforms that seek to incorporate payments into their platform offering (e.g., payment facilitation as a service).

    - Previously, Visa required that the acquirer, payment facilitator, and sub-merchant all be located in the same country. The update, which was effective in October, permits payment facilitators to be located in a different country than the acquirer and sponsored merchant. As a result, payment facilitators now have more flexibility to enter new markets and operate in multi-country "hubs."

    - As of October 2021, a payment facilitator may sign up a marketplace as a sub-merchant. This is a significant change and may have been adopted in recognition of the many payment facilitators that have started providing services for ISVs and online platforms.

- Note that providing payment facilitator and marketplace services continues to raise various regulatory issues, including:

    - Money transmission

    - Contractual requirements/disclosures

    - Data and privacy

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Payments: Continued Law Enforcement Focus

- Regulators such as the FTC, DOJ, CFPB, and state attorneys general continue to target payments companies alleged to have facilitated unlawful conduct by merchants. Their focus is on certain "bad conduct," such as distributing sales transaction volume or activity among multiple merchant accounts or billing descriptors (or "load balancing"), using shell companies to apply for additional merchant accounts, etc.

- Under the Biden administration, expect the CFPB to re-focus its enforcement, which may include bringing actions against the payments industry. The CFPB (and others) brought a number of actions against payments companies under the Obama administration.

- Focus of state attorneys general on complaints received during the pandemic, about access to payments and funds, such as digital wallets and prepaid and other similar products.

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Prepaid Card (Account) Developments

- On May 6, 2020, PayPal, Inc. sued the CFPB alleging violations of the Administrative Procedure Act in connection with the Prepaid Card rule and how it regulated digital wallets and credit associated with digital wallets.

- On December 30, 2020, the District Court issued an order invalidating two parts of the Prepaid Rule on grounds that the CFPB exceeded its authority:

  - (1) the mandatory short form disclosure requirement, and

  - (2) the requirement for a 30-day delay before the linking of any prepaid product to credit.

- The CFPB has appealed the decision to the D.C. Circuit. A three-judge panel from the DC Circuit will be hearing oral arguments on the appeal on February 10, 2022.

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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

Clear and Conspicuous Disclosures

Affirmative Consent

Order Confirmation

Simple Cancellation Mechanism

Renewal Reminders

Material Changes to the Offer
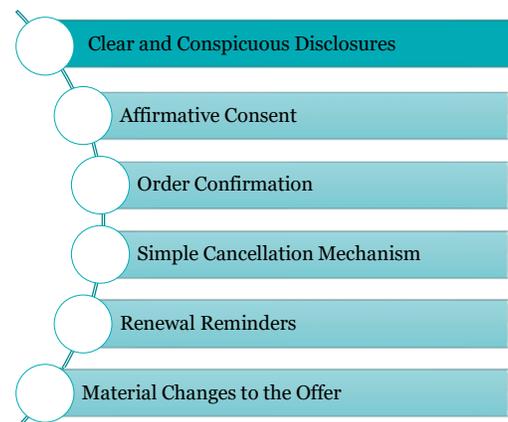
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Focus on Protection of Small Businesses

- In recent years, federal law enforcement has expanded its traditional consumer protection focus to investigation of alleged UDAP violations that harmed small businesses. Expect this type of scrutiny to continue under an aggressive federal enforcement regime.

  - FTC has investigated payments companies for potential UDAP in business-to-business dealing.

  - On January 5, FTC executed settlement that permanently banned two defendants from participating in merchant cash advance and debt collection industries because of deceptive and unfair practices, including misrepresenting terms of cash advance products.

  - Enforcement agencies (including Congress) continue to explore potential claims against banks and other intermediaries that participating in Paycheck Protection Program lending activities.

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Cryptocurrency Developments

- Blockchain has given rise to various products and services, including merchants that accept cryptocurrency for payment; exchanges that allow for the trading of cryptocurrency for investment purposes; non-fungible tokens (NFTs); and in-game currency and other aspects of online games, among others.

- Each of these activities raises significant regulatory issues, including, for example:

  - Money transmission and other state cryptocurrency licensing requirements

  - OFAC

  - SEC and CFTC regulation

  - Card brand rules

  - UDAAP in marketing and advertising

- Federal and state governments are spending significant time and resources to investigate the use of cryptocurrency and the various industries that are impacted:

  - DOJ National Cryptocurrency Enforcement Team (NCET) –Will tackle complex investigations and prosecutions of criminal misuses of cryptocurrency

  - President's Working Group Stablecoin Report

  - The Federal Reserve's expected report on central bank digital currencies (CBDCs).

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What to Expect in 2022

- Continued shift to online and electronic payments that was accelerated by COVID-19
- Additional focus on banking as a service and payments as a service, which will allow additional fintechs and services providers to offer bundled services to customers.
- Continued growth of real-time payments
- Continued expansion of buy now, pay later, along with heightened regulatory scrutiny, including POS implementation
- Focus on customer experience at checkout (embedded payments and ease of checkout)
- Additional clarity on potential future role of a CBDC?
- Scrutiny on collection and use of data by payments and tech companies (see the CFPB's tech orders)
- Continued enforcement against companies that engage in UDAAP affecting consumers AND small businesses

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Noteworthy Regulatory Agenda Items and New Developments

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CFPB Rulemaking Agenda (as of Fall 2021)

Agency Rule List - Fall 2021

Consumer Financial Protection Bureau

Agency	Agenda Stage of Rulemaking	Title	RIN
CFPB	Prerule Stage	Consumer Access to Financial Records	3170-AA78
CFPB	Prerule Stage	Property Assessed Clean Energy Financing	3170-AA84
CFPB	Proposed Rule Stage	Small Business Lending Data Under The Equal Credit Opportunity Act	3170-AA09
CFPB	Proposed Rule Stage	Amendments to FIRREA Concerning Automated Valuation Models	3170-AA57
CFPB	Final Rule Stage	Amendments to Regulation Z to Facilitate Transition From LIBOR	3170-AB01

Agency Rule List - Spring 2021

Consumer Financial Protection Bureau

Agency	Agenda Stage of Rulemaking	Title	RIN
CFPB	Prerule Stage	Consumer Access to Financial Records	3170-AA78
CFPB	Prerule Stage	Property Assessed Clean Energy Financing	3170-AA84
CFPB	Proposed Rule Stage	Business Lending Data (Regulation B)	3170-AA09
CFPB	Proposed Rule Stage	Amendments to FIRREA Concerning Appraisals (Automated Valuation Models)	3170-AA57
CFPB	Proposed Rule Stage	Mortgage Servicing COVID-19 Relief (Regulation X)	3170-AB07
CFPB	Final Rule Stage	Debt Collection Rule	3170-AA41
CFPB	Final Rule Stage	Amendments to Regulation Z to Facilitate Transition From LIBOR	3170-AB01
CFPB	Long-Term Actions	Artificial Intelligence	3170-AB03
CFPB	Long-Term Actions	Mortgage Servicing (Regulation X)	3170-AB04

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Select Bank Agency and FTC Rulemaking Agenda Items (as of Fall 2021)

Agency	Agenda Stage of Rulemaking	Title	RIN
FRS, FDIC, TREAS-OCC, NCUA, CFPB	Proposed Rule Stage	Automated Valuation Models	7100-AE71
FRS, FDIC	Proposed Rule Stage	Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers (Docket No: R-1736	7100-AG06
FRS	Proposed Rule Stage	Enhanced Cyber Risk Management Standards (Docket No: R-1550)	7100-AE61
FRS	Final Rule Stage	Role of Supervisory Guidance (Docket No. R-1725)	7100-AF96
FRS	Proposed Rule Stage	Customer Due Diligence Rule	7100-AE69
FRS	Proposed Rule Stage	Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers–(Docket No: R-1736)	7100-AG06
FRS	Proposed Rule Stage	Customer Due Diligence Rule	7100-AE69
FRS	Proposed Rule Stage	Enhanced Cyber Risk Management Standards (Docket No: R-1550)	7100-AE61
FRS	Proposed Rule Stage	Regulation M–Consumer Leasing (Docket No: R-1591)	7100-AE92
FRS	Proposed Rule Stage	Regulation S–Proposed Rulemaking BSA Recordkeeping (Docket No: R-1726)	7100-AF97
FTC	Prerule Stage	Telemarketing Sales Rule	3084-AB19
FTC	Prerule Stage	Identity Theft Rules	3084-AB50
FTC	Prerule Stage	Regulatory Review	3084-AB53
FTC	Prerule Stage	Trade Regulation Rule on Funeral Industry Practices	3084-AB55
FTC	Prerule Stage	Children's Online Privacy Protection Rule	3084-AB58
FTC	Prerule Stage	Use of Prenotification Negative Option Plans	3084-AB60
FTC	Prerule Stage	Business Opportunity Rule	3084-AB65
FTC	Prerule Stage	Trade Regulation Rule on Commercial Surveillance	3084-AB69
FTC	Proposed Rule Stage	Standards for Safeguarding Customer Information	3084-AB35
FTC	Final Rule Stage	Privacy of Consumer Financial Information	3084-AB42

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Section 1033 – Consumer-Authorized Financial Data Sharing and Aggregation
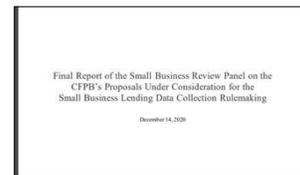
- Section 1033 of the Dodd-Frank Wall Street Reform and Consumer Protection Act provides, among other things, that subject to rules prescribed by the CFPB, a consumer financial services provider must make available to a consumer information in the control or possession of the provider concerning the consumer financial product or service that the consumer obtained from the provider.

- November 22, 2016 – Request for Information

- November 18, 2017 – Principles Statement

- February 26, 2020 – Symposium

- October 22, 2020 – Advance Notice of Proposed Rulemaking issued solicit comments and information to assist the Bureau in developing regulations to implement section 1033.

- February 4, 2021 – ANPR comments closed (99 comments received)

- July 9, 2021 – Executive Order (EO) encourages CFPB to commence rulemaking under section 1033.

- Present – Pre-Rule Stage

- Final Rule?

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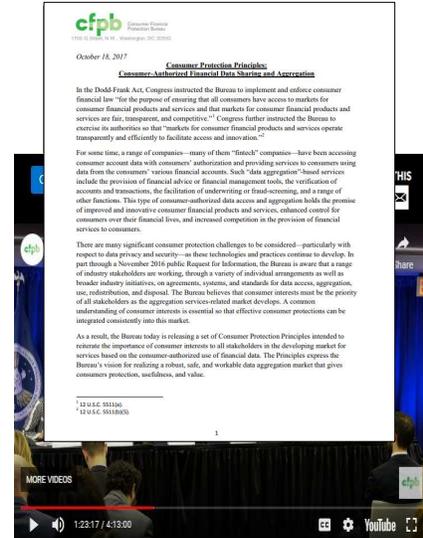
Section 1071 – Business Lending Data (Regulation B)

- Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the Equal Credit Opportunity Act (ECOA) to require, subject to rules prescribed by the Bureau, financial institutions to report information concerning credit applications made by women-owned, minority-owned, and small businesses. https://www.consumerfinance.gov/1071-rule/

- May 15, 2017 – Request for Information

- September 15, 2020 – SBREFA Outline

- December 15, 2020 – SBREFA Report

- September 1, 2021 – NPRM issued

  - CFPB proposes to require covered financial institutions to collect and report to the Bureau data on applications for credit for small businesses, including those that are owned by women or minorities.

  - NPRM addresses CFPB's approach to 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.

  - Comments must be submitted by January 6, 2022.

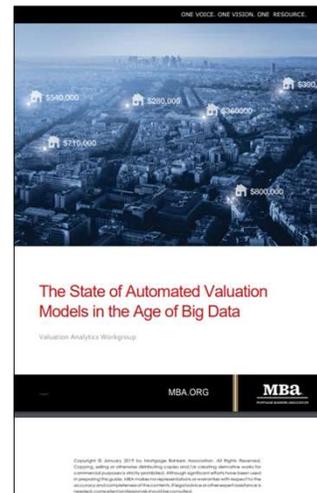- Final Rule?

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CFPB Long-Term Actions – Artificial Intelligence

- "Although use of AI holds the potential to expand credit access to underserved consumers, use of such technologies may also hold risks, including risks of unlawful discrimination and lack of transparency"

- "The Bureau recognizes the importance of continuing to monitor the use of AI and is evaluating whether rulemaking, a policy statement, or other Bureau action may become appropriate"

- 2017 Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process

- 2018 Calls for Evidence

- 2020 Adverse Action Tech Sprint

- 2020 Request for Information on the Equal Credit Opportunity Act and Regulation B

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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.

- Pre-Rule Activities – NPRM expected?

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The State of Automated Valuation Models in the Age of Big Data

Valuation Analytics Workgroup

MBA.ORG   MBA

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CFPB Small-Dollar Loan Rule

- Compliance Deadline: ~~June 13, 2022*~~

- Issued in 2017, the rule included underwriting provisions and payment provisions, but

- Now includes only the payment provisions, after the CFPB rescinded the rule's underwriting provisions in 2020.

- The payment provisions prohibit lenders, including banks, from making a new attempt to withdraw funds from an account after two consecutive failed attempts without consumer consent.

  - Those provisions exempt attempted transfers by institutions that hold the borrower's account and do not charge an insufficient funds or overdraft fee for the attempted withdrawal.

- Exemption in the rule for banks and other depository institutions that made 2,500 or fewer small-dollar loans in each of the current and previous years and for which these loans account for no more than 10% of revenues.

- *5th Circuit entered a stay of the compliance date of the payment provisions until 286 days after appeal in CFSA, CSA TX v. CFBP is resolved.
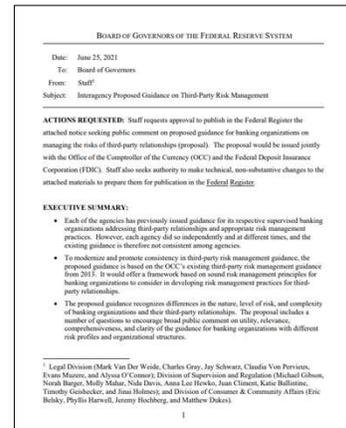
July 2020

Payday, Vehicle Title, and High-Cost Installment Lending Rule

Small Entity Compliance Guide

cfpb Consumer Financial Protection Bureau

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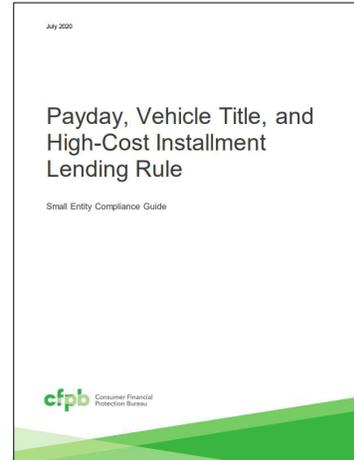
Third-Party Risk Management

- The federal bank regulatory agencies have requested public comment on proposed guidance designed to help banking organizations manage risks associated with third-party relationships, including relationships with financial technology-focused entities. The proposed guidance is intended to assist banking organizations in identifying and addressing the risks associated with third-party relationships and responds to industry feedback requesting alignment among the agencies with respect to third-party risk management guidance.

- "Third-party relationships can include relationships with entities such as vendors, financial technology (fintech) companies, affiliates, and the banking organization's holding company."

- July 19, 2021 – NPRM issued

- September 17, 2021 – Public comment period closed

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Date: June 25, 2021
To: Board of Governors
From: Staff
Subject: Interagency Proposed Guidance on Third-Party Risk Management

ACTIONS REQUESTED: Staff requests approval to publish in the Federal Register the attached notice seeking public comment on proposed guidance for banking organizations on managing the risks of third-party relationships (proposal). The proposal would be issued jointly with the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC). Staff also seeks authority to make technical, non-substantive changes to the attached materials to prepare them for publication in the Federal Register.

EXECUTIVE SUMMARY:
- Each of the agencies has previously issued guidance for its respective supervised banking organizations addressing third-party relationships and appropriate risk management practices. However, each agency did so independently and at different times, and the existing guidance is therefore not consistent among agencies.
- To modernize and promote consistency in third-party risk management guidance, the proposed guidance is based on the OCC's existing third-party risk management guidance from 2013. It would offer a framework based on sound risk management principles for banking organizations to consider in developing risk management practices for third-party relationships.
- The proposed guidance recognizes differences in the nature, level of risk, and complexity of banking organizations and their third-party relationships. The proposal includes a number of questions to encourage broad public comment on utility, relevance, comprehensiveness, and clarity of the guidance for banking organizations with different risk profiles and organizational structures.

[1] Legal Division (Mark Van Der Weide, Charles Gray, Jay Schwarz, Claudia Von Perviova, Evans Muzere, and Alyssa O'Connor); Division of Supervision and Regulation (Michael Gibson, Norah Barger, Molly Mahar, Nida Davis, Anna Lee Hewko, Juan Climent, Katie Ballintine, Timothy Geisbecker, and Jinai Holmes); and Division of Consumer & Community Affairs (Eric Belsky, Phyllis Harwell, Jeremy Hochberg, and Matthew Dukes).

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Consumer Privacy & Data Security

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Notable Recent Events

- **CFPB Director Chopra brings privacy and data experience from the Federal Trade Commission (FTC).**

- **FTC Final Rule Amending Standards for Safeguarding Customer Information (Safeguards Rule) under the Gramm-Leach-Bliley Act (GLBA):** The final rule, promulgated on October 27, 2021, significantly expands on the existing Safeguards Rule and imposes detailed requirements for information security programs. The final rule applies to non-bank financial institutions covered by the Safeguards Rule.

- **Federal Bank Regulatory Agencies Final Rule Requiring Computer-Security Incident Notification:** On November 18, 2021, the federal banking regulatory agencies approved a final rule designed to promote early awareness and stop computer security incidents before they become systemic. It places new reporting requirements on both U.S. banking organizations and bank service providers.

- **Data Breach Enforcement:** Data breach enforcement in the financial services industry remains active. As an example, the New York State Department of Financial Services (NYDFS) brought an action against a mortgage banker that failed to report a breach pursuant to the NYDFS Cybersecurity Regulation.

- **New State Privacy Laws:** Virginia and Colorado enacted comprehensive state privacy laws, similar to the California Consumer Privacy Act of 2018 (CCPA), that will go into effect in 2023 along with the California Privacy Rights Act (CPRA). All three laws have exemptions relevant to financial institutions.

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Transition from FTC to CFPB

- Director Chopra arrived at the CFPB directly from the Federal Trade Commission (FTC), where he served as a commissioner starting in 2018.

- The FTC routinely uses, and has long used, its unfairness and deception authorities to bring enforcement actions relating to privacy and data security.

- *Privacy:* Consumer financial privacy is an increasing focus of the CFPB, and we expect the Bureau to look for ways to increase privacy enforcement and oversight of financial institutions, including through use of its UDAAP authority.

- *Security:* The CFPB lacks formal authority to examine or enforce the GLBA Safeguards Rule, but it has used its deception authority in a data security context and could potentially use its unfairness authority as the FTC has done.

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GLBA Safeguards Final Rule

- Issued by the FTC.

- Applies to non-banking financial institutions, such as check-cashing businesses, payday lenders, mortgage brokers, nonbank lenders, personal property or real estate appraisers, professional tax preparers, courier services, and credit reporting agencies.

  - Expands the scope of covered financial institutions to include "**finders**."

  - Does not *directly* apply to service providers, but service providers should expect covered financial institutions to impose similar requirements by contract.

- As compared to the previous Safeguards Rule, the final rule imposes more detailed requirements for the development, establishment, and maintenance of information security programs.

  - These measures closely track recently enacted regulations by NYDFS, which enacted its own Cybersecurity Regulation in 2017.

- **Compliance Deadline:** October 27, 2022,

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GLBA Safeguards Final Rule: Key Changes

- Provides more specificity on how financial institutions should develop and implement aspects of an information security program. For instance, the rule requires:
  - Implementation and review of access controls;
  - Encryption of customer information in transit and at rest;
  - Development, implementation, and maintenance of information disposal practices; and
  - Adoption of change management procedures.
- Adds provisions designed to improve the accountability of financial institutions' information security programs.
  - Requires a financial institution to designate a "Qualified Individual" to be responsible for the program who regularly reports to the financial institution's board of directors or governing body.
- Exempts financial institutions that collect less customer information from certain requirements.
- Expands the definition of "financial institution" to include "finders."

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Security Incident Notification Final Rule

- Issued by the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (FDIC).
- Requires a "banking organization" to notify its primary federal regulator of any significant computer-security incident as soon as possible and *no later than 36 hours* after the banking organization determines that a "notification incident" has occurred.
  - A "notification incident" is a computer-security incident that has materially disrupted or degraded, or is reasonably likely to materially disrupt or degrade, a banking organization's (i) ability to carry out banking operations, activities, or processes, or deliver banking products and services to a material portion of its customer base, in the ordinary course of business; (ii) business line(s), including associated operations, services, functions, and support, that upon failure would result in a material loss of revenue, profit, or franchise value; or (iii) operations, including associated services, functions, and support, as applicable, the failure or discontinuance of which would pose a threat to the financial stability of the United States.
- Additionally requires a bank service provider to notify each affected banking organization customer *as soon as possible* after experiencing a computer-security incident that has caused, or is reasonably likely to cause, a material service disruption or degradation for four or more hours.
- **Compliance Deadline:** May 1, 2022.

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Data Breach Enforcement

- Data breach enforcement in the financial services industry remains active.

- In 2021, NYDFS issued its first penalty under its Cybersecurity Regulation.

  - Residential Mortgage Services, Inc. (RMS) was required to pay a penalty of $1.5 million related to RMS's failure to disclose a 2019 data breach and to conduct Cybersecurity Risk Assessments required under the Cybersecurity Regulation.

    - The noncompliance was uncovered during a routine compliance assessment by NYDFS.

- Similarly, NYDFS brought an enforcement action against the National Securities Corporation (NSC) last year.

  - NCS was required to pay a penalty of $3 million to New York State for alleged violations of the Cybersecurity Regulation.

  - According to NYDFS, NCS's failure to comply with the Cybersecurity Regulation had "caused the exposure of a substantial amount of sensitive, non-public, personal data belonging to its customers, including thousands of New York consumers."

  - NSC had been the target of four cyber breaches during a two-year period, and two of those breaches had not been reported to NYDFS.

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New State Privacy Laws

California CCPA → California CPRA / Virginia → Colorado

January 1, 2020   January 1, 2023   July 1, 2023

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State Privacy Laws: Overview

- California, Virginia, and Colorado have enacted "rights-based" privacy laws that will go into effect in 2023.

- The laws may apply when businesses collect personal information not subject to GLBA or the Fair Credit Reporting Act (FCRA), such as on a marketing website.

- Notably, these laws:

  - Largely exempt information subject to GLBA or FCRA.

  - May require, or could require in 2023, businesses to provide certain disclosures to individuals.

  - May require, or could require in 2023, certain rights to be provided to individuals upon request – such as access, correction, and deletion.

  - May require, or could require in 2023, businesses to implement certain contractual terms with third parties.

- Virginia and Colorado additionally will impose consent requirements for "sensitive" data.

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State Privacy Laws at a Glance

Requirement	CCPA	CPRA	Virginia	Colorado
Right to Know and Access	✓	✓	✓	✓
Right of Deletion	✓	✓	✓	✓
Right to Opt Out of the Sale of Personal Information	✓	✓	✓	✓
Right to Correct Inaccurate Personal Information		✓	✓	✓
Right to Opt Out of Profiling That Produces Legal or Similarly Significant Effects			✓	✓
Rights to Limit Use of Sensitive Data		✓		
Opt-In Consent for Sensitive Data			✓	✓
Consumer Rights Request Appeal Process			✓	✓
Risk Assessment		✓	✓	✓
Service Provider/Processor Contractual Provisions	✓	✓	✓	✓
Privacy Policy Provisions	✓	✓	✓	✓
Do Not Sell Link or Similar	✓	✓		✓
Application to Personnel and Business Data		✓		

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Supervision, Examination, and Enforcement Outlook

For more on CFS enforcement and recent supervisory highlights, see our recorded webinar available at www.Venable.com/cfs/publications.

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CFPB Enforcement Agenda

- New Enforcement Director – Eric Halperin
- Payment systems/Big Tech
- Fair Lending
- Housing insecurity (mortgage)
- Predatory auto lending
- Competition (Biden administration order)
- Repeat offenders/post-order compliance
- Cryptocurrency/virtual currency
- UDAAP ("Durable jurisprudence" for defining "abusive") – this is expansive and transcends markets
- Pipeline from prior iterations of the CFPB
- Referrals from supervisory examinations
- Lead generation advertising/data broker

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CFPB Enforcement by the Numbers
(through 2020, excluding 19 in 2021)

- $12.9 billion in consumer relief – Monetary compensation, principal reductions, canceled debts, and other consumer relief ordered as a result of enforcement actions.

- 175 million people eligible for relief – Estimated consumers or consumer accounts eligible to receive relief from enforcement actions.

- $1.6 billion in penalties – Civil money penalties ordered as a result of enforcement actions.

Actions by Year
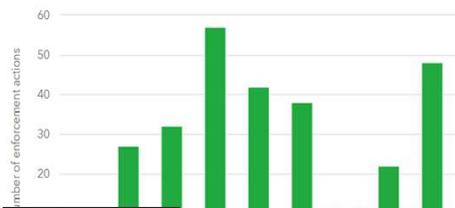
Relief by Year

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Enforcement Update: Trusts as
"Covered Persons" in the Crosshairs

CFPB Takes Action Against National Collegiate Student Loan Trusts, Transworld Systems for Illegal Student Loan Debt Collection Lawsuits

All 800,000 Loans Will Be Independently Audited, Companies Will Pay at Least $21.6 Million and Stop Suing for Invalid or Unverified Debts
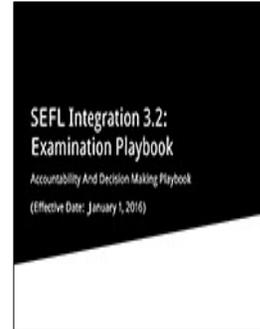
SEP 18, 2017

- CFPB can proceed in its suit alleging 15 student loan trusts harmed borrowers through deceptive and unfair debt collection tactics.
- Lawsuit was not yet time-barred.
- The CFPB may bring enforcement actions to "prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice."
- The CFPB argued the trusts qualify as "covered persons" because they "engage in" providing services listed in CFPA, such as servicing loans and collecting debt.
- The defendants argued they could not be held liable since they used third parties or sub-servicers to collect debt.
  - Judge said the trusts were still "engaged" in their business and the alleged misconduct even though they contracted it out. If Congress had wanted to allow enforcement actions only against those directly involved, it would have said so, the judge said.
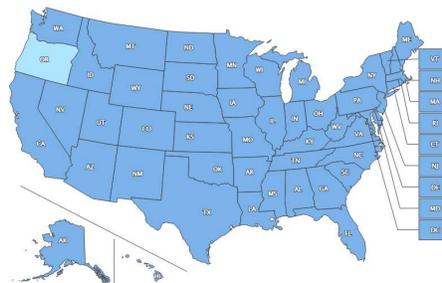
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Supervision and Examinations

CFPB

- Lorelei Salas joined as Assistant Director for Supervision Policy / Acting Assistant Director for Supervision Examinations

- Eric Halperin joined as Assistant Director for the Office of Enforcement

- Renewed focus on supervision of student loan servicers by CFPB

- Renewed focus on fair lending examinations

- COVID-19-related examinations around servicing and collections practices

  - Under way, but will continue

  - Fair servicing an issue that will be closely scrutinized / withdrawal of 2020 guidance

  - UDAAP/Reg V compliance in connection with data furnishing

- Auto lending and other consumer verticals likely to come back to the forefront

  - Fair lending in indirect auto

  - Military Lending Act

- New Debt Collection Rule

- Regulation E FAQs

- IT

SEFL Integration 3.2: Examination Playbook
Accountability And Decision Making Playbook
(Effective Date: January 1, 2016)

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State Regulatory Update

Last updated 11/19/2020

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State Developments to Watch

- States Take on FinTech
  - Money Transmission
  - Lending Law
  - New Resources

DFI's Center for FinTech Information

The Director of the Department of Financial Institutions has created the Center for FinTech Information (CFI) to facilitate communication between the Department and entrepreneurs, start-ups, and FinTech companies.

FinTech Licensing Decision Tree	FinTech Licensing and Regulation Guidance	Timeline: History of FinTech Regulation
FinTech Glossary of Terms	FinTech Guide for Consumers and Investors	File A Complaint

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PRESS RELEASES
State Regulators Urge Early NMLS Renewals Amid Increase in Eligible Licensees
Oct 28, 2021

- NY DFS: New Governor, New Commissioner
- CA DFPI:
  - Use of UDAAP Registration Authority – debt relief services, what's next?
  - Debt Collection Law & Licensing
  - Fair Debt Settlement Practices Act
  - CA Finance Lenders Law – Enforcement
- Key Pending Statutes re Lending, Money Transmission, and More
  - Maine LD 913 (FinTech, Debt Collection, and More)
  - Kansas
  - New Mexico

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Wrap-up and Closing Observations

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Consumer Financial Services Outlook 2022

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

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