

CFPB Bites of the Month - March 2024 - Here Comes the Sun and the CFPB

March 29, 2024 | [Justin B. Hosie](#), [Eric L. Johnson](#) and [Laura J. Bacon](#)

In this month's article, we share some of our top "bites" covered during the March 2024 webinar.

Bite 10: CFPB Issues Statement on Privacy and Personal Data

On February 28, 2024, the CFPB issued a statement on privacy and personal data, responding to an executive order President Biden issued the same day. President Biden's executive order imposed various requirements on the Department of Justice and Homeland Security, as well as other agencies, all intended to protect Americans' sensitive personal data from countries of concern. The Executive Order specifically encouraged the CFPB to consider taking steps to protect Americans from data brokers that are illegally assembling and selling extremely sensitive data, including that of U.S. military personnel. The CFPB indicated that consistent with the executive order and the Fair Credit Reporting Act, it will propose rules to limit activities of data brokers, including those that sell personal data to overseas entities. CFPB Director Rohit Chopra released a statement saying that the executive order is a reminder of the urgent need to protect the personal data of Americans, and that the CFPB will propose new rules to safeguard families and national security.

Bite 9: Director Chopra's Remarks at Financial Data Summit

On March 13th, Director Chopra spoke at the Financial Data Exchange Global summit to discuss the CFPB's goal to shift the country towards open banking. He said that it is widely known that the United States has a "clunky system" when it comes to switching financial service providers and gave the example that moving a checking account involves resetting direct deposits and recurring bill payments, printing new checks, and obtaining a new card device. According to Director Chopra, this clunky system is the reason the largest banks maintain their depositor base even though they have not changed their rates. Chopra said that open banking will involve less red tape and allow for more seamless switching between institutions. He noted that the CFPB has proposed rules to serve as a key foundation in the shift towards open banking. Director Chopra went on to address growing discussion about how to set relevant industry standards without micromanaging or dictating prescriptive technical details. He concluded his remarks by recommending that financial institutions prepare now, before the CFPB finalizes its rulemaking this fall.

Bite 8: Director Chopra Submits Letter on Appraisal Foundation

On March 18, 2024, Director Chopra submitted a public letter to other federal financial regulators after a recent hearing hosted by the Appraisal Subcommittee of the Federal Financial Institutions

Examination Council (FFIEC). The letter concerned the Appraisal Foundation, which is a not-for-profit corporation that sets qualifications and standards for appraisers. Congress established the FFIEC's Appraisal Subcommittee in 1989 to monitor and review the Appraisal Foundation. Last year, the Subcommittee started a series of hearings focused on appraisal bias. Following a hearing on February 13th, Director Chopra claimed that the Appraisal Foundation serves as a lawmaking body but is not accountable to the public or subject to competitive market forces. Director Chopra alleged deficiencies in the foundation's conflict of interest policies, an insular governance structure that favors private interests, and a lack of transparency. Director Chopra stated that the foundation plays a controlling role in the key issues that may contribute to appraisal bias.

Bite 7: CFPB Weighs in on State UDAAP Laws

On March 19, 2024, the CFPB announced that it wrote a letter to New York Governor Kathy Hochul and other state leaders highlighting the importance of banning abusive conduct. Legislative reforms in New York would expand the state's consumer protection laws to address abusiveness, and in its letter, the CFPB indicated that this ban would be an important tool in the state's arsenal. According to the CFPB, the Consumer Financial Protection Act empowers state attorneys general, state regulators, and certain banking regulators to address consumer protection laws.

Bite 6: CFPB Asks for Public Input on Closing Costs and Fees

On March 8, 2024, the CFPB announced that it is seeking consumer input and market research to better understand how closing costs impact households and families. According to the CFPB, total loan costs for mortgage loans, which include origination fees, appraisal and credit report fees, title insurance, discount points, and other fees rose sharply, increasing by 21.8% on home purchase loans from 2021 to 2022, to a median amount of nearly \$6,000. The CFPB said that these fixed costs do not fluctuate based on loan amount, and therefore have an outsized impact on borrowers with smaller mortgages. According to the CFPB, high closing costs are increasing due to a lack of competition in the market. The CFPB noted that it will continue to analyze data and consumer input, which it may use to issue rules and guidance, while continuing to use its supervision and enforcement tools in this industry.

Bite 5: CFPB Issues New Guidance on Comparison Shopping

On February 29, 2024, the CFPB issued a new Circular explaining how comparison-shopping tools may violate consumer protection laws when they steer consumers due to incentives like "kickbacks." According to the CFPB, consumers often encounter manipulated results or practices the CFPB calls "digital dark patterns" when using comparison-shopping tools for financial services. The CFPB claims that manipulated results appear because some providers pay financial kickbacks, sometimes referred to as "bounties" to create the lists of results that consumers see. According to the Circular, comparison-shopping tools may violate the federal prohibition on abusive conduct, because these comparison sites may take "unreasonable advantage" of consumers relying on the comparison-shopping tool to act in their interests.

Bite 4: CFPB and FTC Write Amicus Brief in Mortgage Case

On February 27, 2024, the CFPB announced that it joined the FTC in writing an amicus brief in an appeal case, arguing against fees that the agencies characterized as "unlawful junk fees." In the original case, two mortgage borrowers separately sued their servicer over fees charged for making telephone and online payments. Allegedly, the creditor did not disclose those fees in the credit agreement, and

applicable law did not expressly authorize the fees. The borrowers argued that the Fair Debt Collection Practices Act prohibits charging fees of this type. After the borrowers won, the servicer appealed to the Eleventh Circuit, arguing that the FDCPA's protections do not apply to such fees, and that the borrowers agreed to the fees upon payment. The CFPB and FTC argued that the FDCPA applies to all fees related to the collection of a debt, and that servicers can only charge fees that lenders previously disclosed in the credit agreement or are expressly authorized by law. According to the agencies, this interpretation aligns with Congressional intent.

Bite 3: CFPB Orders Federal Supervision for Installment Lender

On February 23, 2024, the CFPB announced that it had published an order establishing supervisory authority over a national installment lender, using the authority granted to the CFPB under the Dodd-Frank Act. According to the CFPB, Congress gave the agency the authority to supervise *nonbanks* whose activities the CFPB has reasonable cause to determine pose risks to consumers. Back in 2022, the CFPB identified that it was failing to conduct oversight using that legal authority. Afterwards, the CFPB began to use this "dormant" authority and finalized its nonbank supervision procedural rules in November of 2022. When the CFPB issues a notice of a supervisory examination to an organization, the organization can either consent to supervision or contest the notice. The supervisory designation order in this case ("Order") is the first one that the CFPB is conducting in a contested manner. In the Order, the CFPB claims it has "reasonable cause" to find that the lender's activities constitute a risk to consumers, and addresses its interpretation of the "reasonable cause" standard, the meaning of "risk" under the statute, and the use of unverified consumer complaints on the CFPB's portal. The Order specifies that the CFPB does not need to determine that an entity has violated federal laws or regulations to determine that the entity poses risks to consumers. Finally, the Order also notes that the CFPB can rely on consumer complaints it receives in making a risk-based supervision determination.

Bite 2: CFPB Issues Final Rule on Credit Card Late Fees

On March 5, 2024, the CFPB announced that it finalized a rule to cut credit card late fees for large card issuers, a move that the CFPB says will save consumers more than \$10 billion annually. In 2009, the CARD Act banned credit card companies from charging excessive penalty fees. In 2010, the Federal Reserve Board issued an implementing regulation, stating that under the CARD Act, banks could only charge fees to recover costs associated with a late payment, with safe harbor amounts that would adjust with inflation. According to the CFPB, these safe harbor amounts have "ballooned" to \$30 for a first late payment and \$41 for subsequent late payments, even though credit card companies have moved to cheaper forms of payment processing. The new rule lowers the immunity provision fee to \$8 for large card issuers and eliminates the automatic annual inflation adjustment. Instead, the CFPB will monitor market conditions and claims it will adjust the threshold. The rule provides that covered issuers can charge higher fees if they can show they are necessary to cover costs. The CFPB says this new rule is part of a continued effort to address problems and foster competition in the credit card market.

Bite 1: CFPB Sued Over Credit Card Late Fee Cap Rule

On March 7, 2024, several industry groups sued the CFPB over the credit card late fee rule. Banking groups and trade organizations sued the CFPB, asserting that the new rule capping credit card late fees punishes consumers who pay on time. According to the plaintiffs, the CFPB exceeded its authority and ignored Congressional intent. The plaintiffs note that Congress intended the fees to be high enough to deter late payments, ensure accountability, and compensate card issuers for the costs to process late

payments. The complaint states that the new rule will cause irreparable harm through losses and costs, including the costs to service accounts that issuers would have never opened with this late fee cap, and will push the associated servicing costs on to all card holders, including those who have never made a late payment. The CFPB promised to defend the rule, saying that it will save consumers significant money and close a loophole that has turned late fees into a major revenue stream, and characterized late charges as "junk fees." The CFPB also said that the plaintiffs engaged in "forum shopping" when they brought their case in the Northern District of Texas. The judge presiding over the case ordered the parties to submit briefs addressing their positions on the appropriate venue.

Extra Bite: FTC Updates Telemarketing Sales Rule

On March 7, 2024, the FTC announced an amendment to the Telemarketing Sales Rule, extending the rule to business-to-business calls. The TSR has been in place since 1995, and it applies to nearly all telemarketing activities, including calls that originate in the United States and calls made internationally to American consumers. The FTC says that it regularly reviews the rules it enforces to ensure that they are keeping up with advances in technology. The new final rule expands prohibitions against misrepresentations to include business to business telemarketing and revises the recordkeeping requirements for telemarketers. These recordkeeping changes include a requirement to maintain "call detail records" - which includes the phone number that placed and received each call, which the FTC says will help cut down on abuses that arise from spoofing or faking the calling number. The proposed additional change will extend the TSR to cover inbound telemarketing calls from consumers to technical support services, which the FTC says will help fight against scams that often start with a call to a consumer, or a pop-up notification, with a fraudulent warning that their computer is infected.

Extra Bite: FTC Settles Deception Case

On March 18, 2024, the FTC announced that two companies have agreed to settle with the agency over charges they made false promises to small businesses who were trying to use the Paycheck Protection Program during the COVID-19 pandemic. Under the settlement terms, one company will pay \$33 million and the other will pay \$26 million, in what the FTC said were the largest damages amounts ever secured by the agency under Section 19 of the FTC Act. Both companies are also subject to injunctions preventing them from making future misrepresentations. The FTC alleged that one of the companies deceptively advertised that consumers' emergency loan applications would be processed in an average of 10-14 business days when the average processing actually took well over a month, and ignored repeated, urgent pleas by the applicants to withdraw their applications, which prevented these consumers from obtaining the emergency funds elsewhere. The other company allegedly advertised that small businesses and gig workers would successfully get PPP funding through its program, even though more than 60% of applications never resulted in funding. The FTC indicated that the company also made representations about the availability of helpful customer service that never materialized.

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