HUDSON COOK

CFPB Bites of the Month - November 2023 - Giving Thanks to the CFPB

November 17, 2023 | Justin B. Hosie and Eric L. Johnson

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

Bite 10: Director Chopra's Statement on Proposed Rule on Lifetime Bans

On October 24, 2023, CFPB Director Chopra, in his role as a member of the FDIC Board of Directors, released a statement on the new FDIC proposed rule that will implement new legislation to revise the current employment bans under the Federal Deposit Insurance Act ("FDIA"). The FDIA prohibits banks from employing people convicted of certain criminal offenses, and the new proposed rule will revise this prohibition by excluding certain offenses and reducing bans for individuals who were 21 years old or younger at the time of their offense. Director Chopra said that recruiting and retaining qualified employees is one of the biggest challenges facing banks today, and this proposal will create opportunities for more individuals to access employment opportunities and for banks to recruit qualified individuals. The CFPB director pointed out that while low-level employees can lose the ability to ever work in the industry after committing a crime, high-level executives repeatedly preside over financial crimes at banking institutions and must only pay a fine to continue their careers. He said that this proposed rule will help to correct that imbalance.

Bite 9: Director Chopra's Statement on "Shadow Banking"

On November 3, 2023, CFPB Director Chopra issued a statement on the Financial Stability Oversight Council's effort to promote market discipline in the "shadow banking" sector, after the FSOC voted to issue final versions of a new analytic framework for financial stability risks and updated guidance on the Council's nonbank financial company determinations process. He stated that Congress created the Council under Section 113 of Dodd-Frank to designate systemically important nonbank financial institutions that could pose a threat to financial stability. However, the FSOC currently has zero "shadow banks" designated as systemically important, which has led market participants to believe that this designation authority is a dead letter. The FSOC removed procedural restrictions that were placed in 2019, and Chopra says this move "establishes a more appropriate and durable process for using the designation authority." Director Chopra said that the CFPB will now turn to implementing the guidance by evaluating whether any shadow bank meets the statutory threshold for enhanced oversight, and will build on the work that FSOC Committees, such as the Hedge Fund Working Group and Nonbank Mortgage Task Force, have already conducted in the context of sector-wide reviews.

Bite 8: Statement on Community Reinvestment Act

On October 24, 2023, CFPB Director Chopra, in his role as a member of the FDIC Board of Directors, released a statement on the final rule that will implement the Community Reinvestment Act. He stated that the final rule is the product of compromise between the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Federal Reserve Board of Governors, and it should help increase investment and lending in historically excluded communities, including rural communities. Now that the rules have been completed, he said the next step would be to address the "convenience and needs" factor in bank merger applications covered by the Bank Merger Act. Director Chopra stated that reforms are needed for existing merger application review protocols, and the agencies should carefully evaluate whether the community would be better served by the combined entity in the future than it was in the past by the banks individually. He also called on state legislatures to accelerate efforts to ensure certain nonbank entities have Community Reinvestment Act-like requirements, particularly in sectors where there is significant public subsidies or support for their business activities.

Bite 7: CFPB Issues Report on Record-High Credit Card Costs

On October 25, 2023, the CFPB issued a report on credit card costs claiming the card industry charged a record-high $130 billion in interest and fees in 2022. The biennial report to Congress claims that in 2022 credit card companies charged consumers more than $105 billion in interest and more than $25 billion in fees. Total credit card debt rose above $1 trillion for the first time since the CFPB started collecting this data. The CFPB said this report highlights areas of concern, including more consumers carrying balances month to month, with many falling deeper into debt over time, while credit card company profits remained significantly above pre-pandemic levels. Additionally, the report found that annual percentage rates continue to rise above the cost of offering credit, with the average APR margin 15.4% points above the prime rate, even though charge-off rates fell during the pandemic. Late fees continued to be the most significant fee assessed to consumers, in both dollar amounts and in frequency, and more cardholders are carrying balances month to month. The report also found that consumers have shifted toward the use of digital portals, such as websites and mobile apps, to manage their cards and make payments.

Bite 6: CFPB Issues Report from Education Loan Ombudsman

On October 20, 2023, the CFPB issued a report from the Education Loan Ombudsman, analyzing over 9,000 complaints about student loans over the past year. According to the report, about 75% of the complaints about student loans during this period related to the servicing and collection of federal student loan debt, an increase over previous years. The complaints outlined problems with customer service, errors related to basic loan administration, and problems accessing loan cancellation programs. The other 25% of the complaints were related to private student loan debt, including those related to loan cancellation, misleading origination tactics, and coercive debt collection practices. The overall increase in complaints is attributed to ongoing systemic changes in the federal student loan system, the end to the payments pause, and increased financial uncertainty among borrowers. These issues coincided with servicers being responsible for the transfer of millions of accounts, new payment policies, and a requirement to address long-standing servicing failures.

Bite 5: CFPB Analyzes State Community Reinvestment Laws

On November 2, 2023, the CFPB announced that it had published a new analysis on state Community Reinvestment Act laws, which highlighted how states ensure financial institutions' lending, services, and investment activities meet the credit needs of their communities. The report analyzed the laws of eight states and the District of Columbia and found that many of these states adopted laws similar to the federal Community Reinvestment Act. The CFPB also found that state enactments of Community Reinvestment Acts can be more wide-ranging than the federal law; the federal Community Reinvestment Act law applies strictly to banks, but state laws can apply to a wide range of financial institutions, like nonbank mortgage companies. The key findings of the report showed that some states independently examine their covered institutions, while others review federal examinations; that enforcement mechanisms include limitations on mergers, acquisitions, branching activities, and licensing; at least one state requires additional lending data above federal requirements; and that the state laws have been amended in response to changing markets.

Bite 4: CFPB Proposes New Rule on Digital Wallets and Payment Apps

On November 7, 2023, the CFPB announced that it was proposing a new rule on digital wallets and payment apps that will subject larger providers to examinations like banks. The CFPB announced a Notice of Proposed Rulemaking, which it said is designed to define a market for general-use digital consumer payment applications. The proposed market would cover providers of funds transfer apps and digital wallets for consumer use, and larger participants of this market would be subject to the CFPB's supervisory authority under the CFPA. The CFPB indicated that the proposed rule would ensure that these nonbank financial companies, specifically larger companies handling more than 5 million transactions per year, adhere to the same rules as large banks, credit unions, and other financial institutions already supervised by the CFPB. According to the CFPB, Big Tech and other companies operating in consumer finance markets blur the traditional lines that have separated banking and payments from commercial activities, and this can put consumers at risk, especially when traditional banking safeguards like deposit insurance don't apply. The CFPB also noted that it has opened the Office of Competition and Innovation to ensure a level playing field for new firms to compete with Big Tech in the consumer finance space. Comments on the proposal are due by January 8, 2024, or 30 days after publication of the proposed rule in the *Federal Register*, whichever is later.

Bite 3: CFPB Proposes Rule on Personal Financial Data Rights

On October 19, 2023, the CFPB announced that it was proposing a new rule that will give consumers more control over data about their financial lives and new protections against companies misusing their data. This proposed rule implements Section 1033 of the Consumer Financial Protection Act, which charged the CFPB with implementing personal financial data sharing standards and protections. According to the CFPB, this rule will ensure that consumers can access their data without paying "junk fees," will give people a legal right to grant third parties access to information about their financial accounts, and will enable consumers to more easily walk away from bad service by facilitating portability of their data to competing products and services. It will also prohibit companies who receive consumer data from using it for anything but the specific purpose requested by the consumer. Under the proposal, the requirements would be implemented in phases, with larger providers being subject to them first. In addition, community banks and credit unions that have no digital interface at all with their customers would be exempt from the rule's requirements. In prepared remarks, CFPB Director Chopra said that this rule will help decentralize the financial services market, give consumers more control, and allow smaller institutions and startups to compete fairly with major market players.

Bite 2: The Small Business Lending Rule Stayed Nationwide

On October 27, 2023, the U.S. District Court for the Southern District of Texas issued a nationwide injunction prohibiting the CFPB from implementing or enforcing its Small Business Lending Rule, which was written to implement Section 1071 of the Dodd-Frank Act. The Small Business Lending Rule requires banks, credit unions, and small business lenders to collect and report information on the small businesses who apply for loans, including applications from minority businesses. Opponents of the rule have claimed the rule is burdensome and will significantly increase borrowing costs. The district court had previously issued an injunction against the rule only for the named plaintiffs in a case challenging the rule based on doubts about the Bureau's constitutionality, a question which initially arose in the same circuit that issued this injunction. After other covered institutions filed motions to intervene in the case, the district court decided to expand the scope of its previous injunction to all covered entities nationwide.

Bite 1: CFPB Takes Action Against Large Bank for Discrimination

On November 8, 2023, the CFPB announced that it has ordered a large bank to pay $25.9 million in fines and consumer redress for allegedly intentionally and illegally discriminating against credit card applicants the bank identified as Armenian American. From at least 2015 through 2021, the bank allegedly targeted applicants with surnames that employees associated with Armenian national origin as well as applicants in or around Glendale, California because the bank allegedly stereotyped this group as being likely to commit crime and fraud. Allegedly, the bank specifically targeted surnames ending in "-ian" and "-yan," and Glendale is home to approximately 15% of the Armenian American population in the United States. According to the CFPB, supervisors at the bank conspired to hide the discrimination by instructing employees not to discuss the discriminatory practices in writing or on recorded phone lines, and employees lied about the basis of denial, providing false reasons to denied applicants. One employee was allegedly instructed to blame denials based on surname as being declined for "suspected credit abuse"- which blames the consumer for the denial. The CFPB also alleges that the actions the bank took towards people it believed were Armenian American included denying these consumers outright, requiring additional information, or placing a block on the account. The bank is accused of violating the Equal Credit Opportunity Act and will pay $1.4 million to affected consumers and a $24.5 million fine to the victims relief fund.

***Extra Bite 1:* FTC Amends the Safeguards Rule**

On October 27, 2023, the FTC announced that it has approved a new amendment to the Safeguards Rule, requiring non-bank institutions to report certain data breaches and other security events to the agency. Under the existing rule, non-bank institutions, which include mortgage brokers, motor vehicle dealers, payday lenders, finance companies and others must develop, implement, and maintain comprehensive security programs to keep their customers' information safe. The amendment to the rule requires these financial institutions to notify the FTC as soon as possible, and no later than 30 days after discovery, of a security breach involving the information of at least 500 consumers. The notice must include information about the event, including the number of consumers affected or potentially affected. The Commission voted 3-0 to publish notice of the amendment, which becomes effective 180 days after publication of the rule in the Federal Register (or, May 13, 2024).

***Extra Bite 2:* FTC Refunds $100 Million to Consumers**

On November 3, 2023, the FTC refunded $100 Million to consumers saying that consumers were trapped in subscriptions by dark patterns and junk fees. The FTC is refunding nearly $100 million to consumers who it says lost money to their internet phone service provider after the provider allegedly imposed junk fees and used dark patterns to make it difficult for consumers to cancel their subscriptions. The FTC says the provider allowed numerous ways to sign up for the service, but made cancellation much more difficult. Customers could only cancel after speaking to a live agent, and the FTC alleges that the provider made it difficult to find the phone number on the company website, didn't consistently transfer customers to that number from the normal customer service number, reduced the hours during which the line was available, and failed to provide promised callbacks. Allegedly, in some cases, the provider continued to illegally charge customers for phone services even after the customers spoke to an agent directly and requested cancellation. The provider also allegedly charged surprise termination fees that were not clearly disclosed when the customers signed up for the service. The provider has agreed to a court order that requires the provider to change its practices and turn over $100 million to the FTC that will be used for consumer refunds.

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