

CFPB Bites of the Month - February 15, 2023 - "Every Compliance Rose Has Its Thorns"

February 17, 2023 | [Eric L. Johnson](#) and [Justin B. Hosie](#)

In this month's article, we share some of our top "bites" for the prior month covered during the February webinar.

Bite #10: CFPB Reports that Banks' Overdraft/NSF fee Revenue Declined Significantly Compared to Prior Year and Pre-Pandemic Levels

On February 7, 2023, the CFPB [announced](#) that it had released a report on overdraft and NSF fees collected by banks since 2019. According to the report, overdraft and NSF fee revenue was lower in 2020 and early 2021 than it was before the pandemic. The CFPB attributes the lower rates of overdraft and NSF fees to federal stimulus checks that pushed up checking account balances. While the overdraft and NSF revenue began to rise again in late 2021 after the stimulus payments ended, it's been decreasing ever since. The CFPB attributes this more recent decline to changes in bank policies.

Since late 2021, many banks have announced changes to their overdraft policies, and these changes were expected to reduce this kind of revenue. One national bank reduced its overdraft fee to \$10, and experienced a 69.3% decline in overdraft/NSF fee revenue. Another national bank virtually eliminated overdraft and NSF fees, and saw a 98.1% decline in overdraft/NSF fee revenue. According to the report, bank overdraft/NSF fee revenue is down 43% in the third quarter of 2022 over the third quarter of 2019, suggesting that banks will see \$5.1 billion less in fee revenue on an annualized basis. The CFPB claims it has not seen a clear correlation between declines in overdraft/NSF fee revenue and increases in other fee revenue.

Bite #9: CFPB Finds 33% Decline in Collections Items on Consumer Credit Reports

On February 14, 2023, the CFPB [released](#) a report that showed a one-third drop in the total number of collections tradelines on credit reports, from 261 million tradelines in 2018 to 175 million in 2022. The share of consumers who had any collections tradelines on their credit report also dropped and is down by 20% in the same time frame. The CFPB indicated that reductions may be partially due to a strong labor market and to emergency pandemic-related programs, but that the decline was also driven by fewer reports by the types of debt collectors who primarily collect on medical bills.

The CFPB's market monitoring indicated that these contingency-fee-based debt collectors are moving away from furnishing their information to credit reporting companies. Medical debt may be more difficult to verify, and the CFPB's data integrity concerns may have made these collectors unsure of their ability to comply with the Fair Credit Reporting Act. Additionally, the nationwide consumer reporting agencies announced upcoming changes to medical collections reporting that will remove amounts less than \$500 and paid medical collection tradelines from consumer reports, which will further reduce the total number of tradelines reported.

Bite #8: CFPB Addresses Credit Score Transitions During the COVID-19 Pandemic

On January 25, 2023, the CFPB posted information about credit scoring during the pandemic. In short, the CFPB said that pandemic related financial policies lead to increased credit scores. During the pandemic, the CFPB says the distribution of credit scores shifted upwards, suggesting that mortgage forbearances, the student loan repayment pause, and federal cash transfers improved financial well-being for some consumers. According to the CFPB, 43% percent of consumers with subprime credit scores moved up at least one credit tier during the pandemic, whereas in the 10 years beforehand, only 37% percent moved up at least one tier.

Transitions upwards out of the Deep Subprime and Subprime tiers also increased during the pandemic, and downward transitions fell. Only 74% of Deep Subprime consumers remained in that tier after a year, compared with 79% in pre-pandemic years. Near-Prime, Prime and Superprime borrowers were also less likely to transition to a lower credit score tier during the pandemic, and more likely to move upwards. The CFPB cautioned that while increased credit scores help more people access lower-cost credit, the rapidly increasing cost of goods may cancel out the benefits of higher scores.

Bite #7: CFPB Seeks Input on Consumer Credit Card Market

On January 24, 2023, the CFPB issued a request for information, seeking public feedback on how the consumer credit market is functioning and on consumer experiences with credit cards. The CARD Act directs the CFPB to undertake a comprehensive review of the credit card industry to help determine whether adjustments are needed and report its findings to Congress. The CFPB is inviting consumers, credit card issuers, industry analysts, consumer groups, and the general public to submit information by April 24, 2023. The CFPB asked for feedback on the terms of credit card agreements and the practices of card issuers, effectiveness of disclosures, adequacy of protections, cost and availability of consumer credit cards, safety and soundness of credit card issuers, use of risk-based pricing for consumer credit cards, and consumer credit card product innovation. The CFPB also issued market-monitoring orders to various credit card issuers, seeking information on their practices related to applications and approvals, debt collection, and digital account servicing.

Bite #6: CFPB Issues Guidance on Negative Option Subscription Fees

On January 19, 2023, the CFPB issued a new circular affirming that companies offering

"negative option" subscription services must comply with federal consumer financial protection law. Negative option programs include subscription services that automatically renew unless a consumer affirmatively cancels, and trial programs that charge a reduced fee for an initial period and then automatically raise the fee. Under these programs, sellers can interpret a consumer's silence or a failure to cancel an agreement as continued acceptance of the offer. The circular claims that these programs are especially harmful when paired with behavior the CFPB calls "dark patterns." According to the CFPB, digital "dark patterns" are design features that are used to deceive, steer, or manipulate users into behavior that is profitable to the company, but harms consumers or is contrary to their intent. The CFPB stated that negative option programs risk violating the Consumer Financial Protection Act's prohibitions on unfair, deceptive, or abusive acts and practices when they fail to disclose material terms clearly and conspicuously, fail to obtain consumers' informed consent, and mislead or impede consumers wishing to cancel.

Bite #5: 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 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 #4: 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), and forbearances and other tools used during the COVID-19 national emergency 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 the tools at their

disposal under the temporary flexibilities to keep borrowers in their homes.

Bite #3: CFPB Proposes Rule to Limit Credit Card Late Fees to \$8

On February 1, 2023, the CFPB announced that it was proposing a rule to limit credit card late fees to \$8. The CFPB says that this change will curb excessive late fees and put an end to adjustments based on inflation. The Federal Reserve had previously allowed late fees to rise based on inflation, and they are up to \$30 for an initial late payment and \$41 for subsequent late payments. According to CFPB estimates, those amounts are 5 times higher than costs actually incurred for late payments. Instead of adjustments based on inflation, the CFPB will monitor market conditions and make adjustments as necessary. The proposal would also cap late fees at 25% of the minimum payment, which the CFPB says better aligns with Congress's intent to curb late fees to "reasonable and proportional" amounts. The proposal also seeks comments on other potential changes to the current regulations, including whether a longer grace period should be mandated and whether these changes should apply to all credit card penalty fees.

Bite #2: 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. It is currently unknown whether the CFPB will appeal to the Seventh Circuit.

Bite #1: Supreme Court Receives Briefings for Certiorari on CFPB Funding Case

As we've discussed during prior Bites sessions, a panel ruling last October by the Fifth Circuit Court of Appeals has put the future of the CFPB in, when it held that the CFPB's funding mechanism violates the Constitution. The CFPB submitted a petition for certiorari, seeking Supreme Court review of that decision this term, after filing a brief with the Court earlier this month. The briefing on the cross-petition for certiorari filed by the trade association involved in the original suit with the CFPB was also distributed; the association is urging the Court, if it grants certiorari, to hear the case next term. The CFPB's reply brief restated its arguments as to why the Fifth Circuit's decision was incorrect and attempts to rebut the association's arguments. The association's reply brief restated its arguments for why the CFPB's rulemaking on payday, title, and high-cost installment loans could be vacated on alternative grounds. The Supreme Court will

consider the certiorari petition and cross-petition at its conference on February 17, 2023.

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