

# Federal Rulemaking and Enforcement – One Step Back and Two Steps Forward?

Online Lender Alliance – Legal Issues Conference  
February 11, 2025

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## Agenda

- **Overview of the Current Regulatory Environment**
- **The FCC**
  - 1 to 1 Consent
  - Revocation
- **The FTC and CFPB**
  - The FTC's Negative Option Rule
  - Small Dollar/High-APR Lending
  - EWA Rule and FTC Enforcement
  - BNPL Rule
  - Other CFPB Items
- **Closing Thoughts**

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# Overview of the Current Regulatory Environment

## A Timeline of Events...

- **January 20, 2025 (the Inauguration)**
  - A rash of executive orders (e.g., withdrawal from Paris climate agreement, withdrawal from WHO, TikTok Relief, freeze on federal hiring etc.)
  - Andrew Ferguson designated Chairman of the Federal Trade Commission
  - Brendan Carr designated Chairman of the Federal Communications Commission
  - But little direct relief focused on financial services (e.g., a new CFPB director)

## A Timeline of Events...

- January 21, 2025
- January 22, 2025
- January 23, 2025
- January 24, 2025
- January 25, 2025
- January 26, 2025
- ???

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## A Timeline of Events...

- January 27, 2025
  - Senate confirms Scott Bessent's nomination for Secretary of the Treasury
- February 1, 2025
  - CFPB Director Rohit Chopra fired
  - Scott Bessent appointed Acting Director of the CFPB

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## A Timeline of Events...

- **February 3, 2025**

- Reports emerge that Bessent ordered the CFPB to stop all rulemaking, communications, litigation, and other activities including:
  - No new proposed or final rules or formal or informal guidance;
  - Suspension of the effective dates of all final rules have not yet become effective;
  - Cessation of investigative activities and/or settlement enforcement actions;
  - Cessation of public communications of any type;
  - Freeze on all agreements; and
  - Freeze on all filings and/or appearances in any litigation other than to seek a pause in proceedings.
- CFPB begins filing emergency notices in active litigation regarding litigation mandate above (e.g., discrimination as UDAAP litigation in 5th Circuit)

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## A Timeline of Events...

- **February 6, 2025**

- Senate confirms Russell Vought's nomination for Director of the Office of Management and Budget
- Reports that Eric Halperin, CFPB's General Counsel, disputes pause in *pending* litigation


- **February 7, 2025**

- Russell Vought appointed Acting Director of the CFPB
- "CFPB RIP"
  - Reports begin to emerge that DOGE is on site at CFPB
  - DOGE granted administrative access to CFPB systems, including content management system, back-end systems for the CFPB's website, and the active directory of personnel

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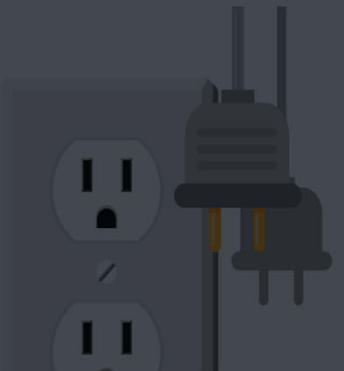
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## A Timeline of Events...

- February 8, 2025**
  - Vought email to CFPB employees suspending nearly all operations:
    - “Effective immediately, unless expressly approved by the Acting Director or required by law, all employees, contractors and other personnel of the bureau shall . . . cease all supervision and examination activity . . .”
  - Vought notifies “the Federal Reserve that CFPB will not be taking its next draw of unappropriated funding because it is not ‘reasonably necessary’ to carry out its duties.”
- February 9, 2025**
  - CFPB employees informed that HQ closed the week of the 10<sup>th</sup> and to “work remotely unless instructed otherwise from our Acting Director or his designee.”
  - CFPB employees’ union files lawsuit against Vought

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## What Now?

- **Regulations Required by Law**

- TILA/Reg. Z
- ECOA/Reg. B
- EFTA/Reg. E

- **Final Rules**

- Is a rule or regulation “effective?”
- “Effective date” v. “compliance date”
- APA Section 705:
  - Agency may “postpone the effective date” (i.e., not already effective) of a rule “pending judicial review” when “justice so requires”
  - APA does not address “compliance date”

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## What Now?

- **Formal v. Informal Rules**

- Rulemaking through APA process with notice and comment period
- Blog posts, “interpretive” guidance, etc.

- **Congressional Review Act**

- Rulemaking may be overturned by joint resolution of Congress within a “60-days-of-continuous-session” period beginning when the rule has been published in the Federal Register and been received by Congress.
- If overturned, it “may not be reissued in substantially the same form, and a new rule that is substantially the same . . . may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution.”

- **Other Congressional Action?**

- **What About the States?**

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# The FCC

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## 89 FR 5098-01 (January 26, 2024)

- Closes the “lead generation loophole” to prevent consumers from receiving telemarketing calls or messages from multiple parties based on a single prior express written consent (PEWC)
- Imposes new disclosure requirements on PEWC
- Also formally gives protections to text messages

**But...**

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## IMC v. FCC

- The Eleventh Circuit heard *IMC v. FCC* on December 18, 2024, challenging the FCC's 2023 order under the TCPA.
- On January 24, 2025, the court vacated Part III.D of the FCC's order, stating the FCC exceeded its authority by requiring one-to-one consent for telemarketing.
- The court found that the TCPA requires only "prior express consent," not "prior express consent plus".
- The FCC postponed the new rule's effective date until the earlier of (a) January 26, 2026, or (b) the date specified in a public notice following a decision from the court reviewing the challenge to the new rule.

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## 89 FR 5098-01 (March 5, 2024)

- Additional protections related to revocation of consent
- Under the rule, consumers would be able to use "reasonable methods" to definitively revoke consent
- Creates a rebuttable presumption of revocation when other methods are used
- Also imposes opt-out obligations on package delivery companies

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## Notable Timelines for Implementation

- **March 26, 2024: 64.1200(e) (applying telephone solicitation and DNC rules to text messages)**
- **April 4, 2024: 64.1200(a)(12) (related to text confirming revocation)**
- **April 11, 2025:**
  - 64.1200(a)(10) (“any reasonable method” revocation right)
  - 64.1200(a)(11) (“other reasonable means” revocation right)
- **January 26, 2026 (or date in public notice, if sooner): 64.1200(f)(9) (amending definition of PEWC to require one-to-one consent)**

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## A note about 47 CFR 64.1200(e)

“The rules set forth in paragraph (c) [TIME OF DAY RESTRICTIONS AND DNC] and (d) [IDNC] of this section are applicable to any person or entity making telephone solicitations [EBR EXCEPTION] or telemarketing calls or text messages [NO EBR EXCEPTION?] to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, “Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991. [ESTABLISHING DNC]”

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# The FTC and CFPB

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## FTC Negative Option Rule

- **Updates to the Negative Option Rule include**
  - “Click to Cancel” requirement
  - Required Disclosures
  - Affirmative Consent
  - Annual Reminders
- **Current Status**

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## Small Dollar/High-APR Lending

- **“Payday” Rule**
  - Application
  - General requirements
  - “Effective date” = January 16, **2018**
  - “Compliance date” = March 30, 2025
- **CFPB Actions and Activity**
  - Industry “Sweep”
  - Status of outstanding litigation

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## Earned Wage Access

- **CFPB Proposed Interpretive Rule**
  - Overview
    - Credit under Reg. Z
  - Current status
- **FTC Actions**
  - Float Me
  - Dave

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## High Rate Point of Sale Financing

- **CFPB Proposed BNPL Interpretive Rule and FAQs**
  - May be dead but, underlying UDAAPs may still be an issue
- **Potential UDAAPs**
  - Not providing any dispute rights
  - Inflating credit price (as compared to cash price)
  - Steering (to financing option that best for merchant)
  - Misleading consumers about who is providing financing
  - Information sharing issues between merchant and financing partner

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## Other Items

- **The Nonbank Consent Order Registry**
  - Overview
  - Current status
- **Report on “Strengthening State-Level Consumer Protections”**
  - Overview

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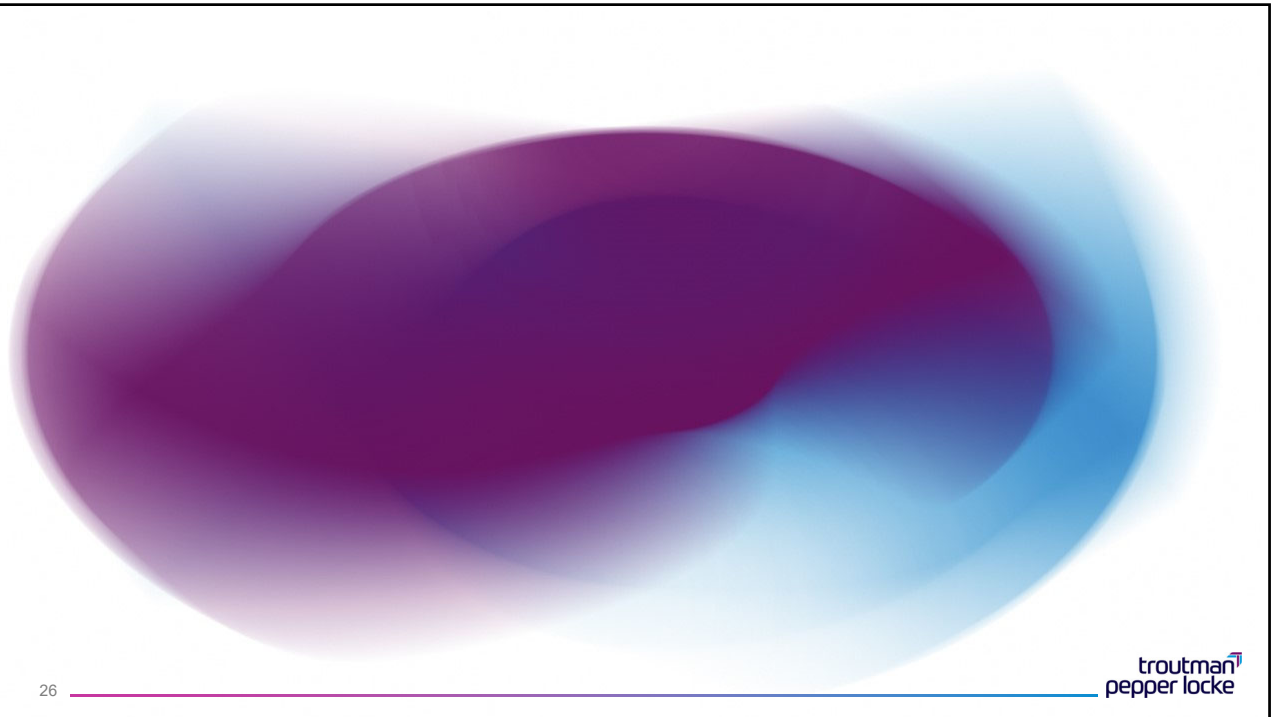
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