



HOW CHANGES AT CFPB AND OTHER REGULATORS ARE AFFECTING ENFORCEMENT

February 23, 2023



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Presenters



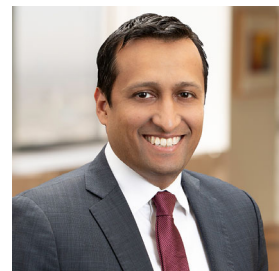
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Agenda: What We'll Cover and What We Won't

- Later Panels Will Cover:
 - Fair Lending
 - Arbitration
 - The CFSA Case (Appropriations)
 - Bank Partnerships
 - Proposed CFPB Registries
 - Privacy/Data Security
- We will cover:
 - Enforcement Overview
 - Current Enforcement Volume
 - Enforcement Tactics
 - Hot Enforcement Areas
 - Fees
 - Add-On Products
 - Ability to Repay
 - MLA/SCRA



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Enforcement Overview

Despite strong rhetoric, CFPB enforcement activity has been down substantially under Director Chopra



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Enforcement Tactics

- Use of the “Bully Pulpit” to force changes to lawful business practices
- “Naming and Shaming”
- Targeting of executives, board members, and investors
- Broader use of UDAAP authority
- Supervision of non-banks based on “risk”
- Coordination with state enforcement authorities

Use of the “Bully Pulpit” to Discourage Lawful Practices

CFPB Finds Credit Card Companies Charged \$12 Billion in Late Fee Penalties in 2020

Largest credit card issuers expected to hike fees further

Significant findings in the report include:

- Many major issuers charge the maximum late fee allowed under the immunity provisions set by the Federal Reserve Board of Governors in 2010. 18 of the top 20 Issuers set late fees at or near the established maximum level.

Banks that do not charge NSF fees, or have publicly announced eliminating them*	Banks that have not publicly announced elimination of NSF fees, as of April 1, 2022**
Bank of America	Arvest
Capital One	Bank of the West
Citibank	Citizens
Fifth Third	First Horizon
First Citizens	First National Bank Texas/First Convenience Bank
Green Dot	KeyBank
JPMorgan Chase	Huntington
M&T	Santander
PNC	SouthState
Regions	TD Bank
Truist	USAA
U.S. Bank	Woodforest
Wells Fargo	

Why the largest credit card companies are suppressing actual payment data on your credit report

Last year, we reported that Americans paid over [\\$120 billion](#) annually in interest and fees on credit cards. Since that time, average interest rates charged by credit card companies have quickly increased. It's critical that consumers can find and switch to credit cards with the lowest and most competitive rates. That's why we've been carefully examining barriers to a fair and competitive credit card market, especially as it relates to the role of consumer credit reporting.

“Naming and Shaming”

CFPB Shuttters Lending by VC-Backed Fintech for Violating Agency Order

Google Ventures, Andreessen Horowitz, Kleiner Perkins, and other prominent venture capital firms invested in LendUp

Thomas H. Lee Partners, L.P. and Goldman, Sachs & Co. invested in MoneyGram from as early as 2008. Then, on Feb. 15, 2022, MoneyGram announced a pending sale to Madison Dearborn Partners, LLC, a Chicago-based private equity firm, in a transaction valued at \$1.8 billion, subject to regulatory approvals.

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Targeting Executives, Board Members, and Investors

CFPB Charges TransUnion and Senior Executive John Danaher with Violating Law Enforcement Order

CFPB Sues United Holding Group, Its Affiliates, and Its Owners for Illegal Debt Collection Practices

The debt collection company and its owners knowingly used third-party collectors that engaged in unlawful and deceptive tactics

CFPB Bans BrightSpeed Solutions and Its Former CEO for Supporting Telemarketing Scammers Targeting Older Americans

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Why Target Officers and Directors?

- Director Chopra's Penn Law School Remarks, 3/28/22:

After the savings and loan crisis of the 1980s and early 1990s, scores of individual bankers were convicted by the Department of Justice. Many were sent to prison. But almost no single senior executive went to jail or was truly held financially accountable for their role in the 2008 financial crisis, even as so many Americans paid a serious price when they lost their homes because they were underwater with toxic mortgages.

In my view, there were many lessons from the FTC's Facebook saga:

- For very large firms, seemingly large fines, even ones that are "record-setting," may appear to be very punitive, but may have little effect;
- Corporate boards will go to great lengths to shield top executives from scrutiny, even though they are all bound by agency orders; and
- Committees, paperwork, compliance units, and other procedural requirements have much higher monitoring costs than bright-line structural remedies that meaningfully change business incentives.

We need to learn from these lessons to think about not only how to halt recidivism, but also how to treat small and big firms equally when it comes to enforcement actions.

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Naming of Individuals and Connected Entities in Enforcement Proceedings

- Under Chopra, for every investigation the "mindset" is to assign "individual responsibility" and to pursue an expansive reach for violations
 - The focus is on who said and did what to whom and when
- Theories for individual liability
 - "Related persons" manage or materially participate in affairs of covered persons
 - Can extend to directors, officers, employee managers, shareholders, contractors, etc.
 - "Service providers" who provide material services to covered persons
 - "Substantial assistance" provided to covered persons
- Individual liability turns on authority to control/knowledge of wrongful acts

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Broader Use of UDAAP Authority

CFPB Targets Unfair Discrimination in Consumer Finance

Discrimination or improper exclusion can trigger liability under ban on unfair acts and practices

The CFPB enforces several laws that can target discriminatory practices. Government regulators and private plaintiffs have commonly relied on the Equal Credit Opportunity Act (ECOA), a fair lending law which covers extensions of credit. However, certain discriminatory practices may also trigger liability under the Consumer Financial Protection Act (CFPA), which prohibits unfair, deceptive and abusive acts and practices (UDAAPs).

The CFPB published an updated exam manual today for evaluating UDAAPs, which notes that discrimination may meet the criteria for "unfairness" by causing substantial harm to consumers that they cannot reasonably avoid, where that harm is not outweighed by countervailing benefits to consumers or competition. Consumers can be harmed by discrimination regardless of whether it is intentional. Discrimination can be unfair in cases where the conduct may also be covered by ECOA, as well as in instances where ECOA does not apply. For example, denying access to a checking account because the individual is of a particular race could be an unfair practice even in those instances where ECOA may not apply.

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Supervision Based on "Risk"

- CFPB only supervises – examines – non-banks in particular industries, e.g., mortgage lending, payday lending, consumer reporting
- But the CFPA has always allowed the CFPB to supervise a non-bank if the Bureau "has reasonable cause to determine" that the non-bank "is engaging, or has engaged, in conduct that poses risks to consumers"
- April 25: CFPB "is invoking" and "has now begun to invoke" this "dormant" authority to supervise
 - And may make final "risk" determinations public
 - November 2022: codified standard for making determinations public
- Specific reference to "UDAAPs"

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Supervision Based on “Risk”

- A non-bank would receive notice and an opportunity to respond, but
 - Notice can be based on mere complaints or information from other sources, including “state partners”
 - “Risk” - not a legal violation
 - No discovery, no fact-finding, no “finding” at all, just “reasonable cause to determine”
- Final determinations made public – more “Naming and Shaming”
 - Signal to all market participants
- Judicial review?

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Enhanced Cooperation with State Actors

- May 2022 Interpretative Rule that states can enforce federal consumer financial protection laws under Dodd-Frank
 - States can enforce the CFPB including its prohibition against UDAAPs, and federal consumer financial statutes such as TILA and ECOA
 - Authority to enforce consent orders
 - According to the Bureau, states are not bound by Bureau’s jurisdictional limits. For example, states can go after auto dealers or persons regulated by the SEC.
 - Bureau looking into to ways states can seek civil money penalties.

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Enhanced Cooperation with State Actors

- We have also seen closer coordination on major litigation with state actors
 - April 2021 action with the New York AG against a debt-collection enterprise
 - February 2021 action with New York, Massachusetts, and Virginia AGs against Nexus Services, Inc. and Libre by Nexus, Inc.
 - April 2022 action with the New York AG against MoneyGram
 - January 2023 action with the New York AG against Credit Acceptance Corporation
- Expect more joint actions and investigations with CFPB-friendly AGs and state agencies

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Key Enforcement Issues for OLA Companies

- Fees
- Add-On Products
- Ability to Repay
- MLA/SCRA

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The Bureau's War on "Junk Fees"

- The Bureau has taken a sustained and aggressive approach against what it refers to as "junk fees"
 - June 2022 advisory opinion prohibiting debt-collectors from charging "pay-to-pay" or convenience fees
 - October 2022 circular prohibiting surprise overdraft fees
 - September 2022 enforcement action against Regions Bank
 - October 2022 compliance bulletin on surprise depositor fees
 - February 2023 proposed rulemaking on credit card late fees
- In addition, it has published several research reports on the issue
- The White House's Junk Fee Prevention Act

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The Bureau's War on "Junk Fees"

- This mix of regulatory guidance and the bully pulpit has been successful
 - Banks have announced the reduction/elimination of overdraft and NSF fees
 - FTC considering a junk fee rule (Proposed November 2022)
- State AGs that spoke at a recent CFPB-sponsored conference said they are focused on "junk fees" including fees added to the end of a transaction or those passed off as government mandated.
 - States bans are coming (New York prohibits APSN fees, California considering legislation on hidden fees)

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Continued Hostility toward Add-on Products

- Bureau has always viewed add-on products as worthless and unsuitable and has attacked them from inception, with initial focus on credit cards and auto finance
- Recent uptick in add-on product enforcement actions
 - Wells Fargo consent order – borrowers did not receive refunds to which they were entitled
 - Credit Acceptance Corporation – the Bureau and New York AG’s complaint focuses on high cost and profit, claiming UDAAP

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Continued Hostility toward Add-on Products

- June 2022 proposed FTC Rule banning add-on products that provide no consumer benefit
- Credit life, credit disability products and optional membership plans at risk
 - Recent CFPB UDAAP investigation into membership plans
 - Multistate AG action (with Pennsylvania as lead) against Mariner Finance
- CFPB’s January 2023 circular on Negative Option Marketing practices
 - Focus on automatic renewal plans and trial subscription/marketing plans
 - Unfair, deceptive, or abusive if “sellers mislead consumers about terms and conditions, fail to obtain consumers’ informed consent, or make it difficult for consumers to cancel”

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Ability to Repay

- Under the 2017 Payday rule, the Bureau tried to impose ability-to-pay requirements. The Bureau appears likely to pursue same through UDAAP enforcement.
 - Credit Acceptance: “In using a lending model that is indifferent to whether consumers are unable to repay their loans in full and end up in default, CAC took unreasonable advantage of consumers’ lack of understanding of the risk of default, and the magnitude of harm in the event of default...”
- If lenders contemplate or build their business model around repeat transactions or refinancings, are representations about the short-term nature of a loan deceptive?

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Military Lending Act/SCRA

- Continued Bureau focus on protecting servicemembers
- MoneyLion lawsuit claims violations of MLA rate cap and arbitration restrictions
- SCRA also likely to be an area of continued focus

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Questions?



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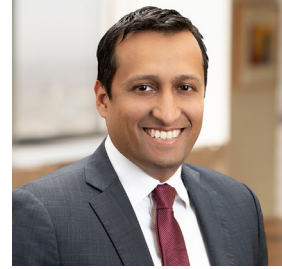
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