

Preparing for a Government Investigation or Consumer Litigation

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Preparing for a Government Investigation or Consumer Litigation

- ◆ Factors Driving Costs of Government Investigations and Consumer Litigation
- ◆ Strategies for Minimizing Discovery Costs
- ◆ Compliance Priorities for Minimizing Risk

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Structural Factors That Drive Litigation Volume

- ◆ Availability of Statutory Damages
- ◆ Availability of Attorneys' Fees
- ◆ Aggressive Claim Identification Tactics by Plaintiff's Counsel
- ◆ Embrace of Mass Arbitration Tactics by Plaintiff's Counsel

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Increasing Government Enforcement Activity

AMERICAN BANKER

POLITICS AND POLICY

CFPB plans to hire 50% more enforcement attorneys, support staff

By [Kate Berry](#) October 05, 2023, 10:06 a.m. EDT 5 Min Read




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Increasing Government Enforcement Activity

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 Consumer Financial Protection Bureau
115,779 followers
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The CFPB's Enforcement team is expanding. Learn more about career opportunities at the CFPB and how to apply.




AS OF DECEMBER 20, 2023,
CFPB enforcement actions
have resulted in:

\$19 billion in consumer relief	195 million people eligible for relief	\$4.2 billion in penalties
Approximate monetary compensation, principal reductions, canceled debts, and other consumer relief ordered.	Estimated consumers or consumer accounts eligible to receive relief.	Approximate civil money penalties ordered.

See more at consumerfinance.gov/enforcement

Help enforce consumer financial protection law | Consumer Financial Protection Bureau
consumerfinance.gov

   23 · 2 Comments

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Increasing Government Enforcement Activity

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Responding to a CID

Preliminary Issues

- ◆ Retaining Counsel
 - Once a CID is received, experienced counsel should be retained as soon as possible.
 - After retaining counsel, meeting with counsel to discuss the CID, any difficulties in responding to the CID, or questions concerning the CFPB's requests is important in advance of the meet and confer meeting with the CFPB.
- ◆ Litigation Hold / Document Preservation Notice
 - Recipient of CID must preserve documents and information to respond to the CID.
 - It is important that the hold covers the full responsive period set-out in the CID as well ensuring all relevant individuals that may have responsive documents and information receive the litigation hold.

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Responding to a CID

Preliminary Issues

- ◆ **Meet and Confer**
 - Upon CID receipt, recipients have 10 days in which to have a meet and confer with CFPB staff to discuss the CID and compliance with the requests outlined in the CID.
 - This is the recipient's opportunity to request modifications to the CID, whether those be to the scope of the CID, individual requests, or additional time to respond to the CID.

- ◆ **Motion to Set Aside**
 - If a company believes it has a legal basis to do so, it must file a petition to modify or set aside the CID within 20 calendar days after the CID is served and after the company has met and conferred with the CFPB. Generally, such a petition is publicly filed and therefore discloses the existence of the Bureau's investigation to the public. These petitions rarely succeed but may still be prudent to defend against a later claim that the company has waived objections to the CID by failing to exhaust administrative remedies.

- ◆ **CIDs are Not Self-Enforcing**
 - Pursue administrative remedies to preserve defenses.
 - CFPB can sue in federal court to compel production.

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Limiting e-Discovery Costs

- ◆ **Be proactive about considering data retention before problems arise.**
 - Consider whether any rules or laws that require you to preserve data for a specified time.
 - Understand how long you need to keep data for business reasons.
 - Data should only be kept as long as it is useful (or legally required).

- ◆ **Consider how your employees communicate.**
 - Informal communications tend to have limited value as business records.
 - Ephemeral message systems, decentralized communications, and internal chat records increase discovery costs.

- ◆ **Make sure our IT team is ready to implement a legal hold / preserve documents.**
 - If you implement auto-delete policies, then you need to know how to suspend them.
 - Learning on the fly may lead to trouble.

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Limiting Litigation Costs

- ◆ Keep your arbitration provision up to date.

- ◆ *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023)
 - The Supreme Court held that a trial court denial of a motion to compel arbitration is immediately appealable.
 - The district court must stay its proceedings during the interlocutory appeal.

- ◆ In two recent cases, different federal judges in Maryland have denied motions to compel arbitration that were subject to unilateral modification provisions that rendered the arbitration agreements “illusory,” or lacking in consideration.
 - *Johnson v. Continental Finance Co.*, 8:22-cv-02001 (Sep. 7, 2023)
 - *Bailey v. Mercury Financial, LLC*, 8:23-cv-00827 (Sep. 26, 2023)

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Avoiding Investigations and Litigation

Compliance Management Systems

- ◆ Most Common Problem:
 - Lack of Sufficient Compliance Resources
 - Insufficient and Applicable Training
 - Inadequate Monitoring and Audits
 - Failure to Manage Complaints
 - Poor 3rd Party Risk Management

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Avoiding Investigations and Litigation

Compliance Management Systems

◆ Practical Considerations:

- Don't fail to learn from consents just because the facts don't match your company perfectly. "We don't do that!"
- Develop a comprehensive understanding of the company's information storage structure - including information held by 3rd parties. Know where stuff is and how to get it!!
- Understand that employee turnover is a compliance issue on many levels. Have structure and procedures in place for loss of institutional knowledge.
- Move quickly when restitution is required.
- Ask the "why" – especially in marketing and origination. If that question cannot be answered appropriately, then UDAAP may be lurking.

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Avoiding Investigations and Litigation

Compliance Management Systems

◆ Practical Considerations:

- Understand AI and its components in underwriting
- Don't allow "Request for Reason" NOAA let you get lazy
- Left-hand, Right-hand (does system/procedures match documents/policies)
- Third-party Relationships (more involvement; # of products/partners)
 - i. Fintech Agreements (See Cross River Consent; 3rd Party guidance; relevant to tribal programs)
- Make the layoffs.
 - ◆ Assess your CMS regularly. Test it!
 - ◆ Test APRs regularly ,, and always when new products implemented
 - ◆ Check websites (including lead websites) regularly
 - ◆ Ensure marketing goes through compliance
 - ◆ Address complaints fast and favorably

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Avoiding Investigations and Litigation

Customer Complaints and Disputes

- ◆ Treat every consumer complaint as a potential lawsuit.

- ◆ Review your business relationships and agreements.
 - KYC/Vendor diligence
 - Risk-shifting or risk-reducing contractual clauses

- ◆ Evaluate potential early resolutions with a risk-weighted analysis.
 - Merits of allegations and defenses
 - Burden and scope of discovery
 - Availability of remedies, including statutory damages and attorney's fees

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Key Areas for Compliance Reviews

What regulators are saying:

- ◆ Discrimination and Algorithmic Bias

- ◆ Data Privacy

- ◆ Creditworthiness and Refinancing Issues

- ◆ Junk fees

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Key Areas for Compliance Reviews

Discrimination and Algorithmic Bias

CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms

Companies relying on complex algorithms must provide specific and accurate explanations for denying applications

MAY 26, 2022

"Companies are not absolved of their legal responsibilities when they let a black-box model make lending decisions," said CFPB Director Rohit Chopra. "The law gives every applicant the right to a specific explanation if their application for credit was denied, and that right is not diminished simply because a company uses a complex algorithm that it doesn't understand."

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Key Areas for Compliance Reviews

Discrimination and Algorithmic Bias

FTC Report Warns About Using Artificial Intelligence to Combat Online Problems

Agency Concerned with AI Harms Such As Inaccuracy, Bias, Discrimination, and Commercial Surveillance Creep

June 16, 2022



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Key Areas for Compliance Reviews

Discrimination and Algorithmic Bias

CFPB Issues Guidance on Credit Denials by Lenders Using Artificial Intelligence

Consumers must receive accurate and specific reasons for credit denials

SEP 19, 2023

WASHINGTON, D.C. - Today, the Consumer Financial Protection Bureau (CFPB) issued guidance about certain legal requirements that lenders must adhere to when using artificial intelligence and other complex models. The guidance describes how lenders must use specific and accurate reasons when taking adverse actions against consumers. This means that creditors cannot simply use CFPB sample adverse action forms and checklists if they do not reflect the actual reason for the denial of credit or a change of credit conditions. This requirement is especially important with the growth of advanced algorithms and personal consumer data in credit underwriting. Explaining the reasons for adverse actions help improve consumers' chances for future credit, and protect consumers from illegal discrimination.

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Key Areas for Compliance Reviews

Discrimination and Algorithmic Bias

CFPB and Justice Department Issue Joint Statement Cautioning that Financial Institutions May Not Use Immigration Status to Illegally Discriminate Against Credit Applicants

English | [Español](#)

Borrowers report being denied loans because of their immigration status

OCT 12, 2023

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Key Areas for Compliance Reviews

Data Privacy

- ◆ 2020 Equifax settlement - \$380 million, plus an additional \$125 million if needed to pay for out-of-pocket losses. Also requires Equifax to pay "potentially \$2 billion more if all 147 million class members sign up for credit monitoring"
 - "In the last decade, numerous well-known businesses have faced consumer class action lawsuits for violations of data privacy laws, including the Fair Credit Reporting Act (FCRA). The settlements in data breach class actions have reached well into the millions: Home Depot (\$200 Million); Capital One (\$190 Million); Uber (\$148 Million); Morgan Stanley (\$120 Million); and Yahoo! (\$85 Million)." <https://www.reuters.com/legal/legalindustry/data-breach-class-action-litigation-changing-legal-landscape-2022-06-27/>
- ◆ Data Privacy Actions on the Rise - <https://www.lexisnexis.com/community/insights/legal/b/practical-guidance/posts/data-privacy-class-actions-on-the-rise>
- ◆ CFPB Proposed Rulemaking on Personal Financial Data Rights: https://files.consumerfinance.gov/f/documents/cfpb-1033-nprm-fr-notice_2023-10.pdf
- ◆ Various new state privacy laws
 - Assess whether company is covered
 - Assess what, if any data is covered

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Key Areas for Compliance Reviews

Creditworthiness and Refinancing Issues

CFPB Sues Installment Lending Conglomerate for Illegally Churning Loans to Harvest Hundreds of Millions in Loan Costs and Fees

A CURO Group Holdings Company, Heights Finance, formerly known as Southern Management Corporation, induced struggling customers into a fee-harvesting and loan-churning scheme

AUG 22, 2023

WASHINGTON, D.C. - Today, the Consumer Financial Protection Bureau (CFPB) sued Heights Finance Holding Company, formerly known as Southern Management Corporation, a high-cost installment lender, as well as several of Heights's subsidiaries (collectively, Southern), for illegal loan-churning practices that harvested hundreds of millions in loan costs and fees. The CFPB alleges that the company - which operates under a variety of trade names, including Covington Credit, Southern Finance, and Quick Credit - identifies borrowers who are struggling to repay their existing loans, and then aggressively pushes them to refinance. Borrowers become trapped in the loan churning scheme and often are forced to refinance multiple times. The CFPB is seeking to end Southern's unlawful loan-churning practices, to gain redress for harmed consumers, and to require Southern to pay a civil money penalty.

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Key Areas for Compliance Reviews

Junk Fees

CFPB Exams Return \$140 Million to Consumers Hit by Illegal Junk Fees in Banking, Auto Loans, and Remittances

New report shows most institutions have eliminated NSF fees, saving consumers \$2 billion every year.

OCT 11, 2023

WASHINGTON, D.C. - Today, the Consumer Financial Protection Bureau (CFPB) released a special edition of its Supervisory Highlights focused on the agency's efforts to protect consumers from illegal junk fees. The junk fees discussed in the report - including fees for fake paper statements and worthless add-on products for auto loans - can strain the financial stability of even the most financially savvy families. As a result of the CFPB's supervisory work, the companies in today's report are refunding \$140 million to consumers, \$120 million of which is for surprise overdraft fees and double-dipping on non-sufficient funds fees. A separate report today finds that most financial institutions have eliminated non-sufficient funds fees, saving consumers an estimated \$2 billion every year.

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Key Areas for Compliance Reviews

Junk Fees

CFPB and New York Attorney General Sue Credit Acceptance for Hiding Auto Loan Costs, Setting Borrowers Up to Fail

WASHINGTON, D.C. - Today, the Consumer Financial Protection Bureau (CFPB) and the New York State Office of the Attorney General sued a predatory auto lender, Credit Acceptance Corporation, for misrepresenting the cost of credit and tricking its customers into high-cost loans on used cars. The car-buying experience turns into a nightmare for many of Credit Acceptance's borrowers, who face unaffordable monthly payments, vehicle repossessions, and debt collection lawsuits. The joint complaint alleges that, among other things, Credit Acceptance hides costs in loan agreements and sets consumers up to fail. The complaint also alleges that Credit Acceptance violated New York usury limits and other consumer and investor protection laws. The lawsuit seeks to force Credit Acceptance to stop its illegal practices, reimburse harmed consumers, pay back wrongfully earned gains, and pay a penalty.

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Questions?

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