

CFPB Bites of the Month - 2022 Annual Review - Small Dollar Lending

January 18, 2023 | [Justin B. Hosie](#) and [Eric L. Johnson](#)

In this article, we share a timeline of our monthly "bites" for 2022 applicable to small-dollar lending.

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 sent a response [letter](#) to advocacy groups who previously asked the CFPB to rescind its guidance on earned wage access products (EWA). In his response letter, 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 Chopra for clarification on the CFPB's stance on the products.

2. The CFPB launched its initiative to save money on "junk fees"

On January 26, 2022, the CFPB [announced](#) that it was launching an initiative to save Americans money on fees it called "junk fees." According to the CFPB, companies are increasingly charging fees that the CFPB believes conceal the true price of products from the competitive process. The CFPB's research has found several areas where back-end fees might obscure the true cost of a product and undermine a competitive market. According to the CFPB:

- In 2019, the major credit card companies charged over \$14 billion in punitive late fees.
- In 2019, bank revenue from overdraft and non-sufficient funds fees surpassed \$15 billion.

As a result, the CFPB sought input from the public through a Request for Information about experiences with fees associated with their bank, credit union, prepaid or credit card account, mortgage, loan, or payment transfers, including:

- Fees for things people believed were covered by the baseline price of a product or service
- Unexpected fees for a product or service
- Fees that seemed too high for the purported service
- Fees where it was unclear why they were charged

The CFPB indicated that it will use responses in order to craft rules, issue industry guidance, and focus supervision and enforcement resources related to reducing junk fees.

3. The CFPB is pursuing discrimination in consumer finance, beyond credit transactions, using its unfairness authority

On March 16, 2022, the CFPB announced changes to its supervisory operations to address discrimination, including in situations where fair lending laws do not apply. The CFPB indicated that in examinations, it plans to scrutinize discriminatory conduct related to advertising, pricing, and other areas to ensure that companies are testing for and eliminating discrimination. 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, under this new approach, 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 for evaluating UDAAPs, which notes that discrimination may meet the criteria for "unfairness."

The CFPB said it will examine for discrimination in all consumer finance markets, including credit, servicing, collections, consumer reporting, payments, remittances, and deposits. CFPB examiners will require supervised companies to show their processes for assessing risks and discriminatory outcomes, including documentation of customer demographics and the impact of products and fees on different demographic groups.

On September 29, 2022, the U.S. Chamber of Commerce, American Bankers Association, Consumer Bankers Association, and other organizations filed a complaint in the Eastern District of Texas against the CFPB. The plaintiffs claimed the CFPB exceeded its statutory authority when it revised its UDAAP exam manual in March. They also claimed that changes were arbitrary and capricious, and violated the Administrative Procedure Act's notice and comment requirements.

4. CFPB Director Chopra promises to rein in repeat offenders

On March 28, 2022, Director Chopra said that regulators face a problem stopping "large dominant firms" from repeatedly violating the law as some large institutions see laws as "mere expenses on their income statements."

According to Director Chopra, the CFPB plans to establish dedicated units in its supervision and enforcement divisions to hold repeat offenders and corporate recidivists accountable. The Director also said that the CFPB will also be looking at remedies that are more structural in nature, seeking "limits on the activities or functions" for firms with violations. This could include:

- Caps on size or growth
- Bans on certain types of business practices
- Divestitures of certain product lines
- Limitations on leverage or requirements to raise equity capital
- Revocation of government-granted privileges

Throughout 2022, several actions ultimately involved organizations involved in prior settlements with the CFPB.

5. The CFPB Issued a report on payday loan rollovers, state law, and payment plans

On April 6, 2022, the CFPB issued a report on payday loan rollovers, state level protections, and payment plans. The CFPB's report on payday loans addresses state-mandated payment plans offered by payday lenders at no additional cost to consumers. Sixteen state laws expressly provide payday loan borrowers with the right to a no-cost payment plan. In addition, some payday loan companies make payment plans available to consumers as part of industry best practices, but the report generally does not include data about those payment plans.

The report indicates that borrowers generally enter payday loan rollovers and pay related costs, instead of entering no-cost payment plans. The report also noted state payment plans vary substantially in those 16 states. The CFPB commented that lenders are "leaving borrowers in the dark" about payment plan options, and addressed state-by-state requirements to "offer" the payment plans. One of the CFPB's stated "key findings" indicated that the CFPB is not aware of studies about consumer awareness of payment plans.

6. The CFPB & NY AG sued a remittance provider

On April 21, 2022, the CFPB and New York Attorney General announced that they had filed a complaint against one of the largest remittance providers in the United States, alleging that the remittance provider systemically and repeatedly violated various consumer financial protection laws. The lawsuit claims the company stranded customers waiting for money and failed to promptly deliver funds to recipients. In 2009, 2012, and 2018, the same company had previously agreed to settlements with federal agencies. The complaint sought monetary relief for consumers, an injunction to stop future violations, and imposed civil money penalties.

7. The CFPB issued an advisory opinion on coverage of fair lending laws

On May 9, 2022, the CFPB published an advisory opinion confirming that the Equal Credit Opportunity Act (ECOA) bars lenders from discriminating against customers after they have received a transaction, not just during the application process. The advisory opinion states that ECOA continues to protect borrowers after they have applied for and received credit and that it requires lenders to provide "adverse action notices" to borrowers with existing credit.

8. The CFPB addresses credit models using algorithms

On May 26, 2022, the CFPB announced that it had published a Consumer Financial Protection Circular addressing adverse action notice requirements under the Equal Credit Opportunity Act (ECOA). The CFPB confirmed that federal anti-discrimination law requires companies to explain the specific reasons for taking adverse actions, even when they are relying on credit models using complex algorithms. The CFPB encouraged tech workers to provide information, and to visit the CFPB's Whistleblower Program webpage to learn more.

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

On June 15, 2022, the CFPB expressed concerns about the ways in which consumer reporting agencies planned to address buy now, pay later (BNPL) companies. Initially few BNPL lenders furnished information about consumers to the nationwide consumer reporting companies (NCRs). In recent announcements, the three largest NCRs each described plans to accept BNPL payment data. However, the CFPB cautioned that the NCRs plans varied, and that those variations could result in inconsistent treatment that will limit the potential benefits of furnished BNPL data. The CFPB said that when BNPL payments are furnished, lenders should furnish both positive and negative data. The CFPB appeared to believe that NCRs should adopt standardized BNPL furnishing codes and formats appropriate to the unique characteristics of the product. The CFPB indicated that it will monitor the progress in this area and invited consumers to submit complaints about both consumer reporting and BNPL products.

10, The CFPB rescinded special regulatory treatment for an earned-wage access company

On June 21, 2022, the CFPB issued an order terminating a company's "Sandbox Approval Order" related to its 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 in light of certain public statements the company made suggesting a CFPB endorsement of its products. Then, on June 21, 2022, the company notified the CFPB that it was planning to modify its earned-wage access product fee model, and requested termination. Read the termination order. The CFPB also noted that it has received requests for clarification regarding its advisory opinion on "earned-wage access" products and plans to issue further guidance soon to provide greater clarity concerning the application of the definition of "credit" under the Truth in Lending Act and Regulation Z.

11. The CFPB sued a payday lender related to no-cost repayment plans and withdrawals of consumers' funds

On July 12, 2022, the CFPB filed a lawsuit accusing a lender of concealing its free repayment plan options. According to the accusations, consumers on reminder calls went through a conversational "waterfall." Allegedly, the lender first told consumers about shorter grace periods. If the consumer rejected that first option, then consumers were then told about fee-based renewals. If the consumer rejected that second option, only then were consumers told about no-cost repayment plans. The CFPB's complaint does not address various ways and times that the lender may have actually informed consumers about its no-cost payment plan options. The CFPB also alleges the lender initiated 4 debit card withdrawals from some consumers when its authorization said it would only make 3 attempts. The Company was part of a 2014 consent order with the CFPB. The CFPB is seeking monetary relief, disgorgement, injunctive relief and civil money penalties.

12. 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 Buy Now, Pay Later (BNPL) offerings, embedded commerce, and integrated "super apps." According to the CFPB, these technologies have "the potential to streamline payments, facilitate commerce, and improve the user experience." But, the CFPB cautioned that 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 the report by noting that it will be proposing rules on "financial data rights," assessing BNPL to decide whether regulatory interventions are appropriate, and evaluating ways to protect consumers in real-time payments.

13. CFPB issued a circular about data security practices

On August 11, 2022, the CFPB issued a circular reminding regulators that financial companies violate federal law when they fail to safeguard consumer data. The circular provides guidance to other regulators, describing examples of circumstances in which organizations can be held liable for data security protocols. According to the circular, liability can arise for failing to implement multi-factor authentication, inadequate password management, and failing to update software in a timely manner.

14. A CFPB study addresses "Buy Now, Pay Later" transactions

On September 15, 2022, the CFPB released a report addressing the Buy Here, Pay Here industry. The report, "Buy Now, Pay Later: Market trends and consumer impacts," cautioned that consumers "may receive uneven disclosures and protections." Director Chopra commented that "Buy Now, Pay Later 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."

15. The CFPB sued an online lender for allegedly overcharging servicemembers and not permitting cancellation

On September 29, 2022, the CFPB filed a complaint against an online lender and 38 of its subsidiaries, for allegedly imposing illegal and excessive charges on servicemembers and their dependents. The CFPB alleges that the lender violated the Military Lending Act by charging more than 36% per year on loans to servicemembers and their dependents, through a combination of stated interest rates and monthly membership fees. The CFPB also alleges that the online lender required customers to join a membership program to access certain "low-APR" loans, and then did not allow the customers to cancel their memberships until they paid their loans.

16. CFPB Sues Company for Allegedly Charging Consumers Illegal "Junk" Membership Fees

On October 18, 2022, the CFPB filed a complaint against an organization for allegedly tricking people into enrolling into a subscription discount club. The CFPB's alleges that the company automatically and unlawfully enrolled consumers into its discount club, when they 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, have separately sanctioned the company for allegedly violating state consumer financial protection laws.

17. Federal Appeals Court Finds CFPB Funding Unconstitutional

On October 19th, a three judge panel of the U.S. Circuit Court of Appeals for the Fifth Circuit decided unanimously, that "Congress's decision to abdicate its appropriations power under the Constitution, *i.e.*, to cede its power of the purse to the Bureau, violates the Constitution's structural separation of powers." As a result, the court reversed the judgment of the district court, rendered judgment in favor of the trade associations suing the CFPB, and vacated a 2017 CFPB rule governing small-dollar lending.

18. CFPB Kicks Off Personal Financial Data Rights Rulemaking

On October 27, 2022, the CFPB released an outline of options and proposals aimed to strengthen consumers' access to, and control over their financial data. The CFPB indicated that this is a first step before issuing a proposed rule on data rights that would implement section 1033 of the Dodd-Frank Act. Under the proposals, the CFPB would require organizations to make a consumer's financial information available to them or to a third party at that consumer's direction.

19. CFPB Proposes Registry to Detect So-Called "Repeat Offenders"

On December 12, 2022, the CFPB proposed to start a registry of organizations it calls "repeat offenders." The registry would include organizations involved in prior consent orders with government agencies. This proposal would require certain nonbank financial firms to register with the CFPB when they become subject to certain local, state, or federal consumer financial protection orders. The CFPB says that the registry will help unify the efforts of consumer financial protection enforcers, as well as provide the increased transparency and coordination. Comments will be due in February of 2023.

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