

CFPB Bites of the Month - 2023 Annual Review - Small Dollar Lending, Lease-to-Own, and Alternative Financial Services

January 25, 2024 | [Eric L. Johnson](#) and [Justin B. Hosie](#)

In this article, we share a timeline of our monthly "bites" for 2023 applicable to the small dollar lending, lease-to-own, and alternative financial services industries. The Consumer Financial Protection Bureau (CFPB) and its director, Rohit Chopra, continued to propose guidance and rulemaking, initiated enforcement actions and lawsuits, and imposed penalties, as industry awaits a final ruling from the Supreme Court about the agency's future.

Bite 14: CFPB Publishes New Findings on BNPL Users

On March 2, 2023, the CFPB published a new report analyzing the financial profiles of Buy Now, Pay Later (BNPL) consumers. According to the CFPB, BNPL consumers are more likely to exhibit measures of financial stress than non-users. The CFPB also claims that BNPL users are more likely to use payday loans, pawn transactions, and bank account overdrafts. The CFPB says that this report debunks the idea that BNPL users don't have access to other forms of credit. The CFPB found that BNPL users have lower credit scores on average than non-users, are more likely to have a credit record in another account, are more likely to be delinquent by more than 30 days on other credit accounts, and have higher usage of other loan products. CFPB Director Chopra said the CFPB is "working to ensure that borrowers have similar protections and that companies play by similar rules."

Bite 13: CFPB Comment Letter Focused on Earned Wage Access

On December 1, 2023, the CFPB announced that it sent a comment letter to the California Department of Financial Protection and Innovation (DFPI) about the DFPI's earned wage advance proposal. The CFPB took the position that earned wage advances, also known as income-based advances, have long been part of what the CFPB calls the country's "consumer lending market." According to the CFPB, state agencies provide critical oversight of companies that provide these consumer financial products. The CFPB claimed that "by treating wage advance products as loans," the "DFPI's proposal takes a similar approach to federal law—the Truth in Lending Act and the regulation that implements it." The CFPB claimed that state agencies should ensure that EWA providers accurately and fully disclose what the CFPB called the "cost of credit." The CFPB said

that it plans to offer guidance on these products to clarify the application of federal law, noting that its previous advisory opinion on this topic had a "very narrow scope (that) should not be misrepresented."

Bite 12: Various Supervisory Highlights Report finds Violations and Address Junk Fees

On March 8, 2023, the CFPB released an edition of its Supervisory Highlights, focused on junk fees. The CFPB addressed various financial products including deposit accounts, auto finance, mortgage servicing, small dollar lending, and student lending. In that edition, the CFPB claimed that some small dollar lenders failed to disclose repossession and property retrieval fees. Later in the year, on July 26, 2023, the CFPB released another edition of its Supervisory Highlights, addressing UDAAP concerns. In the July edition, the CFPB claimed that some small dollar lenders unfairly and abusively prevented consumers from revoking their consent to collection communications. The CFPB also claimed that some small dollar lenders threatened wage garnishment and used unauthorized wage deduction documents. Another edition of the Supervisory Highlights, issued in October of 2023 also focused on junk fees.

Bite 11: CFPB Issues Guidance on Automatic Renewals Including Negative Option Subscription Fees

On January 19, 2023, the CFPB issued a new circular affirming that companies offering automatic renewal transactions such as "negative option" subscription services must comply with federal consumer protection laws. Negative option programs include services that automatically renew unless a consumer affirmatively cancels, and trial programs that charge a reduced fee for an initial period. Under these programs, sellers can interpret a consumer's silence or a failure to cancel an agreement as continued acceptance of an offer. The circular claims that these programs are especially harmful when paired with behavior the CFPB calls digital "dark patterns." According to the CFPB, digital "dark patterns" are design features used to deceive, steer, or manipulate users into behavior that is profitable for businesses but harmful to consumers. The CFPB indicated that negative option programs risk violating the Consumer Financial Protection Act's UDAAP prohibitions when they fail to disclose material terms clearly and conspicuously, fail to obtain consumers' informed consent, and mislead or impede consumers hoping to cancel. On a related note, the FTC has been very active recently with respect to automatic renewals. Back in 2021 the FTC had a published policy statement on the topic, in April of 2023, the FTC proposed changes to rulemaking on such transactions, and in November of 2023, an FTC action resulted in a company paying \$100 million to address issues related to cancellation difficulties for such transactions.

Bite 10: CFPB Issues Guidance to Address Abusive Conduct in Consumer Financial Markets

On April 3, 2023, the CFPB issued a policy statement explaining the federal prohibition on "abusive conduct" and summarizing a decade of CFPB activity. The CFPB noted that abusive conduct includes (1) obscuring important features of a product or service or (2) leveraging certain circumstances—like gaps in understanding, unequal bargaining power,

or consumer reliance—to take unreasonable advantage. The policy statement also describes how abusive conduct can arise from the use of what the CFPB calls "dark patterns," business models that set consumers up to fail or involve kickbacks, self-dealing, and profiteering from captive customers.

Bite 9: CFPB Proposes Rule to Establish Public Registry of Terms and Conditions in Form Contracts

On January 11, 2023, the CFPB announced that it was proposing a rule to establish a public registry of terms and conditions used in form contracts. In December of 2022, the CFPB had previously proposed rulemaking to establish a "registry to detect repeat offenders." The proposed rule on terms and conditions would include those terms provided in "take it or leave it" form contracts that claim to limit consumer rights. The proposed rule would apply to nonbanks subject to CFPB supervisory jurisdiction, including payday lenders, private student lenders, as well as mortgage companies. Larger participants operating in student loan servicing, automobile financing, consumer reporting, consumer debt collection, and international remittances would also be subject to the proposed rule. Examples of terms and conditions that would be included in the registry are those that: waive servicemembers' legal protections, "undermine" credit reporting rights, limit lender liability for bank fees caused by a lender's repeated debit attempts and mislead consumers by using unenforceable waivers in mortgage contracts. In addition to the terms and conditions published on the registry, the CFPB would also require publication of company information such as the company's legal name, state of incorporation or organization, headquarters, principal place of business addresses, and unique identifiers. The CFPB will also require additional information as provided in the proposed rule.

Bite 8: CFPB Sues Individuals for Allegedly Hiding Funds to Avoid Penalties

On April 5, 2023, the CFPB announced that it was suing two people for hiding funds to avoid CFPB penalties. The CFPB alleges they hid money owed as restitution and penalties for illegal lending activities. The CFPB indicated that the individuals sought to avoid paying more than \$40 million they owed from a 2015 lawsuit. That lawsuit involved alleged deception and other allegations related to an online lending company, operated by one of the individuals, and resulted in an agency order to pay over \$38 million in restitution, a civil money penalty for the organization of \$7.5 million, and a civil money penalty of \$5 million for the CEO. The lender and the CEO lost an appeal, and afterwards allegedly did not comply with the order. The CFPB alleges that the CEO and his wife, the two named individuals in the action, fraudulently transferred funds they should have paid to the CFPB to revocable trusts to use for personal and business use.

Bite 7: CFPB Sues an Installment Lender for "Loan-Churning"

On August 22, 2023, the CFPB announced a lawsuit against an installment lender. The CFPB sued the installment lender for alleged illegal "loan-churning." This includes practices that the CFPB claims harvested hundreds of millions of dollars in loan costs and fees. According to the CFPB's allegations, the company identified struggling borrowers and then encouraged them to refinance. The CFPB claims that the company has a

business strategy to get customers to refinance loans early and often. The CFPB also alleges that the company incentivized employees to push refinancing, focused on customers' likelihood to refinance instead of their ability to repay, and falsely marketed refinances as fresh starts. The CFPB brought this lawsuit under its UDAAP authority, claiming that these practices are unfair and abusive. The CFPB's suit seeks to end the company's practices, gain redress for consumers, and require the company to pay a monetary penalty.

Bite 6: CFPB Sues Lease-to-Own Company for Deceptive Acts and Practices

On July 19, 2023, the CFPB announced that it had filed suit against a lease-to-own company, alleging that the company had deceived consumers, obscured the terms of its agreements, and made false threats. According to the lawsuit, the lease-to-own company used deceptive advertising practices to lock consumers into expensive agreements. The advertisements allegedly promoted a "100 Day Cash Payoff," but the CFPB claimed that the company automatically entered into a 12-month plan. The CFPB also claimed the company obscured the terms and conditions of its agreements, alleging that merchants submitted agreements without customer review, requiring consumers to pay fees before seeing their terms. The CFPB also claimed that the company made false and misleading statements to consumers about their rights, leading consumers to believe they could not terminate their agreement or surrender merchandise. Finally, the CFPB claims the company employed illegal debt collection practices by misrepresenting consumers' payment terms and threatening actions - including threats to customers who were not in default. The CFPB is seeking penalties, monetary relief for consumers, and an end to the allegedly illegal practices.

Bite 5: CFPB Settles with a Leasing Company

On September 11, 2023, the CFPB and 41 states, plus the District of Columbia settled an action involving a leasing company, requiring payment of \$36 million in penalties and relief. The CFPB had alleged that the company tricked consumers into expensive leasing agreements by concealing the contract terms and costs, as well as failing to provide legally required disclosures. The CFPB alleged that in addition to concealing the terms of the lease agreements and failing to provide the disclosures required by Regulation M, the company trapped consumers with unreasonable return practices. The CFPB's order required the company to release consumers from existing agreements, which represented approximately \$33.6 million in released payments, pay an additional \$2 million penalty to the civil penalty fund and settling states, and permanently cease leasing activities.

Bite 4: CFPB Orders Vehicle Title Lender to Pay \$10 Million Penalty

On February 23, 2023 the CFPB announced a Consent Order involving a vehicle title lender. The CFPB claims that the company (i) extended credit at a rate in excess of the Military Lending Act's cap, (ii) attempted to alter consumer information to hide activities, and (iii) collected non-file insurance fees without obtaining non-file-insurance coverage. The CFPB called the company a "repeat offender" due to a 2016 Consent Order. The order requires payment of more than \$5 million in consumer relief and a \$10 million

penalty. In addition to the monetary penalties, the company must maintain robust internal controls, conduct testing to address potential violations, and report findings directly to the company's chief officers. The Company denies the factual and legal allegations, noting they have not been proven, and noting that it has complied with all prior direction from the CFPB.

Bite 3: CFPB Fines Online Lender \$15 Million

On November 15, 2023, the CFPB announced that it fined an online lender \$15 million, claiming that the company was a "repeat offender." The CFPB claimed the lender withdrew funds from customers' bank accounts without permission, made deceptive statements, and cancelled loan extensions. The CFPB previously fined the lender \$3.2 million in 2019 and ordered it to cease alleged illegal activities. According to the CFPB's allegations, the lender withdrew funds from consumer accounts without express informed consent, violating the 2019 order, and in some circumstances used bank account information it had purchased from online lead generators, overwriting the bank account information that borrowers had authorized. The company also allegedly granted loan extensions but then cancelled them, and instead debited consumer accounts for the full loan payment. In addition to the penalty, the CFPB banned the lender from making certain consumer loans. The CFPB is requiring the company to refund money to consumers, and tie executive compensation to the company's compliance with federal consumer financial protection laws.

Bite 2: CFPB Orders Installment Lender to Pay Large Settlement

On May 31, 2023, the CFPB ordered an installment lender to pay \$20 million for alleged deceptive sales practices. According to the CFPB's claims, the lender expected its employees to upsell add-on products to borrowers on every loan, and incentivized employees to push add-on products, even when consumers had already declined the products on previous loans. Allegedly, salespeople could be fired for failing to sell enough add-on products. The CFPB also claims that the lender failed to refund interest charged to 25,000 consumers within a "full refund period" and deceived borrowers about their need to purchase add-on products to receive a loan. The lender will pay \$10 million to consumers and an additional \$10 million penalty to the CFPB's civil penalty fund. The CFPB will also require the lender to adjust its policies to make cancellation of add-on products easier, double the period in which a consumer can cancel an unused add-on product without cost (from 30 to 60 days), and include interest in refunds after add-on product cancellations at any time.

Bite 1: The CFPB Constitutionality Challenge

On July 3, 2023, small dollar lending trade associations filed a brief, asking the Supreme Court to affirm a Fifth Circuit Decision, which held that the CFPB's funding mechanism violated the Appropriations Clause of the U.S. Constitution. The Supreme Court heard arguments on October 3, 2023 - audio can be downloaded here, and a transcript can be read here. Briefs and related filings can be downloaded here. The brief by the trade associations argued that as currently structured, the CFPB decides the amount of the CFPB's annual funding, violating the Appropriations Clause, since the CFPB directly

requisitions funds from the Federal Reserve Board in the amount requested by the Director. The trade associations argued that the original meaning of the term "appropriation" was a specific sum, and that therefore the Appropriations Clause requires, at a minimum, that Congress must determine the total amount of funding itself. A decision in the case is expected in early 2024.

We expect in 2024 that the CFPB will continue to take action involving small dollar lenders, lease-to-own companies, and alternative financial service providers. The CFPB will likely publish Guidance on Earned Wage Access in the beginning of 2024. The CFPB is also likely to initiate the process for enforcement of its long-awaited rulemaking on payday, title, and high-cost installment loans, sometimes called the "Payday Rule." The CFPB's guidance can be found [here](#). Settlements on lease-to-own and small dollar lending actions are also likely to emerge throughout the year, resulting in fines and penalties, and potentially causing shifts in servicing and collection practices - particularly related to terms, cancellations, payment plans, and off-ramps.

Still hungry? Please join us 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.

Hudson Cook, LLP provides articles, webinars and other content on its website from time to time provided both by attorneys with Hudson Cook, LLP, and by other outside authors, for information purposes only. Hudson Cook, LLP does not warrant the accuracy or completeness of the content, and has no duty to correct or update information contained on its website. The views and opinions contained in the content provided on the Hudson Cook, LLP website do not constitute the views and opinion of the firm. Such content does not constitute legal advice from such authors or from Hudson Cook, LLP. For legal advice on a matter, one should seek the advice of counsel.

SUBSCRIBE TO INSIGHTS

HUDSON COOK

Hudson Cook, LLP is a national law firm representing the financial services industry in compliance, privacy, litigation, regulatory and enforcement matters.

7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

hudsoncook.com

© Hudson Cook, LLP. All rights reserved. Privacy Policy | Legal Notice
Attorney Advertising: Prior Results Do Not Guarantee a Similar Outcome

