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CFPB Bites of the Month - 2022 Annual Review - Fintech

January 23, 2023 | Catherine M. "Cathy" Brennan, Eric L. Johnson and Justin B. Hosie

In this article, we share a timeline of our monthly "bites" for 2022 applicable to the Fintech industry.

So, what happened in 2022?

1. The CFPB's Acting General Counsel says some EWA products may be loans

On January 18, CFPB Acting General Counsel Seth Frotman responded to advocacy groups who asked the CFPB to rescind its guidance on earned wage access products (EWA). Frotman said that some EWA products may qualify as "credit" under state and federal laws and that those charging fees (or accepting voluntary gratuities) may qualify as "loans" under the Truth in Lending Act. He further indicated that he would ask Director Rohit Chopra for clarification on the CFPB's stance on EWA products.

2. The CFPB introduced its Office of Competition and Innovation

On May 24, 2022, the CFPB opened its "Office of Competition and Innovation" to help encourage innovation and competition. The Office of Competition and Innovation replaced its earlier "Office of Innovation," opened in 2018 (and which, at that time, replaced "Project Catalyst," launched in 2014). The Office of Competition and Innovation will analyze obstacles to open markets, better understand how big players are "squeezing out" smaller players, host incubation events, and encourage competition by training consumers on how to switch accounts and providers As part of the change, the CFPB encouraged organizations and members of the public to file rulemaking petitions to ask for greater clarity on particular rules.

3. The CFPB expressed concerns about credit reporting for Buy Now, Pay Later companies

On June 15, 2022, the CFPB expressed concerns about how nationwide consumer reporting companies (NCRCs) planned to address buy now, pay later (BNPL) companies. The CFPB indicated that the variations amount each NCRC's plan for BNPL consumer data could result in inconsistent treatment that will limit the potential benefits of furnished BNPL data. The CFPB encouraged BNPL companies to furnish both positive and negative data. The CFPB also encouraged NCRCs to adopt standardized BNPL furnishing codes and formats appropriate to the unique characteristics of the product. The CFPB will monitor the progress in this area and invited consumers to submit complaints about both consumer reporting and BNPL products as needed.

4. The CFPB rescinded special regulatory treatment for an earned-wage access company

On June 21, 2022, the CFPB rescinded a Sandbox Approval Order related to one company's earned-wage access products. The prior Sandbox Approval Order, issued in December 2020, indicated that the transactions addressed in the order would not create liability under the Truth in Lending Act. The CFPB informed the company on June 3, 2022, that it was considering terminating the approval order considering certain public statements the company made suggesting the CFPB had endorsed its products. The company subsequently notified the CFPB that it would modify its business model and requested termination of the order. The CFPB, noting that it received requests for clarification regarding its advisory opinion on "earned-wage access" products, plans to issue further guidance to provide greater clarity concerning the application of the definition of "credit" under the Truth in Lending Act and Regulation Z. The CFPB has not yet issued this guidance.

5. The CFPB issued a report on innovations in payments, including BNPL

On August 4, 2022, the CFPB issued a report addressing emerging payment systems and their capacity to harvest user data. The report addressed the growing presence of BNPL, embedded commerce, and integrated "super apps." According to the CFPB, although these technologies have "the potential to streamline payments, facilitate commerce, and improve the user experience," they can "create more opportunities for companies to aggregate and monetize consumer financial data, and for large players to dominate consumers' financial and commercial lives." The CFPB also warned that "while a range of payment capabilities create more options for consumers, varying regulatory requirements may risk regulatory arbitrage." The CFPB concluded by noting that it would propose rules on "financial data rights," assessing BNPL to decide whether regulatory interventions are appropriate, and evaluating ways to protect consumers in real-time payments.

6. The CFPB said that behavioral targeting of individual consumers can create liability

On August 10, 2022, the CFPB issued an interpretive rule and Director Chopra gave a related speech to the National Association of Attorneys General. The interpretive rule and speech addressed digital marketing by big tech firms. According to the CFPB, digital marketers are not exempt from the Consumer Financial Protection Act and can be liable for "unfair, deceptive, or abusive acts." The interpretive rule indicates that digital marketers provide material services to financial firms and are thus subject to consumer protection enforcement. As service providers, they are liable for violations of consumer protection laws.

7. The CFPB required a savings app to pay $27 Million

On August 10, 2022, the CFPB announced a consent order against a financial technology company that allegedly used a faulty algorithm resulting in overdrafts and overdraft penalties for consumers. The company offered a mobile app that it promoted as a way to save consumers money. According to the CFPB, the company falsely guaranteed that consumers would not incur overdraft charges, broke its promises to correct its mistakes, and pocketed funds that should have gone to consumers. The order requires the company to pay redress to consumers and pay a civil money penalty of $2.7 million to the CFPB.

8. A CFPB study addressed BNPL transactions

On September 15, 2022, the CFPB released its promised **report** on BNPL. The report, "Buy Now, Pay Later: Market trends and consumer impacts," cautioned that consumers "may receive uneven disclosures and protections." Director Chopra commented that BNPL "is a rapidly growing type of loan that serves as a close substitute for credit cards," and that the CFPB "will be working to ensure that borrowers have similar protections, regardless of whether they use a credit card or a Buy Now, Pay Later loan." The CFPB also indicated that it will use interpretive guidance or rules to mandate BNPL providers comply with "many of the baseline protections" that Congress has established for credit cards. To reduce the risk of "overextension," the CFPB indicated that it will continue to address "appropriate and accurate credit reporting practices."

9. A consumer group and a bank trade association asked the CFPB for more fintech regulation

On September 15, 2022, the Consumer Bankers Association and Center for Responsible Lending jointly **petitioned** the CFPB asking for a "larger participant rule" so that the CFPB could "schedule examinations" of organizations offering installment loans and lines of credit. The CRL and CBA called for rulemaking to cover fintechs originating and servicing personal loans. The CRL and CBA opined that fintechs and non-bank lenders making personal loans are not subject to regular oversight by the CFPB, which has "created an unlevel playing field and a large risk to consumers."

10. The CFPB indicated it was investigating a company's reversal of a user policy

On October 12, 2022, Director Chopra discussed technology platforms on CNBC. Chopra stated that the CFPB ordered several technology platforms to provide information about people the platforms would remove or fine. Chopra's comments came after a mobile payment app allegedly posted a policy update saying the app would fine users for "promoting misinformation." The company indicated that it made the update in error. The Consumer Review Fairness Act prohibits businesses from using form contract provisions that bar consumers from writing or posting negative reviews online or threatening them with legal action if they do.

11. The CFPB moved to scrap the prior administration's innovation policies

On September 26, 2022, the CFPB issued a statement that it would allow its No-Action Letter and Compliance Assistance Sandbox policies to lapse on September 30, 2022. The CFPB further that no further applications will be accepted under the policies. The CFPB said it will, however, continue to entertain applications submitted under a third, more narrowly focused innovation policy for testing new disclosures.

12. The CFPB sued a company for charging membership fees

On October 18, 2022, the CFPB sued an organization for allegedly tricking people into enrolling into a subscription discount club. The CFPB alleged that the company automatically and unlawfully enrolled consumers into its discount club when consumers thought they were registering for a single event. The CFPB alleges that the company violated the Consumer Financial Protection Act by enrolling consumers in and charging them for discount club memberships without their knowledge, consent, or a full understanding of the material terms of the transaction. The CFPB also noted that that administrative agencies in Iowa and Vermont separately sanctioned the company for allegedly violating state consumer financial protection laws.

13. The CFPB published a bulletin regarding crypto complaints

On November 10, 2022, the CFPB released a complaint bulletin that highlights complaints the CFPB received related to crypto assets. According to the CFPB, consumers most reported being victimized by fraud, theft, account hacks, and scams. The CFPB also claimed that consumers had issues executing transactions and transferring assets. Many consumers had issues accessing funds due to platform failures, identity verification issues, security holds, and technical issues with platforms. The CFPB also indicated that poor customer service is a common theme across crypto-related complaints.

14. The CFPB sought public input on big tech payment platforms

On November 5, 2022, the CFPB issued a request for comment about big tech payment platforms, their acceptable use policies as well as their use of fines, liquidated damages provisions, and other penalties. The issuance related to an earlier request for comment on the same issues.

15. The CFPB finalized a rule regarding nonbank supervision

On November 10, 2022, the CFPB finalized changes to its nonbank supervision procedural rule. In April 2022, the CFPB amended its procedures to allow the CFPB to publicly release decisions indicating that supervision of a company is warranted. Under the amended procedures, the nonbank entity has an opportunity to provide the CFPB with input as to whether the decision should be withheld or redacted. The CFPB's changes and clarifications also indicate that the CFPB will not publish information that would fall within certain Freedom of Information Act exemptions. Likewise, the changes and clarifications extend the time for respondents to provide input related to public release determinations from 7 business days to 10 business days.

16. The CFPB obtained a $19 Million settlement related to a company allegedly offering fake high-yield bank accounts

On December 1, 2022, the CFPB settled a lawsuit with a company and its founder for allegedly offering fake high yield bank accounts. The CFPB alleged that the parties made several false, misleading, and inaccurate marketing representations in advertising health savings CD accounts. Specifically, the CFPB claims that the company took millions of dollars from at least 400 individuals who opened and deposited money into the company's advertised savings product. The CFPB claims that the company and its founder falsely represented that: customer deposits would originate loans for healthcare professionals, customer deposits would be secure, the company was a commercial bank, and the CD accounts had a record of paying high interest rates. The proposed settlement would require the Company and its founder to refund $19 Million to approximately 400 depositors, to stop engaging in deposit taking activities, and pay a $391,530 civil money penalty.

Still hungry?

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