CFPB Bites of the Month - 2023 Annual Review - Mortgage

January 23, 2024 | Joseph ("Jed") E. Mayk, Eric L. Johnson and Justin B. Hosie

In this article, we share a timeline of our monthly "bites" for 2023 applicable to mortgage along with some additional related information.

Bite 18: Advisory Opinion on Mortgage Comparison-Shopping Platforms

On February 13, 2023, the CFPB published in the *Federal Register* an advisory opinion on Digital Mortgage Comparison-Shopping Platforms and related payments to operators which discussed the application of RESPA Section 8 to such arrangements. According to the Bureau, such a platform receives a prohibited referral fee from a participant where: (1) the platform non-neutrally uses or presents information about one or more settlement service providers participating on the platform; (2) that non-neutral use or presentation has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, those settlement service providers (i.e., a "referral" activity); and (3) the operator receives a payment or other thing of value that is, at least in part, for that referral activity. The Bureau further advised that if an operator of such a platform receives a higher fee for including one settlement service provider compared to what it receives for including other settlement service providers participating on the same platform, that can be evidence of an illegal referral fee arrangement absent other facts indicating that the payment is not for enhanced placement or other form of steering.

Bite 17: Summer 2023 Supervisory Highlights on Loan Originators

In its Summer 2023 Supervisory Highlights, the CFPB opined that compensating loan originators differently based on whether a loan is brokered out to a third party or made by lender is a prohibited compensation arrangement based on loan product type under TILA. Examiners found instances where lenders brokered out certain mortgage products not offered in-house and paid the loan originator differently on that basis. The Bureau found that this violated TILA because a lender cannot pay different compensation to the same loan originator based on the terms of a transaction and a loan product is just a "bundle of particular terms." This marked the first time the CFPB formally addressed this compensation practice.

Bite 16: Director Chopra Delivered Remarks about Redlining at a DOJ Event

On April 19, 2023, Director Chopra spoke at a Justice Department Interagency event in

Newark, NJ to highlight efforts to combat modern-day redlining. Director Chopra stated that the CFPB has previously prioritized two types of modern-day redlining: (i) digital redlining, which includes algorithmic bias and technologies marketed as artificial intelligence and (ii) exclusionary conduct by mortgage lenders, including nonbanks. He discussed the CFPB's new focus on a third category - discriminatory targeting, also known as "reverse redlining." According to the CFPB, discriminatory targeting is the act of directing predatory products or practices at certain groups, neighborhoods, or parts of a community. Instead of viewing specific groups of people as inherently problematic, and therefore too risky to lend to, the Director said that companies engaging in discriminatory targeting see those same groups as prime for financial exploitation and credit predation. The CFPB cautioned that when a lender either excludes protected groups of consumers from lending or targets those consumers with harmful credit products or services, they violate the Equal Credit Opportunity Act and potentially other consumer financial protection and civil rights laws. He also discussed the CFPB's Statement of Interest, filed in the U.S. District Court for the Southern District of Florida in a case against a for profit college. In that case, the defendant allegedly targeted students to enroll in its nursing program based on race. According to Director Chopra, the filing emphasizes how the ECOA protects people from discriminatory targeting. Director Chopra noted that the CFPB would be working with the DOJ, federal agencies, and the states to hold lenders accountable for discriminatory targeting.

Bite 15: Junk Fees Supervisory Highlights Special Report

On March 8, 2023, the CFPB released the latest edition of its Supervisory Highlights, this time focused on junk fees. The CFPB addressed types of financial services including mortgage. Specifically, in mortgage servicing, the CFPB addressed excessive late fees, fees for unnecessary property inspections, and "fake" PMI charges.

Bite 14: CFPB Intends to Simplify and Streamline Mortgage Servicing

On June 15, 2023, the CFPB announced that it intended to simplify mortgage servicing. In the fall of 2022, the CFPB had sought public input into: (1) ways to reduce risks for borrowers struggling to make mortgage payments and (2) whether any of the features of pandemic-related forbearance programs could be used to automate and streamline long-term loss mitigation. The CFPB said that during the unemployment spike caused by the pandemic, it recognized that there were places where mortgage servicing rules could be revised to reduce unnecessary complexity. The comments received showed that consumers can face paperwork challenges that hurt both homeowners and servicers, and that the pandemic-related changes made it easier to accommodate borrowers quicker. Commenters also expressed concern that borrowers often incur servicing fees and experience negative credit reporting while waiting for their mortgage servicers to review their options, which can continue to harm borrowers after the loss mitigation options have been implemented. The CFPB said it would use this input to propose ways to simplify and streamline mortgage servicing rules in ways that will promote greater agility on the part of mortgage servicers in their response to borrowers.

Bite 13: CFPB Starting Mandated Review of Mortgage Loan Originator Rules

On March 10, 2023, the CFPB announced that it started its mandatory review of mortgage loan originator rules. Specifically, the CFPB sought public input into the economic impact of the mortgage loan originator rules on small mortgage companies. The originator rules cover those paid to arrange, negotiate, or obtain mortgage credit for their customers, such as mortgage lending companies, mortgage brokers, and loan officers. The current rules prohibit dual compensation and practices that could steer consumers to more expensive mortgages.

Bite 12: CFPB Issues Guidance to Protect Mortgage Borrowers from Pay-to-Play Digital Comparison-Shopping Platforms

On February 7, 2023, the CFPB issued an advisory opinion that companies violate the Real Estate Settlement Procedures Act (RESPA) when they steer mortgage shoppers to lenders who have agreed to pay referral fees instead of providing comprehensive and objective information about all available lenders. Under RESPA, it is illegal for companies and individuals, including digital comparison-shopping platforms, to receive kickbacks and referral fees in connection with a transaction involving a residential mortgage or other real estate settlement service. As mortgage rates have risen, the CFPB suggested that more consumers may be turning to these platforms looking for the best deal, and they expect the information to be comprehensive and objective. The advisory opinion describes how companies may violate RESPA when they coerce payments from mortgage professionals, unlawfully steer consumers, or engage in other illegal referral activities.

Bite 11: CFPB Releases Updates to Mortgage Servicing Exam Procedures

On January 18, 2023, the CFPB announced that it had released its updated procedures for examinations of mortgage servicers. The procedures are used for evaluating mortgage servicers' policies and procedures, assessing whether servicers are complying with applicable laws, and identifying risks to consumers related to mortgage servicing. The updates included guidance released since the last revision and addressed the ongoing use of pandemic-related forbearance tools. The updated procedures address focus areas from past Supervisory Highlights, fees that servicers charge borrowers (such as pay-by-phone fees), misrepresentations related to foreclosures, communications about homeowner assistance programs (including helping borrowers access the Homeowners Assistance Fund), as well as forbearances and other tools used during the pandemic are also covered. The CFPB said that it expects that streamlined loss mitigation options initiated during the pandemic will continue post-pandemic and that servicers will be expected to use all of the tools at their disposal to keep borrowers in their homes.

Bite 10: CFPB Issues New Guidance on Zombie Mortgages

On April 26, 2023, the CFPB issued new guidance on mortgages it calls "zombie" mortgages. These are mortgages in which the statute of regulations has expired, sometimes called "time barred debt" or "zombie debt." The CFPB claimed that debt collectors were attempting to collect on second lien mortgages over a decade after the homeowners defaulted. In prepared remarks, Director Chopra stated that many of these zombie mortgages date back to the leadup to the 2008 financial crisis, where many lenders offered 80/20 mortgages, which had a first lien loan for 80% of the value of the home and a second lien loan for the remaining 20% of the balance. Most lenders did not collect on those second mortgages, and instead sold them to debt collectors. The CFPB's advisory opinion explained that a covered debt collector who brings, or threatens to bring, a foreclosure action to collect a time-barred mortgage debt may violate the Fair Debt Collection Practices Act and its implementing regulation, Regulation F. Director Chopra said that the CFPB would be looking for covered debt collectors breaking the law, and that the CFPB would be working closely with state agencies to pursue offenders. FDCPA actions can be brought by private plaintiffs, the CFPB, and state attorneys general.

Bite 9: CFPB and Other Agencies Propose Guidance on Real Estate Valuation Reconsiderations

On June 8, 2023, the CFPB and other agencies proposed interagency guidance on real estate valuation reconsiderations. The CFPB, FDIC, Federal Reserve, NCUA, and OCC requested comments on proposed guidance addressing reconsiderations of value (ROV) for residential real estate transactions. ROVs are requests to an appraiser or another preparer of a valuation report to reassess the value of residential real estate. ROVs sometimes arise after a consumer provides information to a financial institution about potential deficiencies or other information that may affect the estimated value. The proposed guidance advises on policies that financial institutions could implement to address this consumer information. It also describes how financial institutions may create or enhance ROV processes while remaining consistent with safety and soundness standards, complying with applicable laws and regulations, preserving appraiser independence, and remaining responsive to consumers. The guidance also addresses ways financial institutions can mitigate risks in the collateral valuation process, including discrimination risk.

Bite 8: CFPB Releases Joint Letter Regarding Discrimination in Appraisal Standards

On February 14, 2023, the CFPB and other federal agencies sent a letter to The Appraisal Foundation (TAF), which is a private, nongovernmental organization that sets appraisal standards. The letter urged TAF to revise its draft Ethics Rule for appraisers to address federal prohibitions against discrimination. The agencies expressed concern about: (i) appraisers lacking awareness of these prohibitions, (ii) alleged discriminatory statements in appraisals, and (iii) disparities for communities and borrowers of color. This was the second time that the CFPB asked TAF to address appraisal bias, and the CFPB claimed that TAF appears reluctant to act. The CFPB noted that it will continue to work closely with other member agencies to address mis-valuation of properties owned or sold by families and communities of color.

Bite 7: CFPB Issues Statement and New Interim Rule on LIBOR transition

On April 26, 2023, various federal agencies issued a joint statement indicating that financial institutions should be transitioned away from LIBOR by June 30, 2023. In addition, on April 28, 2023, the CFPB issued its rule to facilitate the orderly wind down of

LIBOR. LIBOR had been used as a reference interest rate for various products such as adjustable-rate mortgages, reverse mortgages, home equity lines of credit, credit cards, and student loans. The agencies noted concerns that LIBOR's discontinuation may lead to problematic disclosures about rate calculations. The interim final rule made updates to the December 2021 interim rule intended to address enactment of the Adjustable Interest Rate (LIBOR) Act and implementing regulations from the Federal Reserve. Under the interim final rule, the CFPB conformed Regulation Z with the LIBOR Act by adding references to the replacement for the LIBOR index. The interim final rule was effective May 15, 2023.

Bite 6: Proposed Rule Addressing Automated Valuation Models

On June 1, 2023, the CFPB, FDIC, Federal Reserve, NCUA, FHFA, and OCC requested comment on a proposed rule to address the credibility and integrity of real estate valuation models. The agencies indicated that the rule is designed to regulate automated valuation models (AVMs), which are real estate valuation models made possible by advances in technology and the availability of larger property datasets. Under the proposal, the agencies would require policies, practices, procedures, and quality control standards designed to ensure the credibility and integrity of valuations. The agencies indicated that standards in the rule are intended to ensure a high level of confidence in the estimates produced by AVMs, help protect against the manipulation of data, seek to avoid conflicts of interest, require random sample testing and reviews, and promote compliance with applicable nondiscrimination laws. The CFPB noted that it is especially concerned that the AVMs may continue to reflect any bias or blind spots that existed in the data used to create these models.

Bite 5: CFPB's Complaint Against Mortgage Company Dismissed

On February 3, 2023, a federal court ruled against the CFPB in a case against a mortgage company. Back in 2020, the CFPB had filed a redlining complaint claiming that the mortgage company's advertisements violated the Equal Credit Opportunity Act ("ECOA") by discriminating against prospective credit applicants. The text of the ECOA only applies to applicants, but the CFPB's Regulation B, which implements the ECOA, extends discrimination protections to prospective applicants. The mortgage company moved for dismissal noting that the ECOA applies to applicants only, and the court for the Northern District of Illinois agreed. The court ruled that the CFPB's approach failed the first step of the two-step Chevron test, which is whether Congress has directly spoken to the precise question at issue. Because Congress had drafted the ECOA to apply to "applicants," and clearly and unambiguously defined that term, the court said that Congress had spoken to this precise question and therefore awarded no deference to the agency's expanded definition in Regulation B.

Bite 4: CFPB Sues Another Alleged "Repeat Offender"

On October 10, 2023, the CFPB announced that it filed a lawsuit in federal court against a mortgage company. The CFPB claimed that this company was a "repeat offender" as it entered a 2019 consent order with this company. According to the CFPB, this company allegedly submitted erroneous mortgage data, violating both the Home Mortgage

Disclosure Act ("HMDA") and the 2019 consent order. In a lawsuit against the company earlier this year, the CFPB sued the company for allegedly paying illegal kickbacks for referrals. The 2019 consent order concerned the company's HMDA reporting, after the CFPB claimed that the company misreported data about applicant race and ethnicity. Director Chopra said that the lawsuit demonstrated the CFPB's focus on "ending the cycle of misconduct by repeat offenders in the financial industry." The lawsuit alleges that the company's 2020 HMDA submission contained widespread errors across multiple data fields affecting nearly 20% of the company's mortgage loan applications. According to the CFPB, the 2019 consent order included a requirement that the company fix its deficient data practices, and the 2020 submission allegedly showed that they failed to do so.

Bite 3: CFPB Shuts Down Mortgage Loan Business for Alleged Repeat Offenses Against Military Families

On February 27, 2023, the CFPB announced that it had shut down and permanently banned a mortgage loan business from operating for alleged repeat offenses against military families. The CFPB claims that the mortgage lender disseminated millions of mortgage advertisements to military families that deceptively used fake U.S. Department of Veterans Affairs (VA) seals, the Federal Housing Administration (FHA) logo, and other language or design elements to falsely imply that the lender was affiliated with the government. The CFPB considered the lender a "repeat offender" based on an order involving the lender in 2015. The CFPB claims that the lender deceived borrowers about interest rates and key terms by illegally disclosing a simple annual interest rate more conspicuously than the annual percentage rate, advertising unavailable credit terms, and using the name of the homeowner's current lender in a way that could mislead consumers. The advertisements also allegedly misrepresented that the benefits were time limited and that military families could obtain VA cash-out refinancing loans without an appraisal. The advertisements also misrepresented the amount of monthly payments, the annual savings under the advertised loans, and the cash available in connection with the advertised loans. In addition to the permanent ban, the lender will pay a $1 million penalty that will be deposited into the CFPB's civil penalty fund.

Bite 2: CFPB Penalizes Two Companies for Alleged Kickbacks

On August 17, 2023, the CFPB penalized two companies for alleged kickbacks. The CFPB took action against a mortgage company and a real estate brokerage firm for actions the CFPB described as an illegal kickback scheme, violating the Real Estate Settlement Procedures Act. The CFPB alleged that the mortgage company provided real estate agents and brokers with numerous incentives, including cash payments, in exchange for referrals. The CFPB also claimed that the mortgage company violated federal law by paying for referrals through illegal marketing service arrangements, offering premium subscription services free of charge, and hosting and subsidizing company events and providing gifts. The CFPB ordered the mortgage company to stop providing anything of value to other entities in exchange for referrals and to pay $1.75 million to the civil penalty fund. The CFPB required the brokerage company to pay a $200,000 penalty.

Bite 1: CFPB Orders Large Bank to Pay $12 Million Penalty

On November 28, 2023, the CFPB announced that it had ordered a large bank to pay a $12 million penalty for violations of the Home Mortgage Disclosure Act. According to the CFPB's allegations, hundreds of loan officers at the bank failed to ask mortgage applicants certain demographic questions as required under federal law, and then falsely reported that the applicants had chosen not to respond. Over a three-month period, the loan officers reported that 100% of applicants chose not to provide their demographic data for a certain period. The CFPB also alleged that the bank failed to adequately oversee accurate data collection and ignored the known problem for years. The CFPB claims that this bank is a "repeat offender" based on other fines and penalties imposed since 2017.

We expect to see in 2024 a continued focus on fair lending in the mortgage space, including appraisal bias, redlining cases, and reverse redlining cases. This continues to be a major priority for the Biden Administration across various agencies - as evidenced by the interagency taskforce on appraisal bias. It has also been several years since the CFPB initiated a loan originator compensation enforcement action. The Bureau has issued several Supervisory Highlights on LO compensation practices over the past few years, and it would not be surprising to see an enforcement action this year.

Still hungry? Please join for our next CFPB Bites of the Month. Here is our lineup for 2024. If you missed any of our prior Bites, request a replay on our website.

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