

## CFPB Bites of the Month - May 2023 - May I Have Another, CFPB

May 19, 2023 | [Justin B. Hosie](#), [Eric L. Johnson](#) and [Laura J. Bacon](#)

In this month's article, we share some of our top "bites" for the prior month covered during the May 2023 webinar.

### Bite 10: Director Chopra Released Statement on Restoration of Oversight Council's Authority

On April 21, 2023, Director Chopra released a statement regarding the Financial Stability Oversight Council's ("FSOC") proposed guidance for designating nonbank financial companies as systemically important financial institutions ("SIFIs"). Director Chopra described the proposed analytic framework for assessing risks to U.S. financial stability, indicating the proposal would restore the FSOC's most important tool to prevent future meltdowns and bailouts in what he referred to as the "shadow banking sector." He stated that one of the key lessons of the 2008 financial crisis was the lack of attention paid to systemically important financial institutions that were not traditional commercial banks. Director Chopra said that due to "regulatory amnesia," the FSOC has not been able to use its authority to designate nonbanks as "systemically important," preventing the FSOC from subjecting these nonbanks to stronger supervision and financial stability safeguards. He further said that FSOC currently has no firms on its roster of SIFIs under this core authority. The FSOC's Proposal was published in the Federal Register on April 28th and the comment period expires on June 27.

### Bite 9: Director Chopra Delivered Remarks at 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 8: CFPB and Federal Partners Released Joint Statement on Automated Systems

On April 25, 2023, the CFPB, DOJ, FTC, and EEOC released a joint statement outlining a commitment to fairness, equality, and justice. The agencies indicated that they would use their authority to protect consumers from discriminatory outcomes that can arise when financial institutions make decisions using AI. The CFPB focused on its work addressing what it calls "black box algorithms," algorithmic marketing and advertising, abusive use of AI, digital redlining, and repeat offenders' use of AI technology. The CFPB also highlighted its whistle-blowing process for tech workers, and encouraged engineers, data scientists, and others to report potential discrimination and other misconduct. The CFPB also indicated that it plans to release a white paper addressing chatbots and the way they allegedly interfere with consumers' ability to interact with financial institutions.

#### Bite 7: CFPB Issues Report on Medical Credit Cards

On May 4, the CFPB issued a report on medical credit cards and other financing plans for medical expenses. The CFPB reported on the growing number of financing mechanisms for families and individuals who have medical expenses, claiming that financial companies are creating new products that are replacing the low- or no-cost informal payment plans that were once commonly offered to patients directly by their medical providers. The report indicates that medical credit cards and loans were once restricted to paying for elective procedures. But, in recent years, these products have been increasingly offered for basic medical treatment and emergency health care. The report states that these specialty products are typically more expensive for patients than other forms of payment, with interest rates often reaching above 25%. According to the report, consumers have used specialty medical credit cards or loans with deferred interest periods to pay for almost \$23 billion in healthcare expenses for more than 17 million medical purchases from 2018 to 2020 and paid \$1 billion in deferred interest. The CFPB said its report showed that patients need guidance on terms and risks, but the healthcare providers often rely on the marketing materials supplied with these products and may be unable to adequately explain complex terms, such as deferred interest plans. The CFPB is also concerned that use of these cards exposes patients to collection actions including lawsuits, because the creditors can pursue a debt's principal plus interest and fees, unlike many healthcare providers.

#### Bite 6: CFPB Issues New Guidance on Zombie Mortgages

On April 26, 2023, the CFPB issued new guidance on "zombie" mortgages. These are mortgages in which the statute of regulations has expired, sometimes called "time barred debt" or "zombie debt." The CFPB states that debt collectors have taken a series of actions on these "zombie mortgages." According to the CFPB, debt collectors are 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 explains 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 is looking for covered debt collectors who are breaking the law, and that the

CFPB will be working closely with state agencies to pursue offenders. FDCPA actions can be brought by private plaintiffs, the CFPB, and state attorneys general.

#### Bite 5: CFPB Issues Guidance about "Fake Account" Creation and Fees

On May 10, 2023, the CFPB issued a circular about "fake account" creation and fees. The CFPB says that it has received complaints that banks are reopening closed accounts after a consumer completes all the required steps to close an account, and then assessing overdraft and nonsufficient funds fees. Plus, the CFPB claims that banks are charging account maintenance fees upon reopening, even if the consumer was not required to pay account maintenance fees before account closure. Director Chopra stated that when a bank unilaterally chooses to reopen an account in someone's name after they closed it, that it's a "fake account," and called the fees charged "junk fees." The CFPB's circular confirms that banks may risk violating the federal prohibition on unfair acts or practices by unilaterally reopening closed accounts, because of the fees that consumers can incur, as well as the risk that this practice will enable third parties to access a consumer's funds without consent. The CFPB states that consumers often cannot reasonably avoid the risk of substantial injury caused by this practice because they cannot control: a third party's attempt to debit or deposit money, the process and timing of account closure, or the terms of deposit account agreements. The CFPB also asked for consumer complaints involving banks and asked whistleblowers to come forward with information.

#### Bite 4: New Rule Proposed to Establish Consumer Protections for PACE Loans

On May 1, 2023, the CFPB proposed a new rule to implement protections for residential Property Assessed Clean Energy (PACE) loans. PACE loans are loans that help homeowners finance clean energy home improvements, like solar panels, water efficiency projects, and projects that prepare homes for natural disasters. The loans are secured by a tax lien on the borrower's home and homeowners repay the loans through increased property taxes over time. The CFPB published a report focusing on PACE loans in California and Florida that found PACE loans increased a homeowner's property taxes, had higher interest rates, led to an increase in borrowers falling behind on their mortgage payments, and had other negative credit outcomes. If finalized, the proposed rule would require PACE creditors and PACE companies to consider a consumer's ability to repay when issuing a new PACE loan, it would amend Regulation Z to address how the Truth in Lending Act applies to PACE transactions, adjust disclosure requirements to address PACE loans, and help consumers understand the loans' impact on their property tax payments, among other amendments. Public comments on the proposal are due by July 26, 2023, or 30 days after publication in the Federal Register, whichever is later.

#### Bite 3: 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 consumers not receiving clear 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 2: CFPB to Distribute More than \$22 Million to Consumers Harmed by Debt Relief and Credit Repair Company

On May 5, 2023, the CFPB announced distributions of more than \$22 million to consumers. Previously, the CFPB had taken an action involving a debt-relief and credit-repair services company that allegedly misled its customers with promises to eliminate their credit-card debts and improve their credit scores. The CFPB's investigation into the company's activities allegedly found that the company failed to produce any evidence showing that it had invalidated, eliminated, or lowered any of its customers' debts or improved customers' credit scores. In a 2021 order, a federal district court determined that the company deceived consumers. As a result, at least \$22.3 million has already been distributed to affected customers. The CFPB allocated more than \$30.4 million to the victims in this case, and the money will come from the "CFPB's victims relief fund."

## Bite 1: CFPB Loses Lawsuit Against Mortgage Servicer

On May 2, 2023, the CFPB lost in a case involving a mortgage servicer. A federal judge ruled that the CFPB's complaint was precluded by a 2017 settlement. Specifically, a judge in the Southern District of Florida granted summary judgment to a mortgage servicer in a case originally filed in 2017. In that case, the CFPB filed a complaint accusing the servicer of misconduct from 2014 through 2017 that led to foreclosure proceedings against approximately 1,000 families. In 2021, the mortgage servicer won on a ruling that the CFPB's lawsuit was precluded by a \$2.1 billion settlement the servicer had reached in 2014 with federal and state agencies, which included \$125 million in refunds to consumers. That ruling was appealed to the Court of Appeals for the Eleventh Circuit, which remanded the case back down to the District Court for a claim-by-claim assessment. The District Court's decision once again ruled in favor of the mortgage servicer, writing that a claim-by-claim analysis led to a conclusion that the terms of the company's settlement bars the CFPB's "current claims in toto."

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

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